

CITATION: Somwar v. Fly Jamaica Airways Ltd., 2019 ONSC 5439
COURT FILE NO.: CV-18-00609498-00CP
DATE: 20190920

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: John Somwar, Tulsidai Somwar and Shanta Persaud, Plaintiffs

– AND –

Fly Jamaica Airways Ltd., The Boeing Company, John Doe #1 Pilot, John Doe #2 Co-Pilot, John Doe #3 Aircraft Maintenance Provider, John Doe #4 Aircraft Maintenance Mechanic

BEFORE: Justice E.M. Morgan

COUNSEL: *Joe Fiorante and Valerie Lord*, for the Plaintiffs

Clay Hunter, for Fly Jamaica Airways Ltd.

Robert Fenn, for the Defendant, The Boeing Company

HEARD: September 19, 2019

CERTIFICATION, PLEADINGS AMENDMENT, AND DISCLOSURE

I. Background

[1] This class action arises from an airline accident and its aftermath. The accident occurred on November 9, 2018, when an airliner manufactured by the Defendant, The Boeing Company (“Boeing”), and operated by the Defendant, Fly Jamaica Airways Ltd. (“Fly Jamaica”), crashed in Georgetown, Guyana shortly after taking off on a flight destined for Toronto.

[2] The Fresh As Amended Statement of Claim states that any of the plane’s 120 passengers suffered physical injuries as well as property damage to their belongings and various expenses as a result of the crash. It also alleges that a number of family members of the passengers also suffered damages in the nature of *Family Law Act* claims.

[3] The Plaintiffs seek certification of this action under s. 5 of the *Class Proceedings Act, 1992*, SO 1992, c 6 (“CPA”). They also seek to amend their pleading to include the name of the first two John Doe Defendants – the pilots of the aircraft – and to generally do an editorial polishing of the Fresh As Amended Statement of Claim. In addition, they seek an Order requiring Fly Jamaica to

provide the Plaintiff with a complete passenger list and what contact information it has for all passengers on the flight.

[4] Counsel for all parties have worked diligently to arrive at a consent Order for certification. Furthermore, counsel for the Defendants make no submissions as to the pleading amendments and disclosure request by the Plaintiff, although they are not in a position to consent to those heads of relief sought here.

[5] I very much appreciate that counsel have been conscientious in their approach to the issues, and that they have strived to make the adversarial process as cooperative as possible while still protecting their respective clients' interests.

II. The criteria for certification

[6] Section 5(1) of the CPA sets out a number of criteria that a claim must fulfill in order for it to be certified as a class action. I am satisfied that the Plaintiffs' claim meets all of those requirements. Moreover, I am satisfied that the preliminary merits and evidence in the record are sufficient to satisfy the "some basis in fact" standard for certification set by the Supreme Court of Canada: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, para 16; *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 477, para 101.

a) Cause of action

[7] The claims against Fly Jamaica are governed by the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Montreal (1999) (the "Montreal Convention"), as implemented by the *Carriage by Air Act*, RSC 1985, C-26, as amended November 4, 2003. The Montreal Convention puts in place a form of strict liability regime against air carriers for bodily injury or death in the event of an accident, subject to defined monetary limits. For claims above those limits, a negligence standard of liability applies, with the burden of proof placed on the carrier to demonstrate that the accident was not caused by its negligence.

[8] The Montreal Convention also provides grounds for liability for damaged baggage and for damage occasioned by delay in the carriage of passengers. The Fresh As Amended Statement of Claim, as amended herein, pleads all of these causes of action and the record provides "some basis" for these pleadings.

[9] Likewise with the claim of negligence against Boeing. The Plaintiffs' claim seeks damages for negligence in relation to the design manufacture, and testing of the flight control system, the hydraulic system, the brake control system, and the adequacy of training and instructions.

[10] Counsel for the Plaintiffs has indicated that although they are named in the pleading, the Plaintiff is not in a position to pursue the claim against John Doe #3 and #4 – i.e. the aircraft maintenance provider and mechanic – at this time. The motion therefore does not seek to certify the claim as against those two Defendants.

