

THE EASTERN CARIBBEAN SUPREME COURT ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.ANUHCV 2014/0027

BETWEEN:

FBO 2000 ANTIGUA LIMITED

Applicant

and

**EASTERN CARIBBEAN CIVIL AVIATION AUTHORITY
PERMANENT SECRETARY IN THE MINISTRY OF AVIATION**

Respondents

Appearances: Mr. Kendrickson Kentish of Lake and Kentish for the Applicant
Ms. Kamilah Roberts of Roberts & Company for the First Respondent
Ms. Carla Harris and Ms. Rose-Ann Kim for the Second Respondent

2014: September 24

RULING

[1] **HENRY, J.:** By its Second Amended Notice of Application, the Applicant (FBO) seeks an order that it be granted leave to file a claim for Judicial Review against the Respondents for the following relief:

- a) A Prerogative Writ of Certiorari be issued quashing the decision of the First Respondent to prevent aircraft which have been provided services by FBO from departing Antigua until arrangements satisfactory to the First Respondent have been made for the payment of all air navigation and communication fees owed by Port Services Ltd.
- b) A Declaration that the decision of the First Respondent to prevent aircraft which have been provided services by FBO from departing Antigua until arrangements satisfactory to

the First Respondent have been made for the payment of all air navigation and communication fees owed by Port Services Ltd is illegal null and void

- c) A Declaration that FBO had a legitimate expectation that it would continue to pay air navigation and communication fees into the Treasury of Antigua and Barbuda
- d) Further or alternatively to (c), a Declaration that FBO had a legitimate expectation that it would be given an opportunity to make representations before being ordered by the Second Respondent to pay air navigation and communication fees directly to the First Respondent
- e) Damages for losses suffered by FBO arising from the decision of the First Respondent to prevent aircraft which have been provided services by FBO from departing Antigua until arrangements satisfactory to the First Respondent have been made for the payment of all air navigation and communication fees owed by Port Services Ltd
- f) An Order of Certiorari be issued quashing the decision of the Second Respondent to order FBO to pay all air navigation and communication fees directly to the First Respondent for want of procedural fairness
- g) A final Injunction restraining the First Respondent, whether by itself, its servants or agents from preventing aircraft which have been provided FBO services by the Claimant from departing Antigua until arrangements satisfactory to the First Respondent have been made for the payment of all air navigation and communication fees owed by Port Services Ltd
- h) An Interim injunction be granted FBO restraining the First Respondent, whether by itself, its servants or agents from preventing aircraft which have been provided FBO services by the Claimant from departing Antigua until arrangements satisfactory to the First Respondent have been made for the payment of all air navigation and communication fees owed by Port Services Ltd, until further order
- i) An order of Certiorari be issued quashing the decision of the First and Second Respondents on or about 18th December 2013 to refuse to consider/ grant the request of the applicant for a 30 day grace period for payment of Nav/Comm Fees
- j) The Respondents do pay the costs of and incidental to these proceedings.

[2] On 19th December 2012 in Claim No ANUHCV2012/0833, FBO filed an application for leave to make a claim for judicial review against the First Respondent (ECCAA). The claim sought relief in relation to an alleged decision by ECCAA to prevent aircraft which had been provided services by FBO from departing Antigua until arrangements have been made for the payment of NAV/COM fees, owed by an affiliate company, Port Services Ltd (PSL). The application for leave was heard on 21st January 2013 and a decision was delivered on 26th March 2013 dismissing the application for leave. FBO filed an appeal but later discontinued same. FBO has now initiated a new application for leave to make a claim for judicial review against ECCAA. In addition, a claim has been added against the Second Respondent. Paragraphs 1(a), 1(b), 1(e), 1(g), and 1 (h) of the current application seek the same relief as in the previous application.

