IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.1995/C-203

BETWEEN	**PAUL COLLINS**	**CLAIMANT**
AND	**AIR JAMAICA LIMITED**	**DEFENDANT**

ORDERED TO BE HEARD TOGETHER WITH

CLAIM NO. C.L. 1994 / L-162

BETWEEN	**CHRISTINE LYN**	**CLAIMANT**
AND	**AIR JAMAICA LIMITED**	**DEFENDANT**

Mr. Kipcho West, instructed by Wong Ken & Co. for the Claimant.

Mr. Dave Garcia instructed by Myers Fletcher & Gordon for the Defendant.

Heard: November 15 2006, and March 16 2007.

Mangatal J:

1. At a case management conference held on the 13th December 2004 I ordered that there be a determination of the following preliminary point:
   Whether the letter of May 7, 1990 (in the case of Paul Collins) and the letter of June 27, 1990 (in the case of Christine Lyn) constitute an enforceable contract between the parties.
2. At that time it was also ordered(at the request of the Claimants' Attorneys that they be permitted so to do) that the Claimants file Affidavits in relation to the preliminary point by the 17th day of January 2005. The Defendant was permitted to file an Affidavit in response, if so advised, by the 2nd day of February 2005.
3. For a number of reasons the preliminary points were not able to be heard until November last year. At a further case management conference held in the interim, in particular, on the 24th January

2006 my brother Anderson J. ordered, amongst other directions, that the order made on December 13 2004 be varied so that the Claimants may file such Affidavits as they think necessary, so however that any such affidavits should be filed on or before Friday 21st April 2006. It was ordered that the Defendants were permitted to file Affidavits in response to any such Affidavits filed, on or before the 5th of May 2006. The case management conference was adjourned to June 15 2006 and it was also ordered that unless by further order of the Court it is otherwise directed, no further adjournments should be permitted to the Claimants in relation to the June 15 2006 date.

4. The matter did not proceed in June 2006 or July 2006 and the preliminary points did not come up for hearing before me until the 15 November 2006. On the eve of the application according to Mr. Garcia for the Defendant, Affidavits which the Claimants' Attorneys say are relevant, were served on the Defendant's Attorneys at 4:10 p.m. Mr. Garcia objected to the use of those Affidavits on a number of bases. I had regard to the issues raised in the pleadings, and closely examined the Further and Better Particulars and Answers to Interrogatories filed under the old Civil Procedure Code. I also took into account the filing of these Affidavits at the eleventh hour, in circumstances where the time for filing was extended and delineated several times and not complied with. I ruled that it would not be just or appropriate to allow these Affidavits to be used at this late stage.

The Claims

Mr. Collins

5. Both Claimants are former employees of the Defendant Air Jamaica Limited. In the case of Mr. Collins, he says that after more than 20 years in the employment of the Defendant, he was rendered redundant under the terms of an agreement made between the Defendant and himself and contained in a letter dated May 7, 1990, from the Defendant to Mr. Collins.

6. Mr. Collins states that he was induced to accept redundancy without any challenge in the courts or otherwise by express representations by the Defendant. Those representations were that a condition of the termination of the Plaintiff's employment would be that he would have the right for himself and his eligible dependants to eight trips per annum on the Defendant's airline "Air Jamaica" based on the reduced rate and facility of the travel benefit which he enjoyed as an employee.
7. The Defendant at all times represented and Mr. Collins understood that his entitlement to eight trips per year was fixed and would neither be increased nor reduced. Acting upon the said representations, Mr. Collins agreed to accept the redundancy on the terms contained in the letter.
8. The Defendant subsequently changed ownership and according to Mr. Collins, in breach of the terms of the letter, refused to allow Mr. Collins the eight trips or any trips at all. The claim is a claim for the value of eight trips per year from August 1994 equivalent to a first class ticket to New York stated as U.S.$16,000.00 per year and continues to the present. Mr. Collins is also seeking declaratory relief in relation to his entitlements.
9. In the Answers to Interrogatories provided by Mr. Collins he states that the Defendant told him or represented to him that if he accepted the redundancy without challenge in the courts or otherwise then on termination of his employment he would have the right for himself and his eligible dependents to eight trips per annum on the Defendant's airline based on the reduced rate facility of the travel benefit which he enjoyed as an employee. Interrogatory No. 4 enquired whether this telling or representation was done orally or in writing, and Mr. Collins' response was that it was done in writing and this was by way of letter dated May 7 1990.
10. The Defendant has denied that the letter from it to Mr. Collins was an agreement between itself and Mr. Collins. It states that the

letter was a unilateral termination by the Defendant of Mr. Collins' employment by reason of redundancy and sets out Mr. Collins' entitlement in respect of such payments as he was legally entitled to.

