DCPI 1542/2006

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1542 OF 2006

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BETWEEN

JOSHUA ONG, a minor by Tung Sau Mei Plaintiff

His next friend and mother

and

MALAYSIAN AIRLINE SYSTEM BERHAD Defendant

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Coram : His Honour Judge Stanley Chan in Chambers

Date of Hearing : 2nd May 2007

Date of Handing Down of Decision : 5th July 2007

DECISION

1. This Chambers’ application is made in pursuance of Order 12 Rule 8 of the Rules of the District Court and the inherent jurisdiction of the Court. The Defendant asks for an Order that:-
   1. the Courts of Hong Kong have no jurisdiction to hear the action under the Plaintiff’s Writ of Summons issued on 23 August 2006; and/or
   2. the Plaintiff’s action was time barred.

# Facts of the Action

1. The Plaintiff was born on 11 March 1991 and aged 13 years old at the time of the accident. He was the holder of an air ticket allowing him to travel from Kuala Lumpur, Malaysia to Hong Kong via the Defendant’s flight No. MH 72Q on 14 August 2004. At the material time, the Plaintiff was a young passenger traveling alone and was taken as an unaccompanied minor (‘UM’). The Plaintiff took the said flight and arrived at the Hong Kong International Airport at about 1:00 pm on 14 August 2004. The Plaintiff, being an UM, was greeted and collected by the Defendant’s agent, Ms Evon, who accompanied the Plaintiff to walk to the Customs and Immigration area. Ms Evon noted that the Plaintiff looked pale and was told that the Plaintiff had a headache. Ms Evon directed the Plaintiff to line up for immigration formalities, and she left the Plaintiff in the queue and walked towards the immigration channel for cabin crew. When it came to the Plaintiff’s turn to walk up to the immigration counter, the Plaintiff fainted and fell down. He hit his head on the marble flooring and consequently sustained severe head injury. The Plaintiff was later admitted to the Princess of Margaret Hospital (‘PMH’). The Plaintiff suffered fracture skull and right frontal lobe contusion and subdural haematoma. Craniotomy operation to remove the intracerebral haematoma and sudural haematoma was only carried out on 26 August 2006. The Plaintiff is still suffering from attentional problems, forgetfulness, reduced efficiency in learning and emotional problems. There is a risk of epilepsy and the chance of attack is 20%.

# Legal issues not in dispute

1. Counsel for the Plaintiff accepts that:-

(1) the Plaintiff’s flight was covered by the Amended Warsaw Convention (‘the Convention’) which is given the force of law by the Carriage by Air Ordinance, Cap 500 (‘the Ordinance’).

(2) The Convention while it applies, provides the exclusive code for relief displacing ordinary Common Law actions.

(3) The Convention is an international treaty and should be considered as a whole, and the purposive interpretation should be adopted.

(4) The Convention is to provide a uniform and exclusive international code relating to the liabilities of air carriers in respect of claims arising out or in the course of international carriage by air, to be applied in the courts of all signatories to the Convention without reference to their domestic law.

(5) The Convention also sets out the limits of liabilities and the conditions under which claims to establish liability are to be met. A balance should be struck in the interests of certainty and uniformity.

**The Amended Warsaw Convention (‘the Convention’)**

1. Schedule 1 to the Ordinance lists out the provisions of the Convention so far as they relate to the rights and liabilities of carriers’ servants and agents, passengers etc. Under section 3 of the Ordinance, it grants the provisions of the Convention have the force of law in relation to any carriage by air to which the Convention applies. There is no dispute that both Malaysia and Hong Kong are the High Contracting Parties under the Convention. Under Art.1 of the Convention, the expression of “international carriage” means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage … are situated either within the territories of two High Contracting Parties.

# Applicability of the Convention

1. Art.17 of the Conventions is in these terms:-

“The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operation of embarking or disembarking.”

1. Under Art.24(2), it stipulates that:

“in the cases covered by Article 17 the provisions of the preceding paragraph [that is any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.] also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights..”