The Intended Claim against ECCAA

- [3] ECCAA submits that: (1) the application for leave is res judicata; in that the relief set out in paragraphs 1 (a), 1 (b), 1 (e), 1 (g), and 1(h) of the instant application is identical to the relief sought in the 2012 application, which was dismissed; and the application fails to disclose an arguable ground for judicial review with a realistic prospect of success.
- [4] ECCAA refers the court to the case of **Thomas v The Attorney General of Trinidad and Tobago (No.2)**¹ where it was stated that the principle of res judicata applies not only where the remedy sought and the grounds thereof are the same in the second action as in the first, but also where the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been, but were not raised in the first action.
- [5] On the issue of res judicata, FBO submits that no order made on an application for leave is final. Therefore the decision of Lanns, J. did not determine the matter in its finality. Counsel refers the court to the case of **Regina v Secretary of State for the Environment Ex p Hackney**². FBO does not dispute that the court has the jurisdiction to dismiss the matter if it finds that this application is an abuse of its process. Counsel invites the court to find that res judicata is inapplicable and that these proceedings are not an abuse of process.

The Issue of Res Judicata

- [6] **In Reg. v. Humphreys** [1977] A.C. 1, the doctrine of issue estoppels in civil proceedings was stated as follows:
- “A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of legal consequences of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion, whether of fact or of the legal consequences of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.”
- [7] The Court of Appeal in **Ex p. Hackney**, expressed the view that it was in agreement with the Divisional Court that the doctrine of issue estoppel cannot be relied on in applications for judicial review, however, the court has an inherent jurisdiction as a matter of discretion in the interest of

¹ [1990] Privy Council Appeal No. 20 of 1989

² 1983 WLR 524

finality not to allow a particular issue, which has already been litigated, to be re-opened. According to Dunn L. J, this depends on the special nature of judicial review which is different from both the ordinary civil litigation and from criminal proceedings

- [8] The authorities submitted by ECCAA, although in the area of public law, all involve matters where there have been full trials in the first instance. No authority has been submitted where a court has applied *res judicata* to an application for leave to make a claim for judicial review. The court is of the view that *res judicata* is not applicable to such an application and that the more appropriate method of dealing with the issue of finality in respect of subsequent applications for leave, is by determining whether the subsequent application is oppressive or an abuse of the process of the court.

Abuse of the Process

- [9] There is no doubt that a court has the power to stop abuse of its own process. The issue of abuse of the process of the court was recently addressed by the UK Court of Appeal in the case of **Konodyba v Kensington and Chelsea Royal London Borough Council**³. Longmore LJ writing for the court stated that one of the most obvious forms of abuse is to attempt to relitigate matters which have already been disposed of by a final judgment which is unappealed.
- [10] A decision on an application for leave to make a claim for judicial review is not considered a final judgment. Given the fact that additional issues have been raised and given the nature of the subsequent events which form a part of this application, the court finds that the current application does not amount to an abuse of the process of the court nor is it oppressive.

The Intended Claim against the Second Respondent

- [11] The Second Respondent was not a party to the first action. Further, the facts pleaded in regard to this party transpired after the decision of Lanns, J, therefore there is little doubt that *res judicata* does not apply to the action against the Second Respondent.
- [12] Having found that the doctrine of *res judicata* is inapplicable and that the present application does not amount to an abuse of process, the court can proceed to consider whether leave ought to be granted to the applicant to make the claim for judicial review.

The Application for Leave

- [13] It is now accepted that in respect of applications of this nature the ordinary rule is that the court will refuse leave to make a claim for Judicial Review unless satisfied that there is an arguable ground for Judicial Review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy.⁴ The test to be applied is whether or not the applicant has an

³ [2012] EWCA Civ 982

⁴ *Sharma v Brown-Antoine* [2006] UKPC 57

arguable case, that is to say, one that has a realistic prospect of success. It is not enough that a case is potentially arguable⁵.

[14] The asserted grounds of the application can be summarized as follows:

FBO is an aviation service provider, offering fixed base operations at the VC Bird International Airport. ECCAA is a statutory entity created to advise on and generally regulate certain aspects of aviation services within the Eastern Caribbean.

