In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 188

BETWEEN:

GLOYD ROBINSON	**Plaintiff**
-and-	
THE BERMUDA CIVIL AVIATION AUTHORITY	**First Defendant**
-and-	
THE MINISTER OF TRANSPORT	**Second Defendant**

Before:	**The Honourable Chief Justice Hargun**
Representation:	**Mr Vaughn Caines of Forensica Legal for the Plaintiff**
	Mr Allan Doughty of MJM Limited for the First Defendant
Date of Hearing:	**15 August 2023**
Date of Judgment:	**6 October 2023**

JUDGMENT

Hargun CJ

Application to strike out claims made in the Statement of Claim arising out of the alleged failure by the Bermuda Civil Aviation Authority to issue the necessary approval under Article 134 of the Air Navigation (Overseas Territories) Order 2013; whether the Plaintiff has the necessary legal standing to pursue these proceedings; whether any alleged breach of the Bribery Act 2016 gives rise to a private law cause of action which can be pursued by the Plaintiff; whether the Plaintiff can demonstrate a sustainable cause of action based upon tortious interference; whether the Authority is vicariously liable for the alleged misconduct of its Director of Operations; whether the claims set out in the Statement of Claim should have been pursued by way of an application for judicial review and whether the failure to do so amounts to an abuse of process.

Introduction

1. By Summons, dated 10 October 2022, the Bermuda Civil Aviation Authority ("**BCAA**"), the First Defendant, seeks an order that the Amended Specially Endorsed Writ of Summons filed by Mr Gloyd Robinson ("**Mr Robinson**") be struck out in that the Statement of Claim ("**SOC**") is frivolous; vexatious; embarrassing; discloses no reasonable cause of action; and otherwise amounts to an abuse of the court's process. At the commencement of the hearing Mr Caines, appearing for the Plaintiff, confirmed that the Plaintiff will be discontinuing any claims made in these proceedings against the Minister of Transport, the Second Defendant.

The pleaded case in outline

2. In the SOC in the following factual statements are pleaded in support of the causes of action pursued by Mr Robinson against the BCAA:

(1) These proceedings are pursued by Mr Robinson in his capacity as the Founder and CEO of the aircraft ferry business Jet Test International Limited ("**JTIL**"). JTIL contractors (individual flight crew members) were at all material times licensed in Bermuda by the BCAA. The BCAA is the statutory body which licenced the aircraft the Plaintiff and JTIL flew that were on the Bermuda Aircraft Registry regarding airworthiness, as part of the Plaintiff's ferry business in accordance with the Bermuda Civil Aviation Authority Act 2016 (paragraphs 1 and 2 of the SOC).

(2) Article 133 (1) of Air Navigation (Overseas Territories) Order 2013, made by Her Majesty on 6 November 2013 ("**the Order**") provides that a person must not operate an aircraft registered in Bermuda of any class for the purposes of general aviation operation, unless the person is the holder of an approval granted under Article 134 of the Order. Article 134 (1) provides, *inter alia*, that the Governor must grant an approval required under Article 133 upon being satisfied that the applicant is competent having regard in particular to the applicant's (i) previous conduct and experience; (ii) equipment; (iii) organisation and staffing; and (iv) maintenance and other arrangements. On or around 2013, JTIL received the approval from the Governor under Article 134 of the Order (paragraph 4 of the SOC).

(3) On or around 13 April 2021, it was discovered by the BCAA that a minority shareholder of JTIL, a Mr Steven Giordano, had allegedly falsified a BCAA derived pilot licence validation for an independent contractor of JTIL, a Mr Christopher Heber. On or around 29 April 2021, as a result of receiving this information, the BCAA, via its then Director of Operations Mr Peter Adhemar, suspended the privileges of both Mr Giordano and Mr Heber, pending a full investigation (paragraphs 5 and 6 of SOC).

(4) On or around December 2021, Mr Robinson enquired about reviving the suspended certification [for JTIL] as he was no longer working with Mr Giordano and Mr Heber.

Mr Robinson also enquired about other options for starting a new approval application under Article 134. Shortly after receiving Mr Robinson's enquiry for a new Article 134 application, Mr Adhemar retired from the BCAA, and a new Director of Operations, a Mr Tariq Lynch-Wade, was appointed in his place. Prior to his retirement, Mr Adhemar briefed Mr Lynch-Wade on Mr Giordano and Mr Heber (paragraphs 7 and 9 of the SOC).