11. The Defendant further states that the "present facility" referred to in the letter was a privilege gratuitously conferred on Mr. Collins during his employment with the Defendant which was not legally enforceable and being in the nature of a licence could be varied or revoked at any time. It was subject to standard regulations for staff which at the material time provided inter alia:

"...the provision of free and reduced rate transportation is at the sole discretion of the Company and the Company does not undertake that any employee shall receive free and reduced rate transportation as a right".

12. In reply, Mr. Collins states that the Defendant is estopped from denying that Mr. Collins is entitled to the said trips, Mr. Collins having agreed to the termination acting on the representation of the Defendant that he would be so entitled.

Ms. Lyn

13. Ms. Lyn states that by letter dated June 27 1990 the Defendant advised her that as a result of restructuring and reorganization of the Defendant company her position had been made redundant and that consequently her services would be terminated with effect July 13 1990. The letter refers to Miss Lyn's sixteen years of employment. Ms. Lyn says that the letter of June 27 1990 set out her entitlements and other terms of termination of her employment. She accepted those terms and they formed the basis of a redundancy termination agreement between herself and the Defendant, in consideration of which she agreed to the termination of her services by the Defendant.

14. Ms. Lyn says that in breach of the agreement the Defendant has refused, and has reduced trips to herself and her dependents from 1993-1994. Her claim is for breach of the redundancy termination

agreement and for damages in respect of those trips refused. She also seeks declaratory relief in relation to trips which she claims to be entitled to.

15. In its Amended Defence the Defendant states that its letter dated June 27 1990 was written in response to a memorandum dated May 5 1990 from Ms. Lyn requesting that she be made redundant. The Defendant says that the letter did not constitute a redundancy termination agreement or any contract between the Defendant and Ms. Lyn and there was no intention to create legal relations. The travel concession referred to in the letter was a gratuitous promise by the Defendant to Ms. Lyn for which Ms. Lyn provided no consideration and which promise is not enforceable. It is further argued that the travel concession was in the nature of a licence which could be varied or revoked at any time.

16. Save that Mr. Collins' and Ms. Lyn's respective letters refer to differing periods of employment and to some payments to which one would be entitled and not the other, which had to do with differences in vacation leave entitlements and like matters not relevant to the issue under discussion, the letter of June 27 is in substantially the same terms as that of May 7 1990.

17. The terms are as follows:

> *Dear.....,*
>
> *The Board of Air Jamaica has restructured and reorganized the Company with a view to improving its efficiency and economic viability. As a result of this, we regret to inform you that after careful consideration, your position has been made redundant and consequently your services with Air Jamaica will be terminated with effect from ..... 1990.*
>
> *In accordance with the terms of the Company's policy, you will be entitled to the following payments:*
>
> *(1) Severance pay based on ....weeks pay for each year of service.....*

(2) ...weeks pay in lieu of notice as stated in the Employment Termination and Redundancy Payments Act (1974).....

.....

Please return your Air Jamaica and Airteam Identification Cards as well as any unused Reduced Rate Authorizations or tickets which you may have in your possession. All uniform items should be return as soon as possible.

Your Health Insurance coverage will expire effective ..... 1990 and your card should therefore be returned to the Personnel Department on or before that date.

You are entitled to a refund of your pension contributions and in order to make this payment, we are requesting that you sign the enclosed forms and return them to us for processing. You will be advised when the cheque is ready for collection.

In keeping with the Company's practice, you will be granted a final trip on Air Jamaica only for yourself and eligible immediate family which will be valid for one year from the date of redundancy. In addition, however, because of your.....years of service, a decision has been taken to extend privilege travel benefits to you and your registered eligible dependents at the time of your separation. In this regard, you will be entitled to a total of.....trips per annum on Air Jamaica's services only, to be shared amongst yourself and your dependents. Requests for travel should be made through the Pass Bureau in Kingston and will be based on your present facility. (my emphasis).

We thank you for your past services with Air Jamaica and hope you will find suitable opportunities for alternate employment.

18. **The Law**

For a contract to exist there must be an offer, acceptance of that offer, and consideration. There must also be an intention to create legal relations.

Consideration

In **Chitty on Contracts** , twenty-eighth edition, Volume 1 on General Principles, in Chapter3 dealing with Consideration, the learned authors have this to say:

3-001.