[15] By the Civil Aviation (Navigation Services Charges) Order, Air Navigation fees are payable by every operator of aircraft. The Directorate of Civil Aviation, ECCAA's predecessor, had instituted a practice of issuing monthly invoices to all aircraft operators in respect of flights during the preceding 30 days. FBO began to pay the charges in accordance with this practice after it commenced operations.

[16] In the latter half of 2003, Port Services Limited (PSL) a sister company of FBO, fell into arrears for Nav/Com fees in respect of aircrafts which it handled. On 9th February 2004, FBO and PSL entered into an arrangement with ECCAA whereby PSL would make monthly payments to reduce its arrears.

[17] However, by letter dated 17 February 2012, ECCAA informed FBO that effective 20th February 2012 Nav/Com fees would no longer be charged on a monthly basis and all such fees would be paid in advance on a flight by flight basis. In August 2012, the debt to ECCAA stood at EC\$83,217.00. By letter dated 8th November 2012 FBO wrote to ECCAA enclosing a cheque issued by the Government of Antigua and Barbuda in the amount of EC\$80,997.00 which effectively liquidated the arrears of FBO. FBO then requested that the process of monthly billing be re-instated. By letter dated 15th November 2012, ECCAA refused to re-instate the monthly invoicing until satisfactory arrangements had been made to satisfy the indebtedness of PSL in the amount of EC\$11,340.00. FBO thereafter wrote to ECCAA challenging the decision and demanding that the monthly billing be re-instated. ECCAA by letter dated 20th November 2012 asserted that it had no obligation to extend credit terms to any operator, and that in view of the applicant's payment history it would be irresponsible to re-instate the process of monthly billing.

[18] FBO now asserts that there is no legal obligation to pay Nav/Com fees; that neither the Civil Aviation Act nor the Eastern Caribbean Civil Aviation Agreement Act 2003 contains any provision for the payment of Nav/Com fees to ECCAA therefore ECCAA is not entitled to the payment of Nav/Com fees nor to impose any penalties for failure to pay the same. Further, that in the event that Nav/Com fees are payable to ECCAA, the restrictions and conditions imposed on FBO by ECCAA's letter of 15th November 2012 are an unnecessary and unreasonable abuse of power. Further that the requirement that FBO pay the Air Navigation fees on a flight by flight basis requires FBO to expend a significant amount of its resources by way of an overdraft facility and which

⁵ The Caribbean Civil Practice Note 34.29; *Matalulu v Director of Public Prosecutions* [2003 4 LRC 712 at 733

negatively impacts its ability to meet its regular monthly financial obligations; In addition, FBO does not owe any Air Navigation fees.

- [19] According to the affidavit of Mekada Mikael in support of the application, on 26th July 2013, about 4 months after the decision of Lanns, J certain representatives of FBO met with the Solicitor General, the Accountant General, the Permanent Secretary of the Ministry of Aviation and a representative of the Air Traffic Control (ATC). The purpose of the meeting was to discuss the propriety of payment of Nav/Com fees to ECCAA. She asserts that the Solicitor General at the conclusion of the meeting, instructed the Permanent Secretary and Air Traffic Control to stop imposing restrictions on flights operated by FBO; that FBO would pay the Nav/Com fees to the treasury and receipt books would be supplied to ATC by the treasury. FBO, she says, complied with this new arrangement.
- [20] However, on 17th December 2013, she received a fax from the Permanent Secretary Ministry of Aviation informing her that having received advice from the Attorney General's Chambers Nav/Com fees should be paid to ECCAA. She was instructed to commence making payments to ECCAA immediately. It is this decision which instructed her to pay the Nav/Com fees to ECCAA with immediate effect that is the basis of the relief set out in paragraphs 1 (c), 1(d), and 1(f) of the Second Amended Notice of Application.
- [21] Ms Mikael asserts that the decision to revisit the arrangement made on 26th July 2016 without allowing all parties to make formal and transparent representation was procedurally improper; that FBO had a concrete legitimate expectation that the Crown would accept the direct payments of the Nav/Com fees into the treasury.