1. The Plaintiff has conceded that the issue of ‘willful misconduct’ is only relevant under Art.25 of the original Warsaw Convention which does not apply in the present case. As such, the issue of willful misconduct will not be pursued.
2. The stance of the Plaintiff is not difficult to discern. Counsel for the Plaintiff contended that the Convention is not applicable in the present case. If the Convention is not applicable, it follows that the issue of jurisdiction under Art.28 and the time limit imposed under Art. 29 of the Convention will have no effect. If that is the case, then the domestic law relating to the time limit applies and the Common Law actions could then be instituted.
3. Counsel for the Plaintiff argued that at the material time, the Plaintiff had completed the process of disembarkation and hence the accident so occurred was outside the scope as stipulated in Art.17 as it was happened not in the course of any of the operation of disembarking. Counsel for the Plaintiff relied on a number of overseas authorities . In Eileen Dick v American Airlines, Inc. US District Court of Massachusetts Action No 05-10446-GAO, 12 March 2007, the Plaintiff sustained injury while traveling from Trinidad to Canada on 25 February 2002. The Plaintiff was traveling with her elderly mother who required wheelchair assistance within the airline terminal from American Airlines. The Plaintiff and her elderly mother had to stop at Miami International Airport. In Miami, the Plaintiff and her mother were proceeding from one gate to another and were directed by their escort to use an escalator. While riding the escalator, the Plaintiff’s mother fell backward on the Plaintiff, injuring her. In that case, the US District Court took the view that the applicability of the Warsaw Convention depends on whether the injury occurred ‘on board the aircraft or in the course of any of the operation of embarking or disembarking’. The phrase could be paraphrased as: ‘on board the aircraft or in the course of any of the operation of getting on or getting off the aircraft.” As such, there must be a ‘tight tie’ between the accident and the physical act of entering an aircraft.’ It was said, “a court must consider (1) the passenger’s activity at the time of injury, (2) his or her whereabouts when injured, and (3) the extent to which the carrier was exercising control. These factors – activity, location and control – as separate legs of a stool, but, rather as forming a single, unitary base.”
4. In Adatia v Air Canada [1992] P.I.Q.R 238, the Plaintiff’s mother required a wheelchair in order to disembark from an aircraft at Heathrow Airport, and a employee of the defendant wheeled her off the aircraft and on to a moving walkway or travelator inside the terminal building. The Plaintiff, who was standing close behind the wheelchair on the travelator, was injured. It was ruled that the Convention did not apply as the Plaintiff was not engaged upon the operation of disembarking at the time when she sustained her injuries. A triparte test suggested that the court should consider the location of the injured passenger, the nature of his activity and whether he was under the control of the carrier at the time of his injury. By relying on the test, the UK Court of Appeal ruled that the claim was not governed by the provisions of the Convention and was not time-barred.
5. The point to be resolved was whether the injury sustained by the Plaintiff was caused “in the course of any of the operation of … disembarking.” I got no assistance as to whether there is any authority specifically deals with the meaning of those words. The case MacDonald v Air Canada 439 F.2d 1402 (1st Circ., 1971) was cited. In that case, the United States Court of Appeals concluded that “if these words [operations of disembarking] are given their ordinary meaning, it would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal, even though he may remain in the status of a passenger of the carrier while inside the building.”
6. Counsel for the Plaintiff submitted that in the present case, disembarkation took effect once the Plaintiff has reached a safe point in the terminal even though he was still regarded as a passenger of the carrier.
7. In my view, by applying the triparte test based on activity, location and control, the cases cited above can be distinguished from the present case. Here the Plaintiff was the UM of the airline. Although there was no evidence presented as to the exact scope and nature of being a UM of the airline, it is not difficult to envisage that an UM should not be taken as an ordinary passenger as such and he would not be allowed to go anywhere he wanted to even though he had left the airplane and was still in the airport. The UM has to be accompanied by the airline staff to clear the Immigration and Customs checkpoints. The UM was under the control of the airline or its agent. The UM has to be literally delivered to the appointed guardian at the airport before the duty of escorting a UM by the airline could be fully discharged. In the circumstances, I find that the Plaintiff was still in the process of disembarking up till the Plaintiff was actually handed over to the appointed guardian at the airport. In these circumstances, Art.17 is applicable in this case.
8. The effect of Art.17 is to displace completely the passenger’s rights at common law. As per Lord Hope of Craighead in Sidu v British Airways [1997] AC 430 at 447F:-

“The intention seems to be to provide a secure regime, within which the restriction on the carrier’s freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of carrier. Thus the purpose is to ensure … it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action.”

# The First Issue - Jurisdiction

1. Now I turn to the first legal issue involved, namely, the jurisdiction of the Hong Kong courts. To this end, Art.28 comes into play.
2. Art.28(1) reads as follows:-

“An action for damages must be brought, at the option of the Plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.”

1. In the present case, the return ticket was bought by the Plaintiff’s uncle in Malaysia. The contract of carriage was made between the parties, not by reference to a particular journey or flight. There is one place of departure and one place of destination for the purposes of the Convention. In Grein v Imperial Airways Ltd [1937] 1 KB 50, the Plaintiff took a ticket from London to Antwerp and back, with an agreed stopping place at Brussels, by the defendant’s air service. On the journey back from Antwerp to London, the aeroplane, in which G was traveling, was wrecked in Belgium, and G was killed. In that case, the UK Court of Appeal (at p.77) considered that:

“ … the [Warsaw] Convention lays down rules governing the terms and operation of contracts of carriage which will be enforced in the courts of the High Contracting Parties. The rules are rules relating not to journeys, not to flights, not to parts of journeys, but to carriage performed under one contract of carriage. The contract is , so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not. It is next to be observed that the fact that there is a break in the carriage is immaterial. In other words, once the contract is ascertained to be a contract for the class of carriage described, it matters not that the journey is broken. … [I]n the minds of the parties to the Convention every contract of carriage has one place of departure and one place of destination. An intermediate place at which the carriage may be broken is not regarded as a ‘place of destination’.”

1. The Court further held, at p.81, that:

“[T]he contract by reference to which the place of departure and the place of destination are to be ascertained may be any contract of carriage whether for a single journey, for a circular journey of for a return journey; the place of departure and the place of destination mean the places at which under the particular contract in question the contractual carriage begins and ends. In the case of a return journey this will be or include, as the case may be, the place out to and back from which by the contract the passenger is to be carried.”

1. The case of Grein was adopted by the Hong Kong Court of Appeal in Manohar t/a Vinamito Trading House v Hill & Delamain (Hong Kong) Ltd [1993] 2 HKC 342 at 345-A where Litton JA (as he then was) held that:

“It should be borne in mind that in considering the amended Warsaw Convention the court is having to give meaning to words which, in other countries, may be expressed in a language other than English: those words should therefore not be construed in our courts restrictively.”

1. Whilst accepting the basic principles as elicited in Grein, Counsel for the Plaintiff submitted that Hong Kong can be regarded as the place of destination as the return trip was severed by the accident. If that is the case, then it would bring this action within the jurisdiction of Hong Kong courts by virtue of Art.28(1).
2. There is a need to give the Convention a purposive interpretation and to consider the same as a whole. In my judgment, the fact that the return trip back to Kuala Lumpur by the Plaintiff was abandoned because of the accident on 14 August 2004 cannot be taken to transform Hong Kong, being a stopping place in this contract of carriage, to the place of destination for the purpose of Art.28.
3. In the present case, it is my judgment that the intermediate stop at Hong Kong by the Plaintiff did not break the contract of carriage. Under the contract of carriage, Kuala Lumpur was both the place of departure and destination of the contractual carriage for the purposes of the Convention.
4. In the circumstances, with the purposive interpretation of Art.28, I find that the Hong Kong courts do not have jurisdiction to hear the claims made by the Plaintiff.