General. *In English law, a promise is not, as a general rule, binding as a contract unless it is either made in a deed or supported by some "consideration." The purpose of the doctrine of consideration is to put some legal limits on the enforceability of agreements even where they are intended to be legally binding and are not vitiated by some factor such as mistake, misrepresentation, duress or illegality....The present position therefore is that English law limits the enforceability of agreements (not in deeds) by reference to a complex and multifarious body of rules known as "the doctrine of consideration".*

3-002.

Informal gratuitous promises. *The basic feature of that doctrine is that "something of value in the eye of the law" must be given for a promise in order to make it enforceable as a contract. It follows that an informal gratuitous promise does not amount to a contract. A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided(or promised) some return for the promise. The invalidity of informal gratuitous promises of this kind can also be supported on the ground that their enforcement could prejudice third parties such as creditors of*

the promisor. Such promises, too, may be rashly made; and the requirements of executing a deed or giving value provide at least some protection against this danger...

3-035

Promisee must provide consideration. *The rule that "consideration must move from the promisee" means that a person can enforce a promise only if he himself provided consideration for it.*

3-037

Consideration need not move to the promisor. *While consideration must move from the promisee, it need not move to the promisor. It follows that the requirement of consideration may be satisfied where the promisee suffers some detriment at the promisor's request, but confers no corresponding benefit on the promisor. Thus the promisee may provide consideration by giving up a job or the tenancy of a flat, even though no direct benefit results to the promisor from these acts.*

19. On behalf of Mr. Collins it has been submitted that his for bearance to sue in respect of the number of flights per year was a detriment to himself as he (1) gave up his legal right(2) was caused additional expense because this could have been litigated in a lawsuit he claims to have filed in 1990, now causing him additional expense to litigate.

20. On behalf of Ms. Lyn it was submitted that the defendant induced members of staff to apply for voluntary redundancy by advertising its offer for members to do so and that the terms of that offer were set out in the letter dated June 27, 1990. Ms. Lyn accepted the offer unequivocally by voluntarily giving up her job with the Defendant. The submission is that the consideration for Ms. Lyn's acceptance of the Defendant's offer of voluntary redundancy was the loss of her future earnings, job benefits and job security. It was

further advanced that the Defendant's offer with regard to the travel benefits was an integral factor that induced Ms. Lyn to apply for voluntary redundancy.

21. Mr. West submitted that a promise not to enforce a valid claim is recognized by the law as good consideration for a promise given in return.

22. It was further submitted that the law recognizes forbearance to sue as good consideration even where the claim is doubtful in law or where the claim was wrongly believed to be valid. The submission continues that where the claim is doubtful in law, a promise to abandon it involves the possibility of detriment to the potential claimant and of benefit to the other party, and is therefore good consideration. The case of **Horton v. Horton** [1961] 1 Q.B. 215 was cited for that proposition.

23. It was also submitted that a person may forbear from enforcing a claim without expressly promising to do so and that actual forbearance may be construed as evidence of an implied promise to forebear. Reference was made to the case of **Re: Wyvern Development** [1974] 1 W.L.R. 1097.

24. Mr. West went on to submit that even where no promise (actual or implied) to forbear has been made an actual forbearance may constitute consideration. Reference was made to **Alliance Bank v. Broom** (1864) 2 Dr. & Sm. 289. It was submitted that in this case the defendant's bank pressed him for some security to cover monies owed to the bank. The defendant promised to pay but the bank made no counter promise not to sue him. It was held that there was consideration for the defendant's promise, as the bank had given, and the defendant had received, some degree of forbearance.

25. In his submissions in response, Mr. Garcia indicated that he readily accepts that forbearance can constitute valuable consideration and thus he was not joining issue in relation to those legal principles and authorities cited by Mr. West. He

submitted however that there is no evidence in this case, whether in relation to Ms. Lyn or Mr. Collins, consisting of consideration in the form of forbearance to sue. Reference was made to the Answers provided by Mr. Collins to interrogatories 3 and 4.

26. **The Law-Intention to Create Legal Relations**

The law in this area has been well-expressed by the English Court of Appeal in **Rose and Frank Co. v. J.R.Crompton & Bros.**[1924] All E.R. Rep. 245. At pages 249I to 250A, Scrutton L.J. stated:

It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family situations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention.

Atkin L.J. at page 252 stated:

To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in

Balfour v. Balfour.. If the intention may be negatived impliedly it may be negatived expressly.

27. The Claimants' Attorneys cited the case of **Edwards v. Skyways Ltd.** [1964] 1 All E.R. 494 where it was held that where the subject of an agreement relates to business affairs, the onus of establishing that the agreement was not intended to create legal relations is on the party setting up that defence and that this onus is a heavy one. Mr. Garcia on behalf of the Defendant did not disagree with the principles discussed.