The Alleged Decision by ECCAA

- [22] In items 1(a), 1(b), 1(e), 1(g) and 1 (h) FBO seeks judicial review and injunctive relief in respect of the alleged decision of ECCAA to prevent aircraft which have been provided services by FBO from departing Antigua until arrangements satisfactory to ECCAA have been made for the payment of all air navigation and communication fees owned by PSL.
- [23] ECCAA submits that it has made no such decision, and that there is no evidence in FBO's affidavit and the several documents as exhibited in support of the application to support the assertion that the alleged decision was made by ECCAA. ECCAA's position is that its decision not to reinstate the credit arrangement cannot properly be categorized as a decision to prevent aircraft which have been provided services by the applicant from departing Antigua until satisfactory arrangements have been made for the payment of NAV/COM Fees owed by Port Services Ltd.
- [24] The court has perused all the correspondence from ECCAA to FBO, including the letter of 15th November 2012, and is unable to find a decision by ECCAA as alleged by FBO. The letter of 15th November 2012, proposed a payment plan for liquidation of the debt of PSL. This letter was

passed to FBO's Attorney for response. In his response, the Attorney refers to the position taken by ECCAA and characterizes it as follows:

"you refused to revisit the payment structure for FBO 2000 Ltd until the purported debt obligations of Port Services Ltd were reduced by EC\$8000.00."

- [25] He demanded that the letter be rescinded along with the letter of 12 November 2012, which had requested the meeting. The letter ended by stating that legal action would be pursued if the said letters were not rescinded immediately.
- [26] Part of FBO's allegations of unreasonableness on the part of ECCAA is based on their assertion that at the time of ECCAA's refusal to reinstate the monthly credit facility, FBO had paid off its outstanding arrears and had no unpaid Nav/Com fees. The arrears outstanding were due by FBO's sister company PSL. In Mr. Walter's letter of 15th November, he made reference to a letter to ECCAA in January 2004 in which Ms. Mikael indicated that FBO was now acting as agents for PSL. Ms. Mikael advised in the letter that as of January 1, 2004, all aviation services rendered by PSL have been undertaken by FBO who has acted as agents for PSL. She informed Mr. Wilson that FBO would keep current all Nav/Com fees which would be paid on a monthly basis. By that letter she offered EC \$10,000.00 as a first payment and pledged to wipe off the arrears by may 2004.
- [27] Mr. Walter noted in his letter of 15th November 2012, that part of the current arrears \$11,340.00 for PSL include amounts outstanding from 2004 and prior.
- [28] Given the history of delinquency in the payment of fees by both FBO and PSL, FBO has not satisfied the court that it has an arguable claim that ECCAA's decision not to re-instate the credit arrangement, but to instead propose a payment schedule was unreasonable in that it was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"⁶.
- [29] With regard to the FBO's allegation that ECCAA is not entitled to payment of Nav/Com fees nor to impose any penalties for failure to pay same, the statutory authority for the collection of Nav/Com fees by ECCAA is well established. Charges were authorized to be paid to ECCAA's predecessor, the Directorate of Civil Aviation, by section 3 (1) of the Civil Aviation (Navigation Services Charges) Order 1982, an Order made under section 4(2) (b) and (C) of the Civil Aviation Act 1982, No. 16 of 1982 (the Act). While the Civil Aviation Act 2003 repealed the Act, the Regulations and Orders made under the Act were saved. ECCAA is now authorized to enforce the existing rules, regulations and aviation standards and to impose administrative fines and penalties for violation of the rules, regulations and aviation standards⁷. Given the above statutory mandate, FBO has failed to satisfy the court that this allegation is an arguable ground having a realistic prospect of success.

