COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2024/CLE/gen/00301

BETWEEN:

CAPTAIN JOSEPH J. MOXEY

First Claimant

AND

CAPTAIN FRAN B. RAHMING

Second Claimant

AND

BAHAMASAIR HOLDINGS LIMITED

Defendant

Before: Mr. Renaldo Toote, Registrar (*Acting*)

Appearances: Mr. E. Raphael Moxey of Counsel for the Claimant
Mrs. Lakeisha Strachan-Hanna of Counsel for the Defendants

Hearing date: 11th February 2025

Interlocutory Ruling

Introduction

1. This matter comes before the Court on two parallel applications. Firstly, the Defendant seeks to set aside the default judgment entered against it on 16th July 2024, while simultaneously applying for a stay of proceedings on the grounds of *res judicata*. The Claimants resist both applications.

2. The central issue is whether the present action is barred by the doctrine of *res judicata* in light of the previous litigation between Captain Moxey and Bahamasair Holdings Limited, since the same issues were previously determined by *Acting Chief Justice Deborah Fraser* in **Captain Joseph J. Moxey v Bahamasair Holdings Limited & Bahamas Airline Pilots Association** (2023/COM/lab/00010). If this action is indeed barred by the doctrine of *res judicata*, then the default judgement should, as of right be set aside.

The Application

3. By Notice of Application filed 18th December 2024, the Defendant seeks: i. An order setting aside the default judgment pursuant to CPR Rule 13.3; ii. a stay of all proceedings on grounds of *res judicata*; iii. leave to file an acknowledgment of service and defence within seven days; and iv. costs in the cause.

Factual Background

4. The material facts may be summarized as follows:

Previous Proceedings (2023)

In Case No. **2023/COM/lab/00010**, Captain Joseph J. Moxey commenced proceedings against Bahamasair Holdings Limited (BHL) and Bahamas Airline Pilots Association (BAPA) concerning his retirement at age 60 pursuant to the Bahamas Airline Pilots Association Industrial Agreement (2018). Captain Moxey claimed that Civil Aviation Authority Licensing Regulation ("CAR LIC") 070(b) had changed the mandatory retirement age from 60 to 65 years, invoking Article 33.1 of the Industrial Agreement.

5. It was further submitted that this was a breach of his contract of employment, resulting in damage and loss. He requested the following relief:

    i. An injunction preventing the defendants by its servants or agents from breaching the Agreement and regulations and section 4 and 6 of the Employment Act.
    ii. A declaration as to the effective date of the CAR LIC 070 (b)
    iii. An order that the Claimant retains his currency by allowing the mandatory regulations recurrent training exercise schedules for the end of February 2023
    iv. Damages and
    v. Costs

6. On 11th September 2024, *Acting Chief Justice Fraser* dismissed Captain Moxey's claim in its entirety, ruling that:

    i. The Industrial Agreement was ineffective as it was unregistered and expired;
    ii. The mandatory retirement age remained 60 years based on BHL's established custom, practice and procedure;
    iii. CAR LIC 070(b) was permissive, not mandatory, regarding pilots working beyond age 60;
    iv. There was no breach of contract or statutory obligations by BHL.

Present Proceedings (2024)

7. In the present **2024/CLE/GEN/00301** action, Captain Joseph J. Moxey (now First Claimant) and Captain Fran B. Rahming (Second Claimant) seek relief concerning the *unregistered* Bahamas Airline Pilots Association (BAPA) Industrial Agreement (2023) instead of the 2018 BAPA Industrial Agreement which was the subject of contention in the first action and the same CAR LIC regulations.