[11] The Montreal Convention gives Ontario jurisdiction over a substantial portion of the proposed class. This jurisdiction exists on two grounds: a) any passenger with a principal residence in Canada; b) any passenger whose destination is Canada as established by the passengers'

itinerary. There is a possibility that of the 120 passengers on the aircraft, some (perhaps up to 20) may not be subject to this Court's jurisdiction.

b) Identifiable class

[12] The class proposed by Plaintiffs' counsel is composed of all passengers on the impugned flight who meet the test for jurisdiction under Montreal Convention, plus *Family Law Act* claimants related to those passengers.

[13] This proposed class is rationally connected to the proposed common issues. It is not defined in such an excessively broad or narrow way that it amounts to an arbitrarily defined group: *Hollick*, para 19. Once Fly Jamaica provides the Plaintiff with a copy of the passenger manifest, all 120 passengers will get notice of the claim.

c) Common issues

[14] Counsel for all parties have worked out a set of common issues for trial. I am satisfied that all of these issues will assist in avoiding duplication of fact-finding or legal analysis, and that they are "common" in the sense that their resolution is necessary to the resolution of each class member's claim.

[15] The Montreal Convention, negligence, and *Family Law Act* claims can all be determined on a class-wide basis.

[16] The proposed common issues are:

"Common Issues of the Passenger Class as against Fly Jamaica

1. Do the events of the crash of Flight OJ256 constitute an "accident" within the meaning of Article 17 of the Montreal Convention such that Fly Jamaica is liable to pay damages:
 - (a) to the Passenger Class Members for "bodily injury" caused by the "accident"; and, or
 - (b) to Family Claimant Class Members for the bodily injury to or death of any passenger on Flight OJ256 caused by the "accident"?
2. If the answer to question (1(a)) is "Yes", what is the meaning of "bodily injury" under Article 17 of the Montreal Convention? In particular, does "bodily injury" include any or all of the following injuries:
 - (a) mental distress of any type;
 - (b) post-traumatic stress disorder or any other form of recognized psychological or psychiatric condition unaccompanied by any other form of bodily injury due to physical trauma;

- (c) post-traumatic stress disorder or any other form of recognized psychological or psychiatric condition accompanied by any other form of bodily injury due to physical trauma; or
 - (d) post-traumatic stress disorder or any other form of recognized psychological or psychiatric condition caused by the accident?
3. If the answer to 1(a) and, or 1(b) is “Yes”, were the damages caused by the accident, due to the negligence or other wrongful act or omission of Fly Jamaica and, or its servants and its agents including, but not limited to, members of the Flight Crew and Cabin Crew, such that the limitations of liability in Article 21(2) of the Montreal Convention do not apply? In particular:
- (a) Did Fly Jamaica owe a duty of care to Class Members as it relates to the Crash?
 - (b) If the answer to 3(a) is “Yes”, what was the standard of care required of Fly Jamaica as it relates to the Crash?
 - (c) Did Fly Jamaica fail to adequately train the Flight Crew on procedures to land the Aircraft in the condition present at the time of the Crash, including,
 - (i) pre-flight inspection and verification of the airworthiness of the Aircraft prior to departure;
 - (ii) the proper response to an in-flight operational problem such as the hydraulic problems or problems identified by the Flight Crew shortly after take-off of the Flight including:
 - (1) following the appropriate checklist of procedures when such a problem is encountered;
 - (2) anticipating possible operational implications to such an identified hydraulic problem, including braking problems on landing;
 - (3) briefing the Cabin Crew via the lead flight attendant of the nature of the problem and ensuring that the Cabin Crew had a reasonable plan in the anticipation of a possible crash landing and an emergency evacuation;
 - (4) ensuring that the passengers are notified by the PA system of a potential emergency landing and the need to follow Cabin Crew instructions including to brace themselves prior to landing;

