

ANTIGUA AND BARBUDA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO ANUHCV 2012/0833

BETWEEN:

FBO 2000 ANTIGUA LIMITED

Applicant/ Intended Claimant/

AND

EASTERN CARIBBEAN CIVIL AVIATION
AUTHORITY

Respondent /Intended Defendant

Appearances:

Mr Kendrickson Kentish and Ms Kathleen Bennett
for the Applicant/Intended Claimant

Ms Kamilah Roberts for the Respondent/Intended Defendant

.....
2013: January 21; March 26
.....

DECISION

INTRODUCTION

[1] **LANNS: J [Ag]:** The Applicant/Intended Claimant FBO 2000 Antigua Limited (FBO) applies to the Court for three orders summarised as follows:

(1) That FBO be granted leave to file a Claim for Judicial Review against the Respondent/Intended Defendant Eastern Caribbean Civil Aviation Authority (ECCAA) for the following reliefs:

(a) A Prerogative Writ of Certiorari quashing the decision of ECCAA to prevent Aircrafts which have been provided services by FBO from departing Antigua until arrangements have been made for the payment of all air navigation and communication (NAV/COM) fees owed by Port Services Ltd, (PSL) an affiliate company of FBO;

- (b) A declaration that the decision of the ECCAA is illegal, null and void;
 - (c) Damages for loss suffered by FBO arising from the said decision;
 - (d) A final injunction restraining ECCAA from preventing aircrafts which have been provided services by FBO from departing Antigua until arrangements have been made for the payment of NAV/COM fees owed by PSL.
- (2) An interim injunction restraining ECCAA from preventing aircrafts which have been provided services by FBO from departing Antigua until satisfactory arrangements have been made for the payment of all NAV/COM fees owed by PSL;
 - (3) Costs of and incidental to the proceedings.

[2] In summary, the grounds of the application are:

- (i) In or about 1982, the Directorate of the Civil Aviation began the practice of issuing monthly invoices to all aircraft operators in respect of flights at VC Bird International Airport during the preceding 30 days. After starting its business at the airport, FBO began to pay charges in accordance with the practice of monthly invoices that existed at the time.
- (ii) PSL and FBO fell into arrears for NAV/COM fees.
- (iii) On 9th February 2004, FBO and PSL entered into an arrangement with the Directorate of ECCAA whereby (1) PSL would make monthly payments to reduce its arrears; (2) All corporate jets were to be invoiced directly to FBO; and Fly BVI and PANAM (clients of PSL) would be invoiced in care of FBO;

- (iv) On 17th February 2012, ECCAA informed FBO that effective 20th February 2012 NAV/COM fees would no longer be charged on a monthly basis and all NAV/COM fees should be paid in advance on a flight by flight basis;
- (v) By letter dated 8th August 2012, the ECCAA wrote to FBO informing among other things that its debt for NAV/COM fees stood at \$83,217.00.
- (vi) By letter dated 8th August 2012, FBO wrote to ECCAA acknowledging that it owed ECCAA the sum of \$83,217.00, but that it found itself in financial difficulty because the Government of Antigua and Barbuda was at the time indebted to it in a sum that far exceeded the amount owed to ECCAA; and that it took about six weeks to collect payments from its clientele who are all based overseas.
- (vii) By letter dated 8th November 2012, FBO wrote to ECCAA informing that it had liquidated its arrears (by an enclosed cheque for EC\$80,997.00), and it demanded that the process of monthly invoicing be reinstated;
- (viii) By letter dated 15th November 2012, the ECCAA replied, indicating among other things, that the process of monthly invoicing would not be reinstated until satisfactory arrangements had been made to satisfy PSL's indebtedness of EC\$11, 340.00 for NAV/COM fees.
- (ix) On or about 15th November 2012, FBO, through its attorneys-at-law, wrote to ECCAA challenging its alleged "decision" and demanding the reinstatement of the monthly invoicing.
- (x) By letter dated 20th November 2012, the ECCAA replied indicating, among other things that it was under no obligation to extend credit terms to any

operator and that in view of FBO's payment history it would be irresponsible to reinstate the process of monthly billing;