(5) On or around 1 March 2021 a new entity named Coral Jet applied for Air Operator's Certificate ("**AOC**"), which would allow Coral Jet to engage in passenger and cargo operations, as well as ferry flight operations. Two of the owners of Coral Jet are Mr Giordano and Mr Allen, with Mr Heber being the organiser of the application for approval under Article 134. Mr Lynch-Wade knew or ought to have known of the suspensions meted out by Mr Adhemar to Mr Giordano and Mr Heber and that allegations were pending against Mr Allen for the similar illegal activity on a second and separate illegal flight. Notwithstanding knowing or ought to knowing this information Mr Lynch-Wade accepted and allowed the application (paragraphs 10, 11 and 12 of the SOC).

(6) On or about 4 January 2022, Mr Lynch-Wade advised Mr Robinson informing him that it would be inappropriate for JTIL, or Mr Robinson, to engage in any business with the BCAA while "*under investigation*", thereby stifling the application for a new certification by JTIL. Mr Robinson complains that he was prohibited from engaging in business with the BCAA. Mr. Robinson further complained that the investigation continued, despite the fact that Mr. Robinson's credentials had not been personally suspended by the BCAA. Mr Giordano, Mr Allen, and Mr Heber (and their new entity), however, were allegedly allowed to continue to engage with the BCAA, despite Mr Lynch-Wade's knowledge that all three had allegedly engaged in professionally illegal and dishonest behaviour.

(7) the BCAA was informed that its employee and agent, Mr Lynch-Wade, accepted an offer of a promise, and/or financial advantage to improperly perform a relevant function or activity, or as a reward for the improper performance of such function or activity (paragraph 18 of the SOC).

(8) Under the heading "PARTICULARS OF CLAIM" Mr Robinson claims:

(i) a declaration that the BCAA vicariously or otherwise was offered a bribe, payment or otherwise provided an advantage to Mr Giordano, Mr Allen or in the alternative to Coral Jet;

(ii) a declaration that the BCAA vicariously or otherwise accepted a bribe, payment or otherwise provided an advantage to Mr Giordano, Mr Arlen or in the alternative to Coral Jet;

(iii) damages caused to Mr Robinson through the offer and acceptance of this bribe to be qualified at a later date; and

(iv) in the alternative, a declaration admitting tortious interference, directly causing the Plaintiff damage and loss.

Grounds for striking out the SOC

3. The BCAA contends that the SOC should be struck out by considering and determining the following issues:

(i) whether Mr Robinson has standing to bring this claim;

(ii) whether a civil claim for breach of statutory duty, based on the Bribery Act, 2016 ("**the Bribery Act**"), is doomed to fail on the pleaded case;

(iii) whether the claim of "tortious interference" is doomed to fail on the totality of the pleadings;

(iv) whether the BCAA can be held vicariously liable for the alleged actions of Mr Lynch-Wade, as pleaded by Mr Robinson; and

(v) whether the failure of Mr Robinson to seek leave to issue judicial review proceedings amounts to an abuse of process, which justifies the striking out of this action.

Legal test for striking out pleaded claims

4. There is no dispute in relation to the relevant test to be applied in considering whether a pleading should be struck out. The Court considered the relevant test in the recent case of Geoffrey *Willcocks v Joseph Wakefield* [2023] SC (Bda) Civ 11 Aug. 2023:

> "*12. In considering this issue the Court reminds itself that the power to strike out a pleading is only to be exercised in clear and obvious cases and in any other case the action must be allowed to proceed to trial. Thus, in Electra Private Equity Partners v KPMG Peat Marwick [1999] EWCA Civ 1247:*
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> > *"It is trite law that the power to strike out a claim under RSC Ord.18, r.19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See Goodson v Grierson [1908] 1 KB 761, CA, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; Wenlock v Moloney, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and Torras v Al Sabah & others (unreported) 21 March 1997 CA, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in*

the pleadings is a myth . . . and has no substantial foundation"; see eg Lawrence v Lord Norreys (1890) 15 App Cas 210, per Lord Herschell at 219-220."

(i) Mr Robinson's standing to bring these claims

5. As noted earlier, these proceedings are being pursued by Mr Robinson in his capacity as "*the Founder and CEO of the aircraft ferry business jets test International Limited (JTIL)".* JTIL itself or any other corporate entity is not a party to these proceedings as the plaintiff. This is in circumstances where the relevant approval, under Article 134 of the Order, which was subsequently suspended by the BCAA, was provided to JTIL and not to Mr Robinson.

6. On 20 December 2021, Mr Robinson sent an email to Mr Adhemar stating:

"*Hello Peter,*

I hope this note finds you well, I'm interested in ferrying some of Bermuda registered aircraft in 2022 and I'd like to see if I can get a status report on where the investigation stands and my options to go forward with ***either the old 134 or apply for a new one****. I have parted ways with Bob [Allen] and Steve [Giordano] and they have started their own company outside of Jet Test.* ***I've closed the old US entity that I was involved with them in, and the Bermuda entity will cease operations and wind down****.*

I have a new US entity with the same name and I've retain the logo and brand as it's my wish to continue operations under that name…

Of course I would like to keep cost and time in mind, but cutting corners and subterfuge are not in a playbook, ***so if we need to start from scratch my involvement will only slow down the process, I'd just like to know."*** (emphasis added)

7. Mr Caines, for Mr Robinson, accepted that in this email Mr Robinson is advising the BCAA that the entity to which the Article 134 approval had been issued was closed and no longer existed. Furthermore, Mr Caines accepted that this was not a proper application and that with this email, Mr Robinson is asking Mr Adhemar for information relating to a possible future application. Finally, Mr Caines accepted that as a matter of BCAA policy, the issuance

of an Article 134 certification to an individual was unprecedented and that it was expected that the application would be made by a corporate entity.

8. It is well established under Bermuda law (which is the same as English law in this respect), a shareholder cannot bring a claim to make good the diminution in the value of its shareholding, or in its dividends, which flows from the loss suffered by the company for the recovery of which it has a cause of action (even if the company fails to pursue that claim). The company, not the shareholder, is the proper plaintiff in respect of such losses. Thus, in *Marex Financial Ltd v Sevilleia* [2021] 1 UKPC 22 Lord Reid PSC held at [19]:

> "*In summary, therefore, Prudential [Prudential Assurance Co Ltd v Newman Industries (No. 2) [1981) Ch 257] decided that a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. Where there is no recoverable loss, it follows that the shareholder cannot bring a claim, whether or not the company's cause of action is pursued. The decision had no application to losses suffered by a shareholder which were distinct from the company's loss or to situations where the company had no cause of action*"

9. It follows that, to the extent that the claim is based upon the suspension of the approval granted to JTIL, the resulting loss is suffered by JTIL. It further follows that the only entity which can seek to recover that loss is JTIL itself and not Mr Robinson in his capacity as a minority shareholder and founder of that company. As noted earlier, Mr Robinson advised Mr Adhemar in his email sent on 20 December 2021, that "*I have a new US entity with the same name and I've retain the logo and brand as it's my wish to continue operations under that name*." To the extent that the claim is based upon the failure to give approval to the new US entity, under Article 134, any such claim must be pursued by that new US entity and cannot the pursued by Mr Robinson in his capacity as a shareholder of that company. It follows that if the pleaded claims are to be pursued, they can only be pursued by JTIL and/or the new corporate entity, if any, which has applied for approval under Article 134 and not Mr

Robinson. Mr Robinson does not have the legal standing to commence proceedings and recover the losses which properly belong to JTIL or the new US entity. Accordingly, the Court holds that these proceedings stand to be struck out on this ground alone.

(ii) Whether infringement of the Bribery Act gives rise to civil causes of action

10. As noted earlier, in the SOC, Mr Robinson pleads, at paragraph 10 that on 1 March 2021, an entity named Coral Jet applied to the BCAA for an AOC. It is also claimed by Mr Robinson that one of Coral Jets owners, Mr Giordano and his associate, Mr Heber, worked with Mr Robinson in the operation of JTIL, were "*under investigation*" for having allegedly forged a "Pilot Licence Validation" for the purpose of conducting a ferry flight was employed by JTIL in April 2021.

11. Mr Robinson then complains that notwithstanding the allegation of forgery made against Mr Giordano and Mr Heber, Mr Lynch-Wade accepted an offer of a promise, and/or financial advantage to improperly perform a relevant function or activity, or as a reward for improper performance of such function or activity in relation to the grant of an AOC to Coral Jet. It is to be noted that the pleading does not state when the AOC was in fact granted to Coral Jet; or what the nature of the offer of a promise or financial advantage was.

12. At paragraph 17 of the SOC Mr Robinson asserts that at all material times the BCAA (vicariously through its agent Mr Lynch-Wade, the Director of Operations) knew or ought to have known that Mr Lynch-Wade was running afoul of section 3 (Case 1 and Case 2) of the Bribery Act. The relevant part of section 3 provides that:

> *"**Offences of bribing another person***
>
> *3 (1) A person ("P") is guilty of an offence if either of the following cases applies.*
>
> *(2) Case 1 is where—*
>
> *(a) P offers, promises or gives a financial or other advantage to another person; and*

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity; or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person; and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party."

13. Section 16 of the Bribery Act provides that an individual guilty of an offence under the Act is liable on summary conviction, to a fine not exceeding $500,000 or to imprisonment for a term of 10 years, or to both; and on conviction on indictment, to an unlimited fine or imprisonment for a term of 15 years, or to both.

14. Under the "PARTICULARS OF CLAIM" the Plaintiff [Mr Robinson] claims for "*Damages caused to the Plaintiff through the offer and acceptance of this bribe which is to be quantified at a later date*". It is to be noted that in relation to this claim Mr Robinson appears to be contending that a breach of section 3 of the Bribery Act gives rise to a private law claim on his part against BCAA. The issue of whether a breach of statutory duty gives rise to a private law civil claim has been considered a number of cases both in England and in Bermuda. In *Pickering v Liverpool Daily Post and Echo Newspapers PLC* [1991] 2 AC 370 Lord Bridge considered the circumstances where a breach of statutory duty may give rise to a civil claim and held at 419H-420D:

"…Quite apart from the considerations to which I have drawn attention arising from the Rules of 1960, I should find it impossible to construe rule 21(5) in the Rules of 1983 as giving a cause of action for breach of statutory duty to a patient applying for his discharge to a mental health review tribunal in respect of the unauthorised publication of information about the proceedings on that application. In holding that the rule did give him such a cause of action, Lord Donaldson M.R. and Glidewell L.J. considered that it fell within the principle formulated by Lord Diplock in Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173, 185:

"where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation."

But in order to fall within the principle which Lord Diplock had in contemplation it must, in my opinion, appear upon the true construction of the legislation in question ***that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach****. In the well known passage in the speech of Lord Simonds in Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398, 407-409, in which he discusses the problem of determining whether a statutory obligation imposed on A should be construed as giving a right of action to B, the whole discussion proceeds upon the premise that B will be damnified by A's breach of the obligation.* ***I know of no authority where a statute has been held, in the application of Lord Diplock's principle, to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss.*** *But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages. Hence Lord Diplock's principle seems to me to be incapable of application to rule 21(5)."* (emphasis added)

15. The English rule of construction has been applied in Bermuda. Thus, in *Darrell v A Board of inquiry appointed under the Human Rights Act 1981* [2013] SC (Bda) 73 Civ Hellman J so held at [38]-[39]:

"38. There is a further difficulty with a claim for breach of statutory duty. As Lord Browne-Wilkinson said in X (Minors) v Bedfordshire CC [1995] 2 AC 633 in the House of Lords at 731 D – E:

"The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty."

39. Section 20A of the 1981 Act does provide for a private right of action for breach of statutory duty where it is alleged that the respondent has committed an act of discrimination against the claimant which is unlawful under Part II of the 1981 Act. The alleged failure of the Board to determine the merits of Mr Darrell's claim would not satisfy this definition and hence would not give rise to a right of action under section 20A. The 1981 Act does not provide for any other claim for breach of statutory duty."

16. In *Dwight Lambert v The Broadcasting Commissioners* [2014] SC (Bda) 51 Civ, Kawaley CJ considered whether a breach of the statutory duty set out in section 4 of the Obscene Publications Act 1973 gave rise to a private law cause of action for damages. Kawaley CJ refer to the House of Lords decision in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39 and held at [23]:

"...and so Mr. Smith, very bravely, sought to argue that if persons such as his client were unable to sue for damages, how else would the statute be enforced? The answer to that question is that the statute can be enforced by way of judicial review. That obviously is of no assistance to the Plaintiff as regards to the specific events of 2007 of which he complains in this action. But in a general sense, the Minister and the Commissioners continue to be subject to ongoing duties that can be enforced by judicial review. But ***section 4, in my judgment, is quite plainly and obviously not the sort of statutory provision which gives rise to a claim in damages. It is not designed to protect people from the sort of injury that normally sounds in damages****."* (emphasis added)

17. Mr Doughty correctly submits that on proper construction of the Bribery Act it is clear that (i) its purpose is "*to make provision about offences relating to bribery and to establish a*

National Anti-Corruption and Bribery Committee"; (ii) it is a criminal statute of general application, which creates offences that apply to "*a person*" who engages in acts of bribery in relation to "*another person*"; (iii) the Bribery Act does not identify a protected class of persons such as those who are expressly protected, for example, by the Human Rights Act as read in conjunction with Part II of that legislation; (iv) unlike section 20A of the Human Rights Act, the Bribery Act does not expressly create a statutory cause of action that allows an individual member of the protected class to launch a civil action; and (v) there is nothing within the Bribery Act that in anyway creates, by implication, a statutory cause of action as a matter of private law. Accordingly, the Court has no hesitation in holding that a breach of section 3 of the Bribery Act does not give rise to a cause of action for damages which can be pursued by Mr Robinson. No doubt it was for these reasons that Mr Caines, appearing for Mr Robertson, abandoned any causes of action based upon the alleged infringement of the Bribery Act.

18. Before leaving this section, the Court notes that even if it was open to the Court to construe the Bribery Act as giving rise to a cause of action under private law, such a cause of action would belong to JTIL or the new US entity and not Mr Robinson in his capacity as a shareholder of those two corporate entities.

(iii) Whether tortious interference is a sustainable cause of action

19. As noted earlier, Mr Robinson alleges in the SOC that the grant of the AOC and refusal to renew the Article 134 for JTIL afforded the principals of Coral Jet and its legal and impermissible advantage, while simultaneously and detrimentally affecting the Plaintiff and his business. Mr Robinson contends that the BCAA vicariously or otherwise via its agent Mr Lynch-Wade tortiously interfered with Mr Robinson's business causing him damage and loss.

20. At the hearing of this application Mr Caines, for Mr Robinson, submitted that as Mr Lynch-Wade knew that Mr Robinson had nothing to do with any wrongdoing and yet suspended the

approval given to JTIL under Article 134. Mr Robinson says that as a result, he suffered damage constitutes tortious interference on part of the BCAA.

21. In *OBG Limited v Allan and Others* [2007] UKHL 21, the House of Lords reviewed the constituent elements of "tortious interference". In his speech to the House, Lord Hoffmann held at [49]-[51]:

> "*49. **In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party**. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which would have been actionable if the third party had suffered loss. Likewise, in National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd [1908] 1 Ch 335 the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment. The fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. In this respect, procuring the actions of a third party by fraud (dolus) is obviously very similar to procuring them by intimidation (metus).*
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> *50. Lonrho plc v Fayed [1990] 2 QB 479 was arguably within the same principle as the National Phonograph Co case. The plaintiff said that the defendant had intentionally caused it loss by making fraudulent statements to the directors of the company which owned Harrods, and to the Secretary of State for Trade and Industry, which induced the directors to accept his bid for Harrods and the Secretary of State not to refer the bid to the Monopolies Commission. The defendant was thereby able to gain control of Harrods to the detriment of the plaintiff, who wanted to buy it instead. In the Court of Appeal, Dillon LJ (at p 489) referred to the National Phonograph case as authority for rejecting an argument that the means used to cause loss to the plaintiff could not be unlawful because neither the directors nor the Secretary of State had suffered any loss. That seems to me correct. The allegations were of fraudulent representations made to third parties, which would have been actionable by them if they had suffered loss, but which were intended to induce the third parties to act in a way which caused loss to the plaintiff. The Court of Appeal therefore refused to strike out the claim as unarguable and their decision was upheld by the House of Lords: see [1992] 1 AC 448.*

> *51.* ***Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant****. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant*." (emphasis added)

22. Here, the actions complained of are not actionable by Mr Robinson because on proper legal analysis, any cause of action belongs to JTIL or the "US entity" and not Mr Robinson. In this regard, the Court again refers to the earlier analysis based upon the "reflective loss" principle at [5] to [9] above.

23. Secondly, despite the pleaded allegations of wrongdoing by Mr Robinson against Mr Lynch -Wade, there is persuasive evidence that Mr Robinson was content to allow Mr Lynch-Wade to deal with the "application" for approval under Article 134 which Mr Robinson had made or intended to make. Thus, the email from Adhemar sent on 20 December 2021 (see [6] above) was referred to Mr Lynch-Wade as the incoming Director of Operations. Mr Lynch-Wade then replied via email on 22 December 2021 and stated:

> "*As the investigation is still ongoing with the Police, the BCAA will wait until the conclusion has been reached before taking the next steps*."

24. Mr Robinson then replied to that message on 22 December 2021 and stated:

> "*Ok. Thanks Tariq. Would it be OK if I had a part in another application with the BCAA*?"