- (iii) landing the Aircraft under an emergency situation in the conditions present on Runway 06 at the time of the Crash and the braking distance required to safely stop the Aircraft in the conditions present on Runway 06 at the time of the Crash?
- (d) Did Fly Jamaica fail to carry out proper inspections of the Aircraft prior to Flight OJ256?
- (e) Did Fly Jamaica fail to take appropriate maintenance action in relation any aspect of the Aircraft which may have caused or contributed to the Crash including, but not limited to, the hydraulic system problems identified by the Flight Crew shortly after take-off of Flight OJ256?
- (f) Did the Flight Crew,
 - (i) accept the Aircraft for Flight OJ256 without having conducted an adequate pre-flight inspection;
 - (ii) operate the Aircraft when they knew or ought to have known that there were problems associated with the hydraulic and mechanical controls, electronic and/or computerized controls and/or other instruments or that there were mechanical engineering problems with the Aircraft;
 - (iii) fail to ensure that the Cabin Crew had conducted a pre-flight safety briefing with the passengers;
 - (iv) commence the Flight when the Aircraft was not in an airworthy condition;
 - (v) fail to take appropriate action to diagnose the nature of the hydraulic system problem which it identified shortly after take-off;
 - (vi) when it first identified the hydraulic system problem shortly after take-off,
 - (1) fail to follow the appropriate checklist of procedures when such a problem is encountered;
 - (2) fail to anticipate possible operational implications to such an identified hydraulic problem, including braking problems on landing;
 - (3) fail to take appropriate measures in response to such a hydraulic system failure;
 - (4) fail to brief the Cabin Crew via the lead flight attendant, or otherwise, of the nature of the problem and ensure

that the Cabin Crew had an appropriate plan in the anticipation of a possible crash landing and an emergency evacuation;

- (5) fail to ensure that that the passengers were notified by the PA system of a potential emergency landing and the need to follow Cabin Crew instructions to brace themselves prior to landing.
 - (6) fail to properly assess the weight of the aircraft, the weather conditions, the runway length and surface condition in order that they might execute a safe landing within the available length of Runway 06;
 - (7) fail to properly assess the identified hydraulic problem and how it might impact the braking ability of the Aircraft in the conditions then prevailing at the time of the Crash and make appropriate adjustments in order that they might safely land the Aircraft within the available length of Runway 06;
 - (vii) cause the Aircraft to touch down at a location on Runway 06 with insufficient remaining distance in order to safely effect the landing, when they knew or ought to have known that they would be unable to bring the Aircraft to a safe stop in the remaining distance on Runway 06 having regard to the condition of the Aircraft, the weight of the aircraft, the length of the runway, its surface conditions, and the weather;
 - (viii) fail to exercise due care and skill in the operation of the Aircraft despite knowing that damage would probably result;
 - (ix) err in selecting or accepting the selection of Runway 06 to carry out the emergency landing which resulted in the Crash;
 - (x) err by failing to divert Flight OJ256 to an airport with a longer, more suitable runway for an emergency landing?
4. If the answer to question 3 is: “Yes, the damages caused by the accident, were due to the negligence or other wrongful act or omission of Fly Jamaica and, or its servants, agents or employees”, is Fly Jamaica vicariously liable for any act or omission of its servants, agents or employees, including but not limited to the Flight Crew or any member of the Flight Crew, or the Cabin Crew or any member of the Cabin Crew, which caused or contributed to the accident and, or any injuries or damages to any of the Class Members?

5. Was the accident due to the negligence or wrongful act or omission of a party other than Fly Jamaica or its servants, agents or employees, in whole or in part?
6. If the answer to question 5 is "Yes":
 - (a) What other party or parties, by its or their negligence, wrongful act or omission, caused or contributed to the accident?
 - (b) What is the proportionate degree of fault or negligence of such other party or parties for the accident?
7. Is Fly Jamaica liable to pay compensation to members of the Passenger Class for damage caused by delay in the carriage of the members of the Passenger Class and their baggage in accordance with Articles 19 and 22 of the Montreal Convention?
8. If the answer to question 7 is "Yes", was the damage caused by an act or omission by Fly Jamaica, its servants, agents or employees acting within the scope of their employment, done with the intent to cause damage or recklessly and with knowledge that damage would probably result from the delay, such that Fly Jamaica cannot rely on the limitation of liability provided in Article 22(1) of the Montreal Convention for damage due to delay?
9. Is Fly Jamaica liable to pay compensation to members of the Passenger Class for destruction or loss or damage to their baggage in accordance with Articles 17(2) and 22 of the Montreal Convention?
10. If the answer to question 9 is "Yes", was the destruction, or loss, or damage to the baggage caused by an act or omission by Fly Jamaica, its servants, agents or employees acting within the scope of their employment, done with the intent to cause damage or recklessly and with knowledge that damage would probably result from the destruction, or loss, or damage to the baggage, such that Fly Jamaica cannot rely on the limitation of liability provided in Article 22(2) of the Montreal Convention for damage due to destruction, loss, or damage to baggage.