- (xi) There is no legal obligation to pay NAV/COM fees because
 - (a) Neither the Civil Aviation Act 2003 nor the Eastern Caribbean Civil Aviation Agreement Act 2003 contain any provision for the payment of any NAV/COM fees to ECCAA;
 - (b) The ECCAA is not entitled to payment of NAV/COM fees, nor to impose any penalties for failure to pay the same.
- (xii) The decision of ECCAA to prevent aircraft which have been provided FBO services from departing Antigua until arrangements have been agreed for settlement of all NAV/COM fees owed by PSL have been paid is illegal and without lawful authority.
- (xiii) The decision of ECCAA to prevent aircraft which have been provided FBO services from departing Antigua until arrangements have been agreed for the settlement of all NAV/COM fees owed by PSL have been paid was an irrational and arbitrary use of power.

[3] Mrs Makeda Mikael, Chairman/CEO of FBO swore to and filed an affidavit in support of the Application on 19th December 2012. Mr Craig Walter, Director of Finance and Administration of ECCAA, and Mr Donald McPhail, Director General of ECCAA, each swore to an affidavit in response to FBO's application.

[4] The application is vigorously opposed.

THE PARTIES

[5] FBO is an aviation service provider. It offers fixed base operations at the VC Bird International Airport. Fixed based operations include service aircraft, diplomatic and VIP coordination, Immigration and customs clearance, twenty-four hour security, gourmet catering, drive-up ramp access and commercial aircraft transfers.

[6] The ECCAA is a regional organization created in 2003 by the Eastern Caribbean Civil Aviation Agreement. By virtue of the Eastern Caribbean Civil Aviation Agreement Act No 24 of 2003, the Agreement has the force of Law in Antigua and Barbuda. The ECCAA regulates civil aviation safety and security in Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines. The ECCAA also maintains aviation and navigational communication equipment in those OECS states.

[7] PSL is not a party to the proceedings. However, it is implicated in these proceedings. It is represented as the sister company of FBO, with common shareholders, and engaged in the same business as FBO. In a letter to the Director of Civil Aviation dated 26th January 2004, Mrs Mikael referred to PSL as "my company." In the same letter, Ms Mikael also informs that FBO acts as agent of PSL.

BRIEF BACKGROUND FACTS

[8] FBO and PSL were previously billed on a monthly basis. FBO became delinquent over several years to the extent of One Hundred and Twenty-five Thousand Dollars (\$125,000.000), and PSL, in the sum of \$11,340.00.

[9] As a consequence of these delinquencies, the ECCAA took a decision to suspend the process of monthly billing in favour of payment of NAV/COM fees in advance on a flight by flight basis.

[10] FBO subsequently settled its debt, (but not that of PSL) and demanded the reinstatement of monthly billing on the ground that the flight by flight arrangement was crippling the operations of FBO. A series of correspondence passed between the parties concerning the payment of NAV/Com fees.

[11] The present dispute seems to have arisen when the ECCAA refused to accede to the written request of FBO to reinstate the monthly billing process, unless satisfactory

arrangements are put in place for the settlement of PSL's debt. Thus, the flight by flight arrangement remains in place in relation to both FBO and PSL.

[12] FBO asserts that the purported decision taken by the ECCAA to prevent aircraft which have been provided FBO services from departing Antigua until arrangements have been agreed for the settlement of all NAV/COM fees owed by PSL is illegal and unreasonable -- hence the present application for judicial review and for interim relief.

[13] The ECCAA refutes FBO's assertions. Its primary argument is that FBO's application for judicial review is fundamentally flawed as the ECCAA has not made the decision in regards to which judicial review is sought. It says that the decision not to reinstate credit facility cannot be characterized as a decision to prevent aircraft from departing Antigua.

[14] For the reasons that follow, I would dismiss FBO's application in its entirety and award costs to be assessed if not agreed.