25. Thereafter, Mr Robinson again wrote to Mr Adhemar on 29 December 2021 at which time he forwarded links to a file sharing site regarding Mr Lynch-Wade's dealings with Mr Giordano and Mr Allen. At that time Mr Robinson stated:

> "*I think it is reasonable to assume that* ***Tariq is not impartial and his ownership in Coral Jet is going to affect how Bob, Steve and Heber's transgressions are adjudicated****, and perhaps I won't have a smooth path going forward with future BCAA business*." (emphasis added)

26. It is reasonably clear that by 29 December 2021 Mr Robinson had formed the view that Mr Lynch-Wade was not impartial and was likely to favour Mr Giordano, Mr Allen and Mr Heber because he allegedly held an ownership interest in Coral Jet. Despite taking this view of Mr Lynch-Wade's impartiality, Mr Robinson was still prepared to allow Mr Lynch-Wade to make a decision in relation to the application which Mr Robinson thought he had submitted to the BCAA. Thus, on 4 January 2022 Mr Robinson sent an email to Mr Lynch-Wade and stated:

> "*I hope you had good holidays. Has there been a decision made about me making a new application with the BCAA? I'd like to start right away if it's okay* ***but I understand if you don't think it's appropriate at this time***." (emphasis added)

27. Mr Lynch-Wade explained, in an email sent on the same date, that the application could not proceed further until the investigation, conducted by the Bermuda Police, had been concluded:

> "*Further to my below email,* ***the investigation is looking into possible past irregularities and until concluded everything is on hold***. *It is important to note that we are not an investigative body, and any supporting evidence or associated information will be passed onto appropriate law enforcement for their review*" (emphasis added)

28. Third, there is compelling evidence that the BCAA has never received the proper application which could properly be considered and determined by the BCAA. Thus, the letter from the BCAA's attorneys to Mr Robinson's attorneys dated 10 April 2023 makes clear that it is the position of BCAA that (i) the informal application of Mr Robinson as submitted to Mr Adhemar on 21 December 2021 was irregular and inappropriate since it did not specify who was in fact seeking certification; (ii) the BCAA will fairly consider an application submitted on behalf of any entity that wishes to do business through its aircraft registry provided that the entity in question properly identifies itself; and (iii) the issuance of an Article 134

certification to an individual is unprecedented as such an application has to be made by a corporate or like entity through the normal application process.

29. For all these reasons the Court is satisfied that the cause of action based upon tortious interference is not sustainable in the circumstances of this case

(iv) Whether there is a sustainable cause of action based upon the assertion that BCAA is vicariously liable for the conduct of Mr Lynch-Wade

30. The Court has already held that (i) if the pleaded claims are to be pursued, they can only be pursued by JTIL and/or the new US entity which applied for approval under Article 134 and not Mr Robinson, and that Mr Robinson does not have the legal standing to commence proceedings and recover the losses which properly belong to JTIL or the new US entity; (ii) Mr Caines, for Mr Robinson, accepted and the Court has held that an infringement of the Bribery Act on the part of Mr Lynch-Wade does not give rise to a private law cause of action which Mr Robinson can pursue against the BCAA; (iii) a cause of action based upon tortious interference is not sustainable in the circumstances of this case. In the circumstances even if it could be established that the BCAA is vicariously liable for the allegedly wrongful conduct of Mr Lynch-Wade, it would not produce the result that would allow Mr Robinson to pursue a cause of action for damages against the BCAA. The above findings are entirely dispositive of this cause of action asserted by Mr Robinson.

31. Had the Court not made the above findings which are dispositive of the claim based upon vicarious liability, the Court would not have struck out this cause of action on the ground that the BCAA could not arguably be vicariously liable for the alleged conduct of Lynch-Wade.

32. In relation to the relevant test to be applied in considering whether an employer should be held vicariously liable for the wrongful acts of the employer, Mr Doughty relied upon the decision in *Wm Morrison Supermarkets PLC v Various Claimants* [2020] UKSC 12, a case which reviewed the earlier authorities in relation to this issue.

33. In the earlier decision in *Dubai Aluminium Co Ltd v Salaam* [2002] 48 the House of Lords (Lord Nicholls at [23]) considered that the best general answer is that the wrongful conduct must be so closely connected with the acts the partner or employee was authorised to do that, for the purpose of liability of the firm or the employer to the third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment.