8. The Claimants allege among other things:

    i. Breaches of the Industrial Agreement (2023); Article 1.1; Article 1.5; Article 1.11; Article 2.1; Article 2.2; Article 2.7; Article 26.1 and Article 33.1;
    ii. Breaches of the Civil Aviation Regulation (2021) LIC 070 (a) & (b) ;
    iii. Breaches of the Employment Act 2001 Sections 4 and 6,
    iv. Unfair and Wrongful Dismissal;
    v. Damages and
    vi. Costs

9. As a result, they both seek the following reliefs:
    i. An injunction preventing the defendants by its servants or agents from breaching the Agreement and regulations and section 4 and 6 of the Employment Act.
    ii. A declaration as to the effective date of the CAR LIC 070 (b)
    iii. An order that the Claimant retains his currency by allowing the mandatory regulations recurrent training exercise schedules for the end of February 2023
    iv. Damages and
    v. Costs

10. The Defendant was served with the amended claim form on 23rd April 2024 but failed to file an acknowledgment of service or defence within the prescribed timeframes of the Civil Procedure Rules ("CPR"). As a result, a default judgment was entered on 16th July 2024, with assessment proceedings to be determined.

The Submissions

Defendant's Submissions

11. The Defendant contends that the present proceedings should be stayed as they constitute an abuse of process, being *res judicata*. The Defendant submits that:

    i. The issues in the present case are identical to those determined by *Fraser ACJ* in the 2023 proceedings;
    ii. both cases concern the same Industrial Agreement framework and CAR LIC regulations;
    iii. the previous judgment is final and conclusive on the retirement age issue;

iv. Captain Moxey is attempting to re-litigate matters already determined against him.

12. Alternatively, the Defendant seeks to set aside the default judgment under CPR 13.3, arguing:
    i. It has a real prospect of successfully defending based on the previous judgment;
    ii. the application was made promptly upon discovering the default;
    iii. the failure to file was due to counsel error, not willful neglect;
    iv. the claim is fundamentally flawed as it relies on an unregistered Industrial Agreement.

Claimants' Submissions

13. The Claimants resist both applications, submitting that:
    i. The Defendant's persistent non-compliance with Court rules constitutes abuse of process;
    ii. The application was filed nine weeks after service of the Default Judgment, well outside CPR requirements;
    iii. There are jurisdictional concerns about the Acting Registrar hearing the set-aside application;
    iv. The current proceedings involve different parties (addition of Second Claimant) and a different Industrial Agreement (2023 vs 2018).

The Law

Res Judicata

14. The doctrine of *res judicata* prevents the re-litigation of issues that have been finally determined between parties. I've adopted the authorities from *Stewart, J.* in **James Fleck v Pittstown Point Landing** (unreported) 2018/CLE/gen/00597 in particular the reliance of Lord Upjohn's speech in **Carl Zeil Stiftung v Raynor & Keeler Ltd.** (No.2) 946, where he said:

> "It [res judicata] goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts established and reasons given by the judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account (see Marginson v Blackburn Borough Council). Res judicata itself has two branches: (1) cause of action estoppel-that it where the cause of action in the second case has already been determined in the first. To such a case the observations of Wigram V.C. in Henderson v Henderson apply in their full rigour."

15. The extended doctrine in **Henderson v Henderson** (1843) 3 Hare 100 prevents parties from raising matters that could and should have been raised in earlier proceedings.

16. The **Henderson** (*supra*) decision was followed in **Thomas v Attorney-General** (No 2) (1988) 39 WIR 372 where *Lord Jauncey of Tullichettle* states:

"It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Sir James Wigram V-C in Henderson v Henderson (1843) 3 Hare 100 at page 115:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward **their whole case**, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

The principles enunciated in that dictum have been restated on numerous occasions of which it is sufficient to mention only four. In Hoystead v Taxation Commissioner [1926] AC 155 at page 165, Lord Shaw of Dunfermline, in delivering the opinion of the Board, said:

> 'Parties are not permitted to begin fresh litigations because of new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.'

In Greenhalgh v Mallard [1947] 2 All ER 255 at page 257, Somervell LJ said:

> 'I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'

In Yat Tung Investment Co v Dao Heng Bank Ltd. [1975] AC 581 at page 590, Lord Kilbrandon, in delivering the opinion of the Board, referred to the above quoted passage in the judgment of Wigram V-C and continued:

> 'The shutting out of a "subject of litigation" — a power which no court should exercise but after a scrupulous examination of all the circumstances — is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'
>
> "It is clear from the authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the appellant's submissions must be examined."

17. Having applied the authorities, the First Claimant must demonstrate special circumstances for the Court to consider permitting the re-litigation of matters previously determined.