Common Issues of the Family Claimant Class as against Fly Jamaica

11. Are the Family Claimant Class members entitled to recover damages against Fly Jamaica pursuant to Section 61 of the Family Law Act, R.S.O. 1990, c. F.3, as amended, and, or section 2(5) and Schedule II of the *Carriage by Air Act*, R.S.C. 1985, c. C-26, as amended if the claims of the Passenger Class members' are governed by the provisions of the Montreal Convention?

Common Issues as against Boeing

12. Did Boeing owe a duty of care to the Class Members as it relates to the Crash?
13. If the answer to question 12 is “Yes”, what is the duty and the standard of care required of Boeing as it relates to the Crash?
14. Did Boeing breach the duty and standard of care required of Boeing as it relates to the Crash?
15. If the answer to question 14 is “Yes”, did the breach of the standard of care cause or contribute to the Crash?
16. Did the Passenger Class members sustain an injury that was proximately caused by the Crash?
17. Did the Family Claimant Class members sustain an injury that was proximately caused by the Crash?
18. Is Boeing liable to pay damages to members of the Passenger Class who sustained injuries and/or death?
19. Is Boeing liable to pay damages to members of the Family Claimant Class?”

d) Preferable procedure

[17] Given the number and importance of the common issues in relation to the overall action, there is little doubt that a class action is the preferable procedure in this case.

[18] Under the circumstances, a class action will be the best means to further the policy goals of access to justice, judicial economy, and behaviour modification: *AIC Limited v Fischer*, [2013] 3 SCR 949, paras 19-22.

e) Representative Plaintiff and litigation plan

[19] The Plaintiffs all appear to be up to the task of being representatives of the class. There is no indication that any have conflicts of interest, and the record establishes that they are capable of instructing counsel and playing the active role in the action that they are supposed to play.

[20] Counsel for the Plaintiffs have produced a workable litigation plan that was fully negotiated and agreed to by Defendants’ counsel. I note that Notice to the class will be by direct communication with class members (using the Plaintiffs’ existing information plus information that Fly Jamaica is able to provide), plus web and newspaper publication.

[21] I was advised by counsel at the hearing that in an effort to further expedite the proceedings, the parties will engage in the process of individual damages assessments concurrently with the common issues phase of the action. This will proceed in the first instance by writing, with class members filing out an agreed-upon questionnaire that will provide an initial input of relevant information.

[22] Counsel have all cooperated with each other in fashioning the proposed procedures which are designed to achieve optimal efficiency.

III. Pleading amendment and disclosure

[23] As indicated, the Defendants take no objection to the Plaintiffs' request to amend their pleading. This is primarily in the nature of editorial clean-up and appears appropriate at this stage.

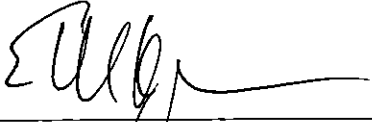
[24] As part of the amendment, the Defendants, John Doe#1 Pilot and John Doe #2 Co-Pilot, will be replaced with the names Basil Ferguson and Keone Bryan.

[25] Counsel for Fly Jamaica has expressed a concern for the confidentiality of passengers and so therefore is not in a position to consent to the Plaintiffs' request for disclosure of passenger identities and contact information. That said, disclosure of this information is necessary for this Notice of this class action to be disseminated in a fair and efficient manner.

[26] Accordingly, the information should be disclosed as requested.

IV. Disposition

[27] There will be two Orders to go, one granting certification and ordering disclosure of passenger information, and the authorizing the amendment of the Fresh As Amended Statement of Claim.



Morgan J.

Date: September 20, 2019