34. The issue was again considered by the Supreme Court in 2016 in *Mohamud v Wm Morrison Supermarkets PLC* [2016] AC 677, where Lord Toulson summarise the present law at [44]-[46] as follows:

> *"42 The "close connection" test adumbrated in Lister and Dubai Aluminium has been followed in a line of later cases including several at the highest level: Bernard v Attorney General of Jamaica [2005] IRLR 398; Brown v Robinson [2004] UKPC 56; Majrowski v Guy's and St Thomas's NHS Trust [2007] 1 AC 224 and Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1 ("the 'Christian Brothers' case")*
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> *44 In the simplest terms, the court has to consider two matters.* ***The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job****. As has been emphasised in several cases, this question must be addressed broadly; see in particular the passage in Diplock LJ's judgment in Ilkiw v Samuels [1963] 1 WLR 991, 1004 included in the citation from Rose v Plenty [1976] 1 WLR 141, 147–148 (at para 38 above) and cited also in Lister v Hesley Hall Ltd [2002] 1 AC 215 by Lord Steyn, at para 20, Lord Clyde, at para 42, Lord Hobhouse, at para 58 and Lord Millett, at para 78.*
>
> *45* ***Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ.*** *To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. Lloyd v Grace, Smith &*

> *Co [1912] AC 716, Pettersson v Royal Oak Hotel Ltd [1948] NZLR 136 and Lister v Hesley Hall Ltd were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in Warren v Henlys Ltd [1948] 2 All ER 935 any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant.*" (emphasis added)

35. Here there can be no real dispute that Mr Lynch-Wade was employed by the BCAA and was the person responsible for determining whether and when to approve any application for Article 134 certification. He was directly involved in relation to the decision-making process in respect of which Mr Robinson complains in these proceedings. Then the Court has to consider whether there was sufficient connection between his position and his alleged wrongful conduct to make it right for BCAA to be held liable.

36. Mr Doughty emphasizes that there is no evidence that Mr Lynch-Wade's duties required him to (i) consider the grant of an AOC to an entity in which he allegedly held a personal financial interest; (ii) allegedly accept bribes from entity seeking the grant of an AOC (iii) engage in alleged communications with the principals of an entity applying for an AOC through private email; and (iv) allegedly seek to harm the interests of the purported competitor of said entity in its application through an abuse of its powers, to ensure his personal gain.

37. The Court accepts that the allegation of bribery, looked at in isolation, can be considered entirely personal and not linked with his employment. It seems to the Court, that the important point here is that the misconduct alleged, on the part of Mr Lynch-Wade, is said to have directly affected the discharge of his duties in relation to the grant of approval under Article 134, to third parties including Mr Robinson. The relevant issue is that the alleged misconduct on the part of Mr Lynch-Wade affected his subsequent actions which were clearly within the course of his employment with the BCAA.

38. But for the findings set out in [30], for the reasons set out above the Court would have held that the issue whether the BCAA is vicariously liable for the conduct of Mr Lynch-Wade was properly arguable and would not have struck out the SOC on this ground.

(v) Should Mr Robinson have issued Judicial Review proceedings

39. Mr Doughty, on behalf of the BCAA, contends that the complaints made by Mr Robinson in respect of the conduct of Mr Lynch-Wade are properly the subject matter of judicial review proceedings and Mr Robinson's failure to issue the proper proceedings amounts to an abuse of process of this Court. He points out that the basic allegations made by Mr Robinson are that (i) Mr Lynch-Wade was a biased decision-maker because of his alleged interest in Coral Jet; (ii) Mr Lynch-Wade acted unfairly by penalizing JTIL in declining to recertify that entity while issuing an AOC to Coral Jet notwithstanding Mr Lynch-Wade's alleged knowledge of Mr Giordano's ownership interest in Coral Jet; and the suspension of Mr Giordano's Pilot Licence Validation; and (iii) the decision of Mr Lynch-Wade to refuse the grant of recertification to JTIL was "irrational".

40. Mr Doughty argues that given that Mr Lynch-Wade, as Director of Operations for the BCAA, is a public decision-maker, all of the complaints made by Mr Robinson were clearly amendable to judicial review of this Court. It is common ground that neither Mr Robinson nor JTIL ever sought leave to issue judicial review proceedings within 6 months of Mr Lynch-Wade's impugned "decision".

41. Hellman J addressed a similar issue in *Darrell v Board of inquiry appointed under the Human Rights Act 1981* [2013] SC (Bda) Civ (17 October 2013). In that case Mr Darrell had issued proceedings by way of Originating Summons contending that the decision of the Board dated 7 April 2007 was (i) not a "determination" within the meaning of section 20(1) of the Human Rights Act 1981 and (ii) that it was in nullity. Hellman J struck out these proceedings instituted by Mr Darrell on a number of grounds. One such ground was that the proper mode of challenging the decision of the Board was by way of judicial review of that decision and the failure to do so by Mr Darrell amounted to abuse of process. At [36]-[37] Hellman J held:

"36. However I accept the Other Parties' submissions that ***Mr Darrell should have challenged the Board's alleged failure to make a final decision by way of judicial review.*** *It is a public law issue par excellence. He should have brought a challenge promptly, and in any event within the 6 month time limit permitted for judicial review applications.* ***It is abusive for him to try to circumvent the requirement of a prompt challenge by bringing some 6 years later what is – presumably – intended to be a private law claim in tort for breach of statutory duty***.