THE ISSUES

[15] The issues raised in the application are:

- (1) Should FBO be granted leave to file a claim for judicial review challenging a decision allegedly taken by ECCAA not to allow aircraft which have been provided FBO services from departing Antigua until satisfactory arrangements are in place for settlement of outstanding NAV/COM fees owed by PSL?
- (2) Should FBO be granted interim injunctive relief against a decision allegedly taken by ECCAA to prevent aircraft which have been provided services by FBO from departing Antigua until specified arrangements are met for payment of NAV/COM fees owed by PSL?

ISSUE 1: SHOULD FBO BE GRANTED LEAVE TO FILE A CLAIM FOR JUDICIAL REVIEW AGAINST THE ECCAA?

The positions of the parties

(a) FBO

[16] FBO's learned Counsel Mr Kendrickson Kentish (Mr Kentish) prefaced his submissions with an exposition on the general rule pertaining to an application for leave to apply for judicial review. In so doing, counsel referred to the test as set forth in the Trinidad and Tobago case of **Sharma v Browne-Antoine**¹ that there must be an arguable case having a realistic prospect of success.

[17] Counsel then sought to base his case for leave on two pillars of judicial review, namely, illegality and unreasonableness.

[18] Illegality: As to illegality, Mr Kentish submitted that the ECCAA has no legal authority to claim NAV/COM fees. To develop his argument, counsel posited that

(a) By the Civil Aviation (Navigation Services Charges) Order, Air Navigation fees charged for the use of government's equipment used to guide aircraft to the aerodrome, are payable by every operator of aircraft to the Directorate of Civil Aviation, an arm of the OECS. This Order was deemed to have been made under the Civil Aviation Act Cap 86 which has since been repealed by section 59 (1) of the Civil Aviation Act 2003. However, subsection 2 of the Civil Aviation Act, 2003, saved the regulations and orders made under the Act;

(b) The Eastern Caribbean Civil Aviation Agreement Act was passed in 2003. The Eastern Caribbean Civil Aviation Authority was created under that Act;

(c) Neither the Civil Aviation Act 2003 nor the Eastern Caribbean Civil Aviation Agreement Act 2003 contain any provision for the payment of NAV/COM fees to the ECCAA;

¹ [2006] UKPC 57; [2007] 1 WLR 780

- (d) There is no Directorate of the Civil Aviation at all. It no longer exists;
- (e) There is no statutory provision which specifically allows the ECCAA to collect NAV/COM fees previously due to the Directorate of Civil Aviation;
- (f) The court cannot imply such a power²;
- (g) Where a statute is penal in nature, it ought to be construed strictly³

[19] Unreasonableness: Mr Kentish submitted that if it is found that the fees are lawfully collected, then they argue that the decision of the ECCAA is wholly unreasonable. After citing the St Lucia case of **Attorney General v Kenny Anthony**⁴ wherein the Court of Appeal applied the test of Wednesbury unreasonableness, Mr Kentish contended that, assuming that NAV/COM fees are in law due and payable, it is unreasonable for the ECCAA to impose restrictions on FBO when FBO does not owe it any money.

[20] Alternative remedy: Mr Kentish recognizes that leave to pursue a prerogative writ will not be granted where an adequate alternative remedy is available to an applicant to air his complaint. Counsel pointed out that in the case at bar, the ECCAA is purporting to act by a statutory power which does not exist; so this is not a civil claim but one that must be determined in public law.

[21] Delay: Mr Kentish takes cognizance of the need to act promptly, failing which permission to apply for leave may be refused. However, counsel is of the view that there is no evidence before the court of any delay in bringing the application for judicial review.

² The opinion of Dr Claude Denbow in his work **Income Tax Law in the Commonwealth Caribbean** relied on.

³ The observations of Lane CJ in **A.-G. Reference (No 1 of 1988)** (1989) 2 WLR 195 at 206 relied on.