28. **Edwards v. Skyways** interestingly is a case involving airline business and the Claimant was an airline pilot who was employed by the Defendant company. His terms of employment provided for three months' notice of termination. The Defendant company, being in financial difficulty, and not having sufficient work to continue to employ all its staff, wrote a letter to the Claimant at the same time sending similar letters to other persons. The Claimant was informed that it would be "necessary to declare a redundancy of approximately fifteen percent of our pilot strength" and he was given three months' notice. He was offered alternative employment either with a subsidiary company or with the Defendant company at a reduced pay and status.

29. The question of the threatened redundancy was taken up with the Defendant Company by the British Airline Pilots Association, to which the Claimant belonged. A meeting took place between the representatives of the Association and representatives of the Defendant Company. The substance of what took place at the meeting was summarized in Notes of the meeting where it was indicated:

> "The following general principles were then adopted in relation to the redundancy and consequential matters...
>
> Pilots declared redundant and leaving the company would be given an ex gratia payment equivalent to the company's

contribution to the Pension Fund. They would, of course, be entitled to a refund of their own contribution to the Fund".

30. The headnote indicates that having been informed of the recorded agreement and having found other employment and left the defendant's employment, the Claimant elected to withdraw his contributions to the pension fund and to receive the ex gratia payment that the defendant company proposed to make. The defendant company paid the plaintiff the amount of his contributions but did not make the ex gratia payment. It rescinded the decision to make ex gratia payments, having regard to the defendant company's financial difficulties and creditors. The Plaintiff brought an action to recover a sum equal to the total contributions made by the defendant company in respect of him to the pension fund. The defendant company contended that the recorded agreement was not intended to create legal relations and was too vague, and thus was not legally binding. It was admitted at the hearing that there was consideration moving from the Plaintiff and that at the time of the meeting the defendant company intended to carry out the recorded agreement. The Plaintiff succeeded in establishing the existence of a contract between himself and the defendant company.

31. In the present case the Defendant seeks to demonstrate that there was no contract and that there was no intention to create legal relations and thus the burden is on the Defendant to establish this state of affairs. The Defendant's Attorney Mr. Garcia argues that there was no contractual animus and he relies on the case of **Wilkie v. London Passenger Transport Board** [1947] 1 All E.R. 258. Mr. Garcia submits that both parties must have such an intention if there is to be a contract. By the respective letters of Collins and Lyn dated May 7 and June 27 1990, the Defendant terminates a then existing contractual relationship of employer and employee. He submits that there is nothing in these letters that indicates an intention by the Defendant to assume a new

contractual obligation to the Claimants. The Claimants are merely given permission to travel, with conditions limiting such aspects as the number of trips and the persons who might share the benefit with the Claimant.

32. In **Wilkie v. London Passenger Transport Board** the headnote indicates that the Claimant was an employee of the defendant board and as such held a pass enabling him to travel free on the board's buses. By clause 6 of the pass, the pass was stated to be issued and accepted "on condition that neither the [board] nor their servants are to be liable to the holder...for loss of life, injury or delay..... however caused." Owing to the negligence of the conductress, a servant of the board, the Claimant was thrown off and injured while attempting to board a bus. In an action brought by the Claimant against the board for negligence, it was argued on his behalf that in the circumstances this condition had no application, and that, in any case, it was excluded by the Road Traffic Act 1930, s.97 which provides: "Any contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of any person in respect of any claim which may be made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle.....be void."

33. It was held (i) the Claimant, when the injury occurred, was acting in a way which the pass entitled him to and was taking the benefit of a right which the pass gave him, and therefore, the condition in clause 6 operated. (ii) the pass was a mere licence and not a "contract for the conveyance of a passenger" within section 97, and, therefore, the provisions of that section did not apply.

34. Lord Greene M.R. of the English Court of Appeal, in affirming the decision of Lord Goddard C.J. where it was found that the pass was in the nature of a licence and not a contract, at page 260 D-F stated:

The Lord Chief Justice dealt quite shortly with the argument that that section (section 97 of the Road Traffic Act) applied. He said there was no contract for the conveyance of the plaintiff, but that he was a mere licensee. I agree that the giving or receiving of this pass cannot be regarded as a contract for the conveyance of a passenger. It was said that the contract for conveyance is to be found in the giving and receiving of the pass, the contract being of this nature: "We, the London Passenger Transport Board, agree to carry you free on our buses on the terms that you agree to give up what would otherwise have been your common law rights." I think that the short answer to that is that the question depends on the true construction of the pass and to regard it as having any contractual force is entirely to misinterpret it. There is no contractual animus to be found in relation to it. It is clearly nothing but a licence subject to conditions, a very common form of licence, eg. a licence to a neighbour to walk over a field, providing he does not go with a dog. You cannot spell such a thing as that as being a contract: " I will let you go across my field in consideration of you, as a contracting party, agreeing not to take your dog." In other words, looking at this document shortly and sensibly, it contains no intention to contract. It is the mere grant of a revocable licence subject to a condition that, while the licence is being enjoyed, certain consequences shall follow. That is not contractual, but is a term or condition of the licence, and if anyone makes use of the licence he can only do so by being bound by the condition.

35. **Resolution of the Issues**

Having reviewed all of the matters before me I find that there is nothing to demonstrate that either Mr. Collins or Ms. Lyn have provided any consideration of any kind for the travel benefit. There is no evidence of forbearance to sue. Certainly, in relation to Ms. Lyn the letter has no language of forbearance and there is no reference to a dispute, whether perceived or otherwise. Ms. Lyn's Claim is quite specific in relying on the letter of June 27 1990 and

nothing else. In relation to Mr. Collins, whilst originally as pleaded his Claim was not similarly specific, it is clear from the Answers supplied by him to Interrogatories 3 and 4 that the representations which he says he relies on are in writing and are contained within the corners of the letter of May 7 1990. Although his Attorneys sought to argue that Mr. Collins had filed suit in 1990, there was no such evidence before me, nor was there evidence that "Mr. Collins forbearance to sue was a detriment to himself, causing him additional expense because this could have been litigated in the lawsuit of 1990".

36. I am of the view that the **Edwards v. Skyways** case is readily distinguishable because in that case it was conceded and taken as a given, that there had been consideration flowing from the employees.

37. It may well be that the transport benefit offered was a promise gratuitously made, from sentimental motives or rash motivation. I can find no evidence to suggest that either Mr. Collins or Ms. Lyn have "given something of value in the eyes of the law" in exchange for the Defendant's travel benefit promise.

38. In this case, looking at these documents "shortly and sensibly" as did Lord Greene M.R. in **Wilkie**, I agree with Mr. Garcia that the letters were not a contract between the Defendant and Mr. Collins or Ms. Lyn. They were the instrument by which the Defendant terminated an existing contractual relationship of employer and employee and there was no intention to create or assume new contractual obligations in relation to the Claimants.

39. In the language of Lord Greene M.R. in the **Wilkie** case, there was no contractual animus in relation to the letters of May 7 and June 27 1990. The reference to the "present facility" in each letter I accept as being reference to a privilege gratuitously conferred on the Claimants during their employment pursuant to the standard regulations for staff, which regulations in my view make it quite clear that the transportation benefit is discretionary and not as of

right. I therefore agree that the nature of the transportation benefit was that of a mere or bare licence and not a contract.

40. I have therefore come to the view that the answer to the preliminary point is that the letters of May 7 1990 and June 27 1990 do not constitute an enforceable contract between the parties.

41. In their submissions, the Defendant's Attorneys have argued that if the letters do not constitute an enforceable contract, then the Claims should be dismissed. In the case of Ms. Lyn, where the case put forward has been very specific, it would seem to follow that the claim must be dismissed. However, in relation to Mr. Collins, in the Reply filed on his behalf it has been pleaded that the Defendant is estopped from denying that he is entitled to the trips, Mr. Collins having agreed to the termination acting on the representation of the Defendant that he would be so entitled.

42. Mr. Collins is therefore relying on the doctrine of promissory estoppel. Does this impact on the question of whether Mr. Collins Claim should be dismissed? In my judgment, that equitable doctrine cannot avail Mr. Collins because there is no intention evinced in the letter to create or affect legal relations and further, this doctrine cannot create a new cause of action where none existed before. I refer to **Halsbury's Laws of England,** 4th Edition, Volume 16 on Estoppel, paragraph 1514, which states:

> *Promissory Estoppel. When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted upon accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous relations as if no such promise or assurance had been made by him,*
>
> *But he must accept their legal relations subject to the qualification which he himself has so introduced.....*

The doctrine cannot create a cause of action where none existed before....(my emphasis).

43. I can not help but feel a certain amount of sympathy for the Claimants who may have expected to receive these trips indefinitely and who did give lengthy periods of service to the Defendant. However, their past service could not amount to consideration as it would constitute past consideration.In the circumstances, based on the view which I have taken on the preliminary point, and same having been determined against the Claimants, the appropriate step is to dismiss the Claims with costs to the Defendant to be taxed if not agreed.