

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 35/2013

[2014] SCSC

OLIVIA VEL

Plaintiff

versus

ETHIOPIAN AIRLINES

Defendant

Heard: 24 February 2014
Counsel: Frank Elizabeth for plaintiff
Kieran Shah for defendant
Delivered: 19 March 2014

RULING

Robinson J

Background

[1] On 4th August 2012, Plaintiff, Olivia Vel, flew from London Heathrow, United Kingdom, to Mahe, Seychelles, aboard Ethiopian Airways. Her itinerary involved changing planes in Addis Ababa, Ethiopia. Plaintiff travelled with four pieces of baggage, all of which she checked through from London, Heathrow, United Kingdom to Mahe, Seychelles. When Plaintiff arrived in Mahe, Seychelles, on 5th August 2012, she discovered that one piece of baggage had gone missing. That piece of baggage was not recovered.

[2] Plaintiff filed this cause, alleging a cause of action for fault, and claiming €24,554.00 in damages.

[3] Defendant filed a defence, denying the claim of Plaintiff, and, raising a plea in limine litis as follows —

“(1) [u]nder Article 1370 (2) of the Civil Code of Seychelles, the Plaintiff is precluded from bringing an action in delict for loss of a checked baggage whilst travelling as an airline passenger pursuant to a contract of carriage in that the contract limits the sum recoverable for loss by law, in terms of the Warsaw Convention applicable to Seychelles. The Plaintiff must therefore sue in contract.

(2) [t]he recoverable sum is a fixed sum calculated in US dollars per weight in kilos of the lost baggage checked-in irrespective of the value of the baggage unless the passenger had insured the baggage for a higher sum.

(3) [i]n consequence of the above, this suit brought in delict, is frivolous, vexatious and an abuse of the process of the court and should be struck out.”.

Submission

[4] Defendant relying on grounds 1, 2 and 3 of the plea raised submitted that under Article 1370 (2) of the Civil Code of Seychelles Act CAP 33 (hereinafter referred to as the “Civil Code”), a plaintiff who has a cause of action, which may be founded either in contract or in delict, may elect which cause of action to pursue. However, if a law limits liability in either of the two causes of action, the plaintiff shall be bound to pursue the cause of action, to which that law relates. On this point, learned Counsel for Defendant read from A. G. Chloros, Codification in a Mixed Jurisdiction, at page 121, which refers to this question of choice between an action in contract and an action in delict, when the facts may give rise to either or both as “one of the most intractable problem”, resolved by Article 1370 (2) of the Civil Code. He also referred this Court to the case of Mike Valentin v Beau Vallon Properties Ltd Civil Side No. 46 of 1992, as a case in point. He, further, submitted that the liability of Defendant for checked baggage is limited by the Warsaw Convention, a treaty governing air travel.

[5] Plaintiff raised two principal objections to Defendant's plea. Firstly, learned counsel submitted that Plaintiff has pursued a cause of action in delict because the cause of action in this case is not founded in contract. He, further, explained that Plaintiff is permitted under Article 1370 (2) of the Civil Code to elect which cause of action to pursue, and Plaintiff has correctly elected to pursue a cause of action in delict, Defendant having committed a fault under Article 1382 of the Civil Code. Secondly, he argued that the liability limitations of the Warsaw Convention should not apply in the case of Plaintiff, but, then, stated that should Court determine that the cause of action in this case is founded in contract, it should determine whether damages should be granted either to the amount provided under Article 22 in Part I of Schedule 4 of the Carriage by Air Acts (Application of Provisions) (Overseas Territories) Order, 1967, (hereinafter referred to as the "Order") or in excess to the said amount.

Discussion

[6] I have considered the plea in limine litis raised by Defendant and the submissions of counsels. I shall begin by addressing the basis of air carrier's liability for the loss of any registered baggage, where a baggage check was delivered, sustained during the carriage by air. Section 5 (1) of the Order provides that "Schedule 4 to this Order shall have effect in respect of carriage to which this Order applies, being carriage which is international carriage as defined in that Schedule". Schedule 4 to the Order deals with international carriage under the Warsaw Convention. The Warsaw Convention, under section 2 of the Order, "means the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12th October 1929".

[7] Article 1 (2) in Part I of Schedule 4 to the Order defines "[i]nternational carriage". I reproduce the said Article 1 (2) in part —

"International carriage means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties to the Warsaw Convention or within the territory of a single such State [...]"

- [8] Article 4 (1) in Part I of Schedule 4 to the Order requires the carrier to deliver a baggage check for the carriage of baggage, other than the small personal objects of which the passenger takes charge himself. The baggage check shall contain, among other things, a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.
- [9] Article 18 in Part I of Schedule 4 to the Order deals with the liability of an air carrier. The said Article 18 (1) and (2) provides —
- “(1) The carrier is liable for damage sustained in the event of the loss of, or damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.
- (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo are in the charge of the carrier, whether in aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.”.
- [10] Article 24 (1) in Part I of Schedule 4 to the Order provides that, in the cases covered by Articles 18 and 19, any action for damages, however, founded, can only be brought subject to the conditions and limits set out in the Schedule to the Order.
- [11] I note on a close inspection of the above referred Articles and the mixed legal system which Seychelles follows that an action under the Warsaw Convention is founded in contract, and the basis of recovery in the event of the loss of registered baggage, where a baggage check was delivered, under the Convention is Article 18. On this point, I am persuaded that the words “damage sustained” in Article 18 (1) allow for a compensatory damage recovery. I have found no authority indicating punitive damages are available under the Warsaw Convention.
- [12] Article 22 (2) in Part I of Schedule 4 to the Order sets the limits on the monetary amount of a damage award. The said Article 22 (2) limits an air carrier's liability under Article 18 (2) in Part I of Schedule 4 to the Order to a sum of 250 francs per kilogram, unless the

consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.

[13] Article 1370 (2) of the Civil Code provides —

“1370 (2) — When a person has a cause of action which may be founded either in contract or in delict, he may elect which cause of action to pursue. However, if a law limits the liability in either of the two causes of action, the plaintiff shall be bound to pursue the cause of action, to which that law relates. A plaintiff shall not be allowed to pursue both causes of action consecutively.”.

[14] For the reasons set forth above, I find that the basis of recovery of Plaintiff’s claim against Defendant is the Warsaw Convention. The cause of action to which the Warsaw Convention relates is contract and not delict. Applying Article 1370 (2) of the Civil Code, I am satisfied that the basis of recovery in the event of the loss of Plaintiff’s baggage is the Warsaw Convention. I am also satisfied that Defendant has met its burden to establish that the limits of the Warsaw Convention apply in this case.

Decision

[15] I uphold the plea in limie litis and dismiss the Plaint. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 19 March 2014

F Robinson
Judge of the Supreme Court