⁴ St Lucia High Court Civil Appeal 2009/031

(b) The ECCAA

[22] The ECCAA's learned Counsel (Ms Roberts) agrees that the test to be applied by the court in exercising its discretion to grant leave was set out in the case of **Sharma**, supra. However, counsel refutes Mr Kentish's submission that FBO's intended claim for judicial review has any realistic prospect of success for the following reasons:

- (1) The ECCAA has not made the decision in relation to which judicial review is claimed.
- (2) There is no evidence in FBO's supporting affidavit and the several documents exhibited to support the assertion that the alleged decision was made by the ECCAA;
- (3) In February 2012, the ECCAA decided to suspend the extension of a credit arrangement that allowed NAV/COM fees to be paid on monthly basis. FBO was later required to pay NAV/COM fees in advance on a flight by flight basis, and despite FBO's request, the ECCAA refused to reinstate the original credit arrangement.
- (4) The ECCAA's decision to suspend FBO's credit arrangement and the later refusal to reinstate the credit arrangement cannot properly be characterized as a decision to prevent aircraft which have been provided services by FBO from departing Antigua until satisfactory arrangements have been made for the payment of NAV/COM fees owed by PSL. On that basis, Ms Roberts submitted that the application for leave to claim judicial review is fundamentally flawed.

[23] On the question of illegality, Ms Roberts argued that FBO's argument that there is no legal obligation to pay NAV/COM fees is without merit as the ECCAA is clearly empowered by statute to collect the NAV/COM fees and has been doing so since its inception in 2004, when it assumed all the functions of the former Directorate of Civil Aviation.

- [24] Counsel referred to the Civil Aviation (Navigation Services Charges) Order 1982, section 3 (1), as amended, which provides that the operators of every aircraft for which air navigation services are provided, are required to pay specified charges to the Directorate of Civil Aviation (and now to the ECCAA).
- [25] By counsel's further submission, the Civil Aviation (Navigation Services Charges) Order 1982 has never been repealed or revoked, it having been saved by section 38 (2) of the Civil Aviation Act 1986 (now repealed), and later by section 59 (2) of the Civil Aviation Act 2003. By virtue of the Eastern Caribbean Civil Aviation Act 2003 (No 24 of 2003), the ECCAA assumed all functions previously performed by the Directorate of Civil Aviation, Ms Roberts contended.
- [26] Counsel next pointed to Article 5 (i) of the Eastern Caribbean Civil Aviation Agreement Act 2003, which specifically empowers the ECCAA to enforce existing rules, regulations and aviation standards. Counsel reasoned that as the Civil Aviation (Navigation Services Charges) Order was in existence at the time of the Eastern Caribbean Civil Aviation Agreement Act 2003, the ECCAA is therefore entitled to continue to enforce the Navigation Services Charges Order by virtue of the said Article 5(i).
- [27] As regards Mr Kentish's submission that the Aviation Charges Order does not mandate payment of navigation fees, Ms Roberts countered that the Aviation Charges Order does not mandate monthly charges either.
- [28] Ms Roberts next addressed the issue of "unreasonableness" raised by FBO. In so doing, Ms Roberts, like Mr Kentish referred to, and examined the case of **Attorney General v Kenny D. Anthony** supra, which establishes the appropriate standards by which reasonableness should be assessed. However, Ms Roberts contrasted the case at bar with the **Kenny Anthony** case, submitting that in the **Kenny Anthony** case, the decision that was under scrutiny was a Cabinet decision which was made contrary to established procedures and for an improper purpose, that is, to shield a Cabinet Minister from further investigation and possible prosecution for breaches of the Customs Laws; whereas in the

instant case, the ECCAA has complied with all relevant laws and has made a decision which is justified and supported by undisputed facts.

[29] In the view of Ms Roberts, the ECCAA's decision to suspend the extension of a credit arrangement and later refusal to reinstate the credit arrangement does not merit classification as a decision so unreasonable and outrageous that no reasonable authority could have come to it.

[30] In amplifying that view, Ms Roberts set out a number of factors which she urged the court to take into consideration in assessing the reasonableness or unreasonableness of the ECCAA's decision. These factors include:

(1) The ECCAA is under no legal obligation to enter into credit arrangements with aircraft operators;

(2) The ECCAA suspended the credit arrangement with FBO after several years of continued delinquency and broken promises on the part of FBO which resulted in the accumulation of arrears of EC\$125,237.00.

(3) The ECCAA refused to reinstate the credit facility upon consideration of FBO's poor payment history;

[4] There is no evidence of bad faith or improper motive on the part of the ECCAA.

(4) FBO has been operating under the flight by flight arrangement and there is no evidence that this payment structure has been unduly oppressive.

(c) **FBO's reply**

[31] Mr Kentish did not offer any specific response to Ms Robert's submission in relation to the decision not to reinstate the monthly billing arrangements. Nor did counsel address Ms Roberts' submission that FBO's application for judicial review is fundamentally flawed

because the ECCAA has not yet made the decision in relation to which judicial review is sought. Rather, counsel confined his reply to the decision allegedly made by the ECCAA to prevent aircraft provided service by FBO from departing Antigua unless satisfactory arrangements are agreed for the settlement of PSL's outstanding NAV/COM fees. In seeking to refute Ms Roberts' submission that the ECCAA has not made the decision for which judicial review is sought, Mr Kentish pointed to Exhibits "MM 1 (i)" and "MM 1 (J)".

- [32] Exhibit MM1 (i) is a letter from Mr Craig Walter, Director of Finance and Administration of ECCAA to Mr Edward Gilkes, Chief Executive Officer of Antigua and Barbuda Airport Authority (ABAA) dated 8th August 2012. It will be instructive to reproduce relevant portions of the letter.

"Dear Mr Gilkes

Re: FBO 2000 Limited – Payment of NAV/COM fees

We write to advise of the following change to the present arrangement for payment of NAV/COM fees by FBO 2000 Limited.

FBO 2000 Limited must pay all NAV/COM fees directly to the ECCAA at its offices situated at the Corner of Factory Road and Nugent Avenue, St Johns. The ECCAA will issue a receipt for payments received which must be presented to the AIS Office at the VC Bird International Airport so as to facilitate the departure of the aircraft for which fees were paid.

This arrangement shall take effect from Monday 13th August 2012, and remain in effect until further advised by the ECCAA."

Yours sincerely,

Craig J Walter

Director – Finance and Administration."

[33] Exhibit "MM 1 (J) is a letter from Mr Walter to Mrs Mikael also dated 8th August 2012, informing of the said decision and outlining the reasons for the decision. The critical part of the letter is paragraph 3 which reads:

"Under the circumstances, the ECCAA hereby inform you that effective Monday 13th August, 2012, FBO 2000 must pay all NAV/COM fees directly to the ECCAA at its offices situated at the Corner of Factory Road and Nugent Avenue, St John's. The ECCAA will issue a receipt for payment received which must be presented to the AIS Office at the VC Bird International Airport so as to facilitate the departure of the aircraft for which the fees were paid."

[34] Based on those two Exhibits, Mr Kentish submitted that there is a clear indication that the airplanes cannot leave Antigua unless fees are paid.

Discussion and ruling on issue 1

[35] Despite the fact that FBO seeks leave to challenge by way judicial review, a decision allegedly taken by the ECCAA to prevent aircraft which have been provided FBO services from departing Antigua until satisfactory arrangements have been agreed for the settlement of all NAV/COM fees owed by PSL, clearly, the crux of the matter is, that FBO's application for judicial review stems from the actual decision taken by the ECCAA not to reinstate the credit arrangement which allows for the monthly invoicing in respect of NAV/COM charges. In this regard, the ECCAA submitted that it is under no duty to afford FBO credit facility, and that, in any event FBO's application is flawed, because the ECCAA has not yet taken the decision in relation to which judicial review is sought. Mr Kentish made an unconvincing attempt at addressing the very forceful submissions put forward on behalf of the ECCAA.

[36] I am satisfied, based on the evidence before me, and the oral and written submissions of counsel, that the application for judicial review must be refused for the following reasons:

1. FBO's application for judicial review is based on grounds of illegality and unreasonableness of a decision allegedly taken by the ECCAA to prevent

aircraft which have been provided services by FBO from departing Antigua until arrangements have been made for the payment of NAV/COM fees owed by PSL. FBO's counsel advanced submissions based on that alleged decision.