18. To assess whether such special circumstances exist, and whether the doctrine of *res judicata* applies with full force to bar the First Claimant's claim, I must examine the essential elements of the doctrine in the context of these proceedings. Furthermore, I must carefully consider whether any finding of *res judicata* extends to the Second Claimant, who was not a party to the previous proceedings. My analysis is grounded on the following considerations.

(i) Identity of Similar Parties

19. While the present proceedings include Captain Rahming as the Second Claimant, Captain Moxey remains the moving party in both cases. The addition of a second claimant pursuing the same legal scheme does not prevent the application of *res judicata* as against the First Claimant. It is this same legal ingenuity that *res judicata* seeks to thwart.

20. It is critical to note that Captain Rahming was not a party to the 2023 proceedings and therefore cannot be bound by the doctrine of *res judicata*, which operates *inter partes*. The principle is that *res judicata* only binds parties to the original litigation is fundamental to the doctrine's application.

(ii) Identity of Subject Matter and Cause of Action

21. The subject matter in both proceedings is fundamentally identical. Both matters concern the interpretation of unregistered Industrial Agreements between BHL and BAPA. Both claims involve the same CAR LIC Regulation 070(b) and its effect on retirement age. Both claims invoke the same legal theory regarding Article 33.1 - invalidating retirement age provisions. Both claims seek the same relief - recognition that the retirement age has been changed from 60 to 65 years.

22. The fact that the current proceedings reference the (*unregistered)* 2023 Industrial Agreement rather than the 2018 Agreement is immaterial, as *Fraser, ACJ* judgment established that:

    i. Industrial Agreements have no legal effect unless registered under the Industrial Relations Act;
    ii. The retirement age of 60 years is established by BHL's custom, practice and procedure, independent of any Industrial Agreement;
    iii. CAR LIC 070(b) is permissive, not mandatory, regarding work beyond age 60.

23. In **Symonette v Bahamasair Holdings Limited** BS 2013 SC 74 *Barnett CJ* (as he then was) made the following pronouncements at paragraphs 10:

> "The retirement age between the pilots of Bahamasair and that company is a matter of contract. They are entitled to agree a retirement age when the contract of employment comes to an end. I agree entirely with the observations made by Sopinka, J. of the Supreme Court of Canada in McKinney v. University of Guelph [1990] 3 S.C.R 229 where he said: "employers and employees through the collective bargaining process can determine for themselves whether there should be a mandatory retirement age and what it should be".

24. The terms of Captain Moxey's employment were clearly expressed in the expired yet unregistered Agreement. It would appear that, with respect to the retirement age, it would have to be gleaned from the custom, practice and policy of BHL. As such, to establish a custom, practice and policy, it must be reasonable, certain and notorious.

25. According to *Jones, J.* in The **Bahamas Hotel Catering & Allied Workers Union v Cable Beach Resort Limited and New Content Ventures Inc. D/B/A Melia Beach Resort** at paragraph 75:

> "Where a *valid registered* Industrial Agreement has expired, the employment of the worker is covered by individual contracts of employment. The terms of an expired registered Industrial agreement may be incorporated into the individual's contract of employment, either expressly or by implication, but must be done during the currency of the Industrial Agreement".

(iii) Finality of Previous Judgment

26. *Fraser, ACJ* judgment of 11th September 2024 constitutes a final determination on the merits by a court of competent jurisdiction. The judgment specifically addressed and rejected the very interpretation of CAR LIC 070(b) that forms the foundation of the present claim.

27. Captain Moxey had every opportunity to raise issues concerning the 2023 Industrial Agreement and Captain Rahming's position in the earlier proceedings but failed to do so.

28. Further, the agreement was negotiated by both the BHL and the BAPA (the pilot's union). Therefore, the pilot's union and the BHL together agreed to the terms of the said agreement, which falls within section 46 of the Industrial Relations Act.

29. Section 50 of the Industrial Relations Act, 1971 provides that "an Industrial Agreement shall have effect only if it is registered by the Registrar in accordance with section 49". The said agreements (2018 and 2023) were not registered, making the agreements ineffective.

30. Having carefully examined the previous judgement of *Acting Chief Justice Fraser* and pursuant to judicial notice, the findings made by the Court of Appeal SCCivApp. No. 185 of 2024, I am compelled to strike out the First Claimant's cause of action pursuant to the doctrine of *res judicata*.

31. The Court of Appeal decision delivered by *Charles, JA* on behalf of the majority at para. 95 were very instructive:

> "The learned Judge made no material error of law or fact that warrants appellate intervention. She correctly held that the unregistered 2018 Agreement was legally

> ineffective and not binding, and that its provisions, including Articles 26.1 and 33.1, were not incorporated into the Appellant's employment contract. On the evidence, she was entitled to find that the mandatory retirement age was sixty (60) years, consistent with the First Respondent's longstanding custom, policy, and practice and that CAR LIC.070(a) and (b) did not alter or extend that age to sixty-five (65)."

Abuse of Process

32. Captain Moxey having failed in his previous litigation, has simply repackaged the same claims with cosmetic differences (different Industrial Agreement year, additional claimant) in an attempt to circumvent an adverse judgment.

33. In the same way, the Court in **James Fleck v Pittstown Point Landing** (*unreported*) 2018/CLE/gen/00597 was persuaded that the claimant had failed to make out a case that another court might reasonably arrive at a decision different to that reached in the original proceedings. *Fraser, ACJ* comprehensive judgment had conclusively determined that: (a) the retirement age for BHL pilots remains 60 years; (b) CAR LIC 070(b) does not create a mandatory retirement age of 65; (c) Industrial Agreements have no legal effect unless registered; and (d) BHL's custom, practice and procedure establishes the retirement framework. These findings are directly applicable to the current proceedings raising identical issues based on the same legal theory that had been comprehensively rejected.

34. I am satisfied that where comprehensive judicial determination has occurred, and where subsequent proceedings represent mere reformulations of previously rejected theories, the doctrine of *res judicata* operates as an essential safeguard against the endless cycles of litigation that would otherwise compromise the integrity of the judicial system.

35. In this regard, it is my finding that the decision of *Acting Chief Justice Fraser*, which was upheld by the Court of Appeal, conclusively determined the current issues raised as it relates to Captain Moxey. As such, for him to pursue the current claim would represent a collateral attack on that decision.

36. This conduct undermines the finality of litigation and wastes judicial resources. However, the same cannot be said of Captain Rahming, who seeks to vindicate his own employment rights and was afforded no opportunity to participate in the earlier proceedings.

Determination

37. For these reasons, I am satisfied that the First Claimant, Captain Joseph Moxey, has failed to make out a case that another court, differently constituted, might reasonably arrive at a decision different from the one reached by *Fraser, ACJ*.

38. However, the Court must draw a critical distinction between the position of the First Claimant and that of the Second Claimant, Captain Fran B. Rahming. The fundamental principle of natural justice demands that every litigant be afforded an opportunity to be heard before a court of competent jurisdiction. To deny Captain Rahming his day in court based solely on the *res judicata* effect of proceedings to which he was not a party would

constitute a denial of natural justice and would be contrary to the established rule that *res judicata* operates *inter partes* between the same parties.

39. Accordingly, Captain Rahming's claim is entitled to proceed to a hearing on its merits.

40. The Court recognizes that Captain Rahming may face significant evidentiary and legal challenges given the comprehensive findings made by *Fraser, ACJ* regarding the legal framework governing retirement at BHL, but these are matters to be determined.

41. Accordingly, I make the following orders:

i. The default judgment entered on 16th July 2024 is hereby set aside in its entirety.
ii. As of right being, the claim of the First Claimant Captain Joseph Moxey is struck out on the grounds of *res judicata* and an abuse of the court process.
iii. The Defendant is granted leave to file an acknowledgment of Service and Defence within fourteen (14) days of the date having determined there is a real prospect of success.
iv. The claim of the Second Claimant Captain Fran Rahming, shall continue.
v. The Defendant shall have its costs of this application as against the First Claimant, fixed at $5,000.00.
vi. Liberty to apply.

DATED this 2nd day of October 2025.

[Original signed & sealed]

Renaldo Toote
Registrar (Acting)