37. The point was well made by Lord Woolf MR in Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 in the Court of Appeal of England and Wales at para 17:

*"Since it was published the CPR [Civil Procedure Rules] 1998 have given substance to its suggestion that the mode of commencement of proceedings should not matter, and that what should matter is whether the choice of procedure (which will now be represented by the identification of the issues) is critical to the outcome. This focuses attention on what in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual [or, by parity of reasoning, tortious] will in many cases circumvent the valuable provision of R.S.C., Ord. 53, r. 4(1)—which, though currently due to be replaced by a new Civil Procedure Rule, is unlikely to be significantly modified—****that applications for leave must be made promptly and in any event within three months of when the grounds arose, unless time is enlarged by agreement or by the court****."* (emphasis added)

42. Mr Caines, for Mr Robinson, urges the Court that if the Court considers that the judicial review proceedings was the appropriate route to challenge the decision, then the Court should give Mr Robinson leave to issue judicial review proceedings out of time. The Court declines to do so for two reasons. As made clear by Hellman J in *Darrell* and Lord Woolf MR in *Clark v University of Lincolnshire* any application for leave to issue judicial review proceedings must be made promptly and in any event within 3 months of when the grounds arose. Secondly, it appears to the Court that the BCAA is prepared to consider an application

for approval, under Article 134, from an appropriate entity and is prepared to designate a person other than Mr Lynch-Wade to make the determination.

43. By letter dated 2 August 2023, Mr Thomas Dunstan, Director General of BCAA, advised Mr Caines that the Police investigation had been completed and as a result, the BCAA is prepared to consider a *de novo* application concerning the issuance of an approval under Article 134. Mr Dunstan also stated that he would personally consider any such application in his capacity as Director General. The letter explains that the main reason for inviting Mr Robinson to make a *de novo* application stems from (i) Mr Robinson's claim that Mr Lynch-Wade, the Director of Operations for the BCAA is a biased; and (ii) it is unclear to the BCAA whether JTIL still exists and thereby properly holds such a certificate.

44. Mr Dunstan further notes that it has come to the attention of the BCAA that there are issues concerning Mr Robinson that may be problematic if he proceeds to file his *de novo* application or as a principal of the corporate entity making such an application. Specifically, the BCAA has concerns that (i) Mr Robinson attempted or acted as flight crew while intoxicated; and (ii) Mr. Robinson previously filed, with the BCAA, Pilot Flight Proficiency Completion Records checked by a "Michael Balzary", whose identity is suspect. In the circumstances, the BCAA has advised Mr Robinson that if the does wish to submit a *de novo* application for approval under Article 134, he must also submit to Mr Dunstan a hard copy of an affidavit, sworn, under penalty of perjury, addressing the allegations of intoxication made in the Complaint filed by JTIL, Mr Giordano and Mr Allen against Mr Robinson with the Eighth Judicial District Court of Clark County, Nevada, US. Mr Dunstan also stated that he has serious concerns as to whether there is an individual named "Michael Balzary", to carry the qualifications necessary to sign the Pilot Flight Proficiency Completion Records that the BCAA now holds but suggested means by which Mr. Robinson may wish to provide evidence as to Mr. Balzary's identity and qualifications.

45. It seems to the Court that the proposals which the BCAA has put forward to Mr Robinson in relation to the *de novo* consideration of any application he may wish to make on behalf of any corporate entity for approval under Article 134, is all he can realistically hope to achieve

in any successful application for judicial review. In the circumstances, the court declines to give leave, out of time, to Mr Robinson to issue judicial review proceedings.

Conclusion

46. Having regard to the Court's findings that (i) Mr Robinson does not have the legal standing to pursue these proceedings; (ii) any alleged breach of the Bribery Act does not give Mr Robinson a private law cause of action which he is able to pursue in these proceedings; (iii) the pursuit of the cause of action based upon tortious interference is not sustainable in all the circumstances; (iv) Mr Robinson is unable to sustain a stand alone cause of action based upon the principle of vicarious liability of an employer for the wrongful acts of the employee; and (v) the commencement of these proceedings was an abuse of process given that the appropriate challenge to the alleged misconduct on the part of Mr Lynch-Wade should have been made by way of an application for judicial review, the Court has come to the conclusion that the claims made by Mr Robinson in the SOC must be struck out and the Court so orders.

47. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 6th day of October 2023

NARINDER K HARGUN
CHIEF JUSTICE