2. There is no evidence before me upon which I can make a finding that the ECCAA has made any such decision.
3. I am not of the view that the letters pointed to by Mr Kentish (Exhibits MM 1 (i) and MM 1 (J)) in seeking to prove that the ECCAA had in fact taken the decision against which judicial review is sought, indicate that the ECCAA has taken a decision to prevent aircraft which have been provided services by FBO from departing Antigua until arrangements have been made for the payment of NAV/COM fees owed by PSL.
4. I accept the submission of Counsel for the ECCAA, that the ECCAA decided not to reinstate the monthly invoicing payment arrangement; and that such refusal cannot properly be characterized as a decision to prevent aircraft provided services by FBO from departing Antigua until satisfactory arrangements have been made for the payment of NAV/COM fees owed by PSL.
- (5) NAV/COM fees are a tax levied by the Government of Antigua and Barbuda which is collected by the ECCAA under the law. The fees are payable immediately by the operators of aircraft landing at the VC Bird International Airport. The ECCAA is well within its rights, if there is a serious concern, to put procedures in place to collect NAV/COM fees. Changing from monthly invoicing to flight by flight payment was entirely within the ECCAA's proper discharge and powers under the relevant Laws, that is to say, (a) section 3 (1) of the Civil Aviation (Navigation Services Charges) Order 1982⁵; (b) Article 5

⁵ Which has never been revoked

(i) of The Civil Aviation Agreement Act, 2003 (No 24 of 2003)⁶ ; and (c) Section 59 (2) of The Civil Aviation Act 2003 (No 25 of 2003)⁷, and can in no way be illegal as suggested by Mr Kentish. As Ms Roberts correctly pointed out, the ECCAA is under no legal obligation to enter into credit arrangements with aircraft operators; No rights are said to have been infringed, and none have been infringed.

5. I do not view the ECCAA's decision to change the arrangement for credit facilities as unreasonable or arbitrary in light of FBO's payment history.
6. There is nothing in the materials filed by FBO in support of its application to suggest that the decision not to reinstate the monthly invoicing payment is crippling its operations. The flight by flight payment arrangement is apparently working well, as FBO does not owe the ECCAA any money at the moment. To revert to the old system will likely be prejudicial to the ECCAA in that the same problems may arise - arrears, inability to collect revenue and inability to perform its functions.
7. The application is devoid of merit.
8. The delay of six months has not been explained.
9. FBO does not have any prospects of success to justify the grant of judicial review. There is no serious question to be tried.

ISSUE 2: SHOULD FBO BE GRANTED INTERIM INJUNCTIVE RELIEF AGAINST A DECISION ALLEGEDLY TAKEN BY ECCAA TO PREVENT AIRCRAFT WHICH HAVE BEEN PROVIDED SERVICES BY FBO FROM DEPARTING ANTIGUA

⁶ Which specifically empowers the ECCAA to enforce existing rules, regulations and existing standards

⁷ Which specifies that regulations, orders or rules or directions made or continued under the repealed Civil Aviation Act Cap 86 shall remain in force until they are revoked.

**UNTIL SPECIFIED ARRANGEMENTS ARE MET FOR PAYMENT OF NAV/COM
FEES OWED BY PSL?**

Ruling on issue No 2

[37] It is apparent from the conclusions that I have reached, that there is no basis on which I can grant the interim injunction. So the application for interim relief must also be refused.

CONCLUSION

[38] Leave to apply for judicial review is refused. There is no doubt that the ECCAA has no legal obligation to extend credit facility to FBO.

For the reasons stated:

1. The application for leave to apply for judicial review is refused.
2. The application for interim injunctive relief is refused.
3. The applicant, FBO is to pay costs to the Respondent, the ECCAA to be assessed if not agreed

[39] I have been presented with impressive submissions. I thank counsel for their assistance.

PEARLETTA E. LANNS
High Court Judge [Ag]