ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.26 OF 2005

BETWEEN:

LUIS JARVIS trading as L & J PRODUCTION

Appellant

and

AMERICAN AIRLINES INC.

Respondent

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Steadroy Benjamin for Appellant
Ms. Veronica Thomas for Respondent

2006: July 19;
October 9.

JUDGMENT

[1] BARROW, J.A.: No reasons have been provided by the master for her decision to strike out the claim on the ground that the relevant limitation period had expired at the time that the claimant brought this claim. The claim was for damages for breach of a contract to carry by air 11 members of a musical band from Puerto Rico to Antigua in time to perform on the day they were scheduled to travel.

[2] In his statement of case the claimant alleged that he was a producer of shows and musical events in Antigua and Barbuda and that in July 1999 the defendant agreed with him to transport by air the 11 members of the band. He further alleged that he purchased 11 airline tickets and that at the time he purchased the tickets he made plain to the defendant's agent "that it was essential, necessary and

mandatory that the 11 band members journey to Antigua on the 18th July, 1999 with a scheduled arrival time of 1:40 p.m. since the said music band was to perform at a musical show sponsored and organised by the claimant which itself was scheduled to begin at 6:00 p.m. on the said 18th July, 1999." The claimant stated that the defendant knew that if the band members did not travel on the scheduled flight the claimant would suffer loss and damage.

[3] Alternatively, the claimant stated, it was an implied term of the agreement that priority should be given to the band members who had been confirmed on the scheduled flight.

[4] The members arrived on time, were issued with electronic tickets and the departure of the flight was announced. However, the defendant's employees informed the band members that the flight was overbooked and no band member was put on that flight to Antigua. Two band members were put on a later flight and they arrived at 10:30 p.m., approximately 4 hours after the show was scheduled to begin.

[5] The Defence denied the material statements of the claimant and stated, in particular, that pursuant to Article 19 (sic) of the 1929 Warsaw Convention the time for bringing a claim for damages for breach of a contract of carriage was two years. There is no dispute that this claim was brought more than five years after the alleged breach.

[6] The defendant applied to strike out the Statement of Claim on the ground that the cause of action arose outside of the period of limitation. Both parties agree that the master held that the Warsaw Convention was applicable to this contract and struck out the claim on the basis that it was brought after the limitation period had expired.

[7] On appeal the appellant/claimant disputed that the Convention applied. The appellant contended that the Convention only applied after a boarding pass was issued. On the facts alleged by the appellant no boarding pass for the particular flight was ever issued hence his contention that the Convention did not apply.

[8] The appellant's contention that the Convention did not apply was supported by the decision of Morrison J in the English High Court case of Phillips v Air New Zealand.[1] In that case while the claimant was being transported in a wheelchair within the airport building the chair fell back and the claimant was injured. The two-year limitation period under the Convention had expired at the time the claim was brought and the airline relied on the Convention. The judge held that the Convention became applicable when the passenger presented a valid ticket for travel, the ticket was accepted and a boarding pass issued. In other words, the carriage began when the passenger had successfully completed the check-in procedure. In that case it was found that the reason why the claimant was being transported by wheelchair was to enable her to board the aircraft after passengers had been called to the departure gate and were being boarded. It was held that the convention applied.

[9] The response of counsel for the respondent is that the decision in Phillips v Air New Zealand is wrong (or, perhaps, inapplicable). Counsel argued that the applicable principle was stated in a number of cases from the United States of America, including Malik v Gulf Air[2], in which it was held that the Convention applied to a delay in the carriage as opposed to a total failure to carry. The respondent argued that in this case there had been a delay rather than a total non-performance of the contract of carriage because two members of the band had been sent from Puerto Rico to Antigua on a later flight. Counsel urged that this meant there had not been a total failure to perform.

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[1] [2002] EWHC 800 (Comm)
[2] 1993 U.S. Dist. LEXIS 14472

[10] I am prepared to leave it open for argument, after the facts are known, including the terms of the contract of carriage, that transporting two members of an eleven-member band (to reach the place of performance after the performance was scheduled to start) may be capable of constituting partial performance of the contract of carriage. However, I would not consider that argument, at this stage, an overpowering one. It is certainly not a basis for concluding that the convention applied to this contract and that, therefore, the claim had no real prospect of success.

[11] As counsel for the parties have argued the matter, the answer to the question whether or not the Convention applies to this contract is determined directly by whether or not there was a total or only a partial failure to perform the contract of carriage. That determination, it seems to me, can only be made after the facts are proved at trial including, as I have indicated, the terms of the contract or contracts.

[12] I therefore consider that it was premature for the master to have decided that the convention applied to the contract or contracts upon which the claimant has claimed. I would therefore allow the appeal, set aside the master's order striking out the claim and direct that the claim proceed. I would allow the costs of the appeal, and of the application in the court below to strike out, to the appellant in a sum to be assessed, if not agreed.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal