

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Anguilla

CLAIM NO. AXAHCV2011/0083

BETWEEN:

1. Vernon Fleming
2. David Reid

Claimants

and

1. The Attorney General of Anguilla
2. Remington Lake

Defendants

Appearances:

Navine Fleming of Counsel for the Claimants
Ivor Greene of Counsel for the Defendants

2013: December 16th, 27th

ASSESSMENT OF DAMAGES

- [1] **Taylor-Alexander, M.** Judgment was entered for the claimants herein with damages to be assessed and costs to be assessed if not agreed when at pretrial review, an application by the defendants for an extension of time to comply with the trial directions issued by the court for which they were in default was denied.
- [2] The claimants had filed a claim in which they alleged that the defendants had breached a verbal rental agreement for cubicle 4 at Wallblake/Clayton J Lloyd International Airport. It is alleged that the defendants unlawfully and without just cause terminated the agreement in February 2009 resulting in loss and damage to

the claimants. The claimants claimed for damages, exemplary damages; interest, costs and further or other relief.

- [3] The pleaded loss of the claimants is reflected as being the loss of office equipment in the sum of US\$13,570.00 for of the first named and the sum of US\$2500.00 for the second named defendant; Registration of the airline in the sum of US\$27,000.00; renovations of the cubicle in the sum of US\$9000.00; and loss of Income for 435 days from the 2nd November 2008 to the 11th January 2011 for a total of 2 hours per day at US\$1250.00 per hour. The total special damage claimed is US\$1,139,570.00.
- [4] The affidavit of Vernon Fleming and David Reid filed on the 6th November 2012 supporting the assessment was brief and merely asked the court to fix a date for the assessment of damages consequent on the judgment of the court and on the inability of the parties to arrive at a settlement of the damages. Following a direction from my sister master to file and serve evidence and documents in proof of their claim, the claimants filed a further affidavit of Vernon Fleming dated the 31st October 2013 in which he alleges that following the purchase of an aircraft from Carib Aviation the claimants set about the licensing and certification of the aircraft and sought registration under an Anguilla licence with Air Safety Support International (ASSI). It appears that while the process was in train, the aircraft purchased by the claimants was with permission placed under the licence of and joined the fleet of Trans Anguilla Airways for a short time when the aircraft generated a very reasonable income. The claimants have submitted a claim for 2 hours a day to cover their net loss at US\$1200.00 for a total of three years and two months.
- [5] The defendants' evidence is that of Remington Lake who is the Chief Executive Officer of the Anguilla Airport and Seaports Authority and whose affidavit avers that he is knowledgeable in the area of aircraft certification and with the operation and economics of aircraft, airlines and charter companies. He has provided logs in

the form of exhibit "RL 1" of the claimants' aircraft during the period under review showing the period when the aircraft was not operational from the 17th April 2009 to 23rd December 2009; showing periods when it was operational between the 26th of February 2009 and the 7th January 2010. He further gave evidence of the usual operating costs associated of this type of airline, including the maintenance costs and other charges incurred in the operation of the airline such as landing fees and handling fees charged by each country and the frequency of those charges; insurance charges and the costs of retaining personnel in the use of the aircraft. This evidence in my view was provided in addition to showing the usual operating costs of any such aircraft, to show that the damages claimed were grossly overestimated by the claimants in their pleading. He also averred to a general decline in airline profits in recent times due to the economic downturn and relies on "RL 3" to show the general decline in aircraft movement for the Clayton Lloyd Airport for the period 1997 to 2012.

- [6] Remington Lake's affidavit also criticized other averments of loss by the claimants. He states that the invoices supplied by the claimants are consistent with a set up costs of a carrier. He further averred that the allegation of the necessity of an operating desk at the airport is fallacious. An operating desk at the airport is not necessary for the operation of a charter service and he provided as an example Anguilla Island Air Charterers who operates without an office.

Measure of damages for breach of contract

- [7] **Halsbury's Fourth Ed Volume 12 para 1774** provides that "in cases of breach of contract the contract breaker is responsible and responsible only for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely or liable to result from his breach, or of which there was a serious possibility or real danger." The rule in **Hadley v Baxendale** [1854] EWHC J70 attributes to the contract maker a degree of foresight where either the damage is such as may be fairly and reasonably regarded as arising naturally, i.e.,

according to the usual course of things, from the breach of contract or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Assessment of the pleadings and evidence

[8] Of the damages claimed, it appears that there has been agreement of the parties in relation to the damages payable for the office equipment that was not returned or otherwise returned in a condition that was unsatisfactory in the amount of US\$3693.60 also for the renovation of the rented cubicle in the sum of US\$9,000.00 and for the registration of the Airline in the sum of US\$27,000.00. It is unusual to impede an agreement reached by the parties. I do not propose to do so and award these sums without interference.

[9] The claim for loss of income remains under challenge. I have carefully considered the application before me and I have also considered the rival submissions and took guidance from the law as to how damages are to be assessed. Admittedly I had difficulty with this loss which I found was neither foreseen nor contemplated damage flowing as a natural consequence of the defendant's breach. I examined the evidence on affidavit and the reply affidavit which was short and to the point. I also examined the Air Navigation (Overseas Territories) Order 2007. I find as a fact that the claimants' supposed interest in operating a commercial charter operation was not precluded by its inability to have a location at the airport, although admittedly it may not have been as convenient. I have found that at the time their lease was terminated the claimants did not have an AOC and as such were limited in the operation of their aircraft to leasing it for use by Trans Anguilla Airways. I can find no evidence to suggest whether the application for the AOC was stopped or was denied, but in any event the airline never received the required certification allowing it to operate its own commercial operation. I find as a fact that the grant of an Air Operator's Certificate (AOC) to the airline of the claimant's was not dependent on the claimants having a fixed base at the airport

and as such I cannot conclude that the application for the AOC was denied as a result of it losing the lease. I also find no evidence from which I can conclude that the claimants continued relationship with Trans Anguilla Airways was impeded by the termination of its lease with the defendants. I therefore find the claim for damages for loss of profit to be unsupported and I make no award of damages under this head.

Exemplary Damages

[10] I questioned the claimants as to whether they had abandoned their claim for exemplary damages, and their counsel assured me they had not, although it has so far only occupied no more than a mention in the prayer to the claim. Exemplary damages are punitive and are awarded in addition to general damages where the court wishes to punish a defendant who has acted with outrageous, flagrant, high-handed, or contumelious disregard for a claimant's rights. Quite apart from me finding no basis for its consideration, it is a remedy unavailable in contract. I am therefore constrained by law from making an award.

Costs

[11] Despite the order of Mathurin J for costs to be assessed I found that neither party had provided documentary support or a bill of costs to allowing for the assessment of the claimants' costs. In the circumstances and to bring finality to the proceedings, I award the claimants their costs of the proceedings and of the assessment of damages, summarily assessed in the sum of US\$2000.00 to be settled in 14 days of judgment.

V. GEORGIS TAYLOR- ALEXANDER

HIGH COURT MASTER