⁶ CCSU v Minister for the Civil Service; Attorney General v Kenny Anthony HCVAP 2009/031

⁷ See Section 5(i) of the Civil Aviation Agreement Act 2003 No. 24 of 2003

- [30] Accordingly, the application for leave to make a claim for judicial review in respect of the relief claimed in items 1(a), 1(b), 1(e), 1(g) and 1(h) is denied.

The Other Aspects of the Application

- [31] The other aspects of the intended claim concern the alleged instructions emanating from FBO's meeting with the Solicitor General, the Second Respondent and others and the subsequent directions allegedly given to FBO by the Second Respondent. The challenge by FBO is based on legitimate expectation and want of procedural fairness.
- [32] According to FBO, the meeting took place on 26th July 2013. Present were representatives of FBO, the Solicitor General, the Accountant General, the Second Respondent and a representative from Air Traffic Control. The purpose of the meeting was to discuss the propriety of payment of Nav/Com fees to ECCAA. At the conclusion of the meeting, the Solicitor General instructed the Second Respondent and the representative from Air Traffic Control to stop imposing restrictions on flights operated by FBO; FBO would pay the Nav/Com fees to the Treasury and receipt books would be supplied to the Air Traffic Control by the Treasury. FBO complied with this arrangement.
- [33] Ms Makeda Mikael states that on 17th December she received by fax a letter from the Second Respondent which instructed her to make payments of the Nav/Com fees to ECCAA starting immediately. The instruction was based on advice received from the chambers of the Attorney-General.
- [34] Ms Mikael's stated position is that the decision to revisit the arrangement made on 26th July 2013 without allowing all parties to make formal and transparent representations was procedurally improper as by that time, FBO had a concrete legitimate expectation that the Crown would accept the direct payments of the Nav/Com fees into the Treasury.
- [35] According to her, on 18th December 2013, her solicitors wrote to ECCAA and to the Ministry of Aviation requesting a 30 day grace period in the payment of Nav/Com fees and in any event challenging the legality of any payments of such fees.
- [36] In her affidavit in opposition, the Second Respondent admits that there was a meeting held on 26th July 2013 as alleged. She denies however, that the Solicitor General instructed her or Ms Mikael that Nav/Com fees are to be paid to the Treasury Department and that receipt books would be supplied to ATC by the Treasury Department. According to her no such agreement was made at the meeting.
- [37] She states that sometime before the meeting of 26th July 2013, Ms Mikael expressed that she did not wish to pay the fees to ECCAA and that she informed Ms Mikael that she did not have such authority to determine to whom Nav/Com fees are to be paid. Ms Mikael thereafter wrote to her stating her position on the matter. The Second Respondent says she never responded to that letter. Instead she sought guidance from the Financial Secretary.

[38] The Second Respondent admits that she wrote to FBO by letter dated 16th December 2013. She is adamant however that no arrangement was made on 26th July 2013 or at all with FBO that they should pay Nav/Com fees into the Treasury Department.

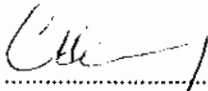
Legitimate Expectation

[39] A legitimate expectation may arise either from an express promise given on behalf of a public authority, or from the existence of a regular practice which the claimant can reasonable expect to continue.⁸

[40] Given the above allegations, the court is of the view that FBO has set out arguable grounds in respect of that part of its claim set out in 1(c), 1(d), 1(f) and 1(i).

[41] Accordingly, leave is granted to FBO to make a claim for judicial review as set out in paragraphs 1(c), 1(d), 1(f) and 1(i) of it Second Amended Notice of Application, on condition that the claim be made within 14 days of the date herein.

[42] Cost to FBO to be cost in the cause.


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CLARE HENRY
High Court Judge
Antigua & Barbuda

⁸ Per Lord Fraser of Tullybelton in *CCSU v Minister of Civil Service* [1985] AC 374 at 401