**The Second Issue – Time Limit**

1. As I have ruled that the Hong Kong courts have no jurisdiction to hear this claim, strictly speaking, I do not have to decide on the second legal issue relating to the time bar under Art.29. However, it is my judgment that the issue of time limit is an open-ended question and there may well be an arguable case for the Plaintiff.
2. Art.29(1) reads as follows:

“ The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”

1. Both Counsel could not provide the rationale of or assist the court as to the real meaning of the last limb of Art.29(1), namely, “from the date on which the carriage stopped.” Be that as it may, the purposive interpretation and the literal meaning of the provisions should be adopted. The Writ of summons was issued on 23 August 2006 and the accident was happened on 14 August 2004, a lapse of more than 2 years.
2. It is established that the discharge given by Art.29 is substantive not procedural in that the proceedings before the court must have been brought in time otherwise they must fail. It is a bar of a special kind, viz one which extinguishes the claim, not one which, as most English statutes of limitation and some international conventions do, bars the remedy while leaving the claim itself in existence: The Nordglimt [1988] 1 QB 183 at p.190-D to G.
3. The Plaintiff left for Hong Kong on 14 August 2004 and sustained injury on the day of his arrival in Hong Kong. He was scheduled to return to Kuala Lumpur on 21 August 2004. The Plaintiff did not use the return ticket to return to Kuala Lumpur. Instead, in February or March 2005, the Plaintiff returned to Australia direct with the use of another air ticket which was purchased subsequently. No submissions were made in respect of the possibility of a variation of the contract of carriage as the original return ticket had never been used by the Plaintiff. It is my judgment that the fact that the return trip was not used by the Plaintiff might well be taken as a kind of variation of the contract of carriage depending on the nature and status of the air ticket that the Plaintiff possessed at the time.
4. I consider that the destination of the contract of carriage was Kuala Lumpur. Hence, the first limb of Art.29, namely, the date of arrival at the destination, is not applicable as the Plaintiff never returned to Kuala Lumpur by using the same contract of carriage. The date of arrival should be the actual date the passenger arrived at the destination wherever it is under the contract of carriage.
5. The second limb, that is, “from the date the aircraft ought to have arrived”, does not apply either as it seems that it applies to those, say, plane crash situation in which the aircraft could be said ‘ought to have arrived’ but it never happened. Counsel for the Defendant submitted that as the return date of the original contract of carriage was 21 August 2004, hence 21 August should be taken as the date that the aircraft ought to have arrived. In this regard, the issue of the Writ by the Plaintiff on 23 August 2006 still brought it outside the 2-year limit as prescribed by Art.29. If one has to give the Convention a purposive interpretation, the words “ought to have arrived” should not simply be taken as the date as stated in the contract as it ignores the possibility of the contract of carriage being varied by, say, certain intervening events.
6. For the third limb, namely, “from the date on which the carriage stopped”, it seems that there is no clear definition as to what constituted or caused a carriage stopped. It is to be noted that, unlike what is stated in the first limb, the second limb and third limb is connected by the disjunctive word ‘or’. There should be two situations envisaged under the latter 2 limbs. There is no definition of carriage in the Ordinance itself but Art.1 of the Convention provides the scope of the carriage. It can be argued that the date the carriage stopped was the date when the contract of carriage ceased to have any effect. If this argument is accepted then the issue of the Writ by the Plaintiff might well be within the prescribed 2-year limit under Art.29.

# The issue of mis-representation

1. It was submitted by Counsel for the Plaintiff that the issue of misrepresentation constitutes another sustainable claim which is outside the scope of the Convention. As such, it was argued that even if I ruled that the Hong Kong courts have no jurisdiction to hear the present claim and that the

present claim was time-barred, the Plaintiff should be allowed to proceed with the claim under the ground of mis-representation.

1. In reply, Counsel for the Defendant submitted that the issue of mis-representation was not pleaded in the Amended Statement of Claim dated 8 December 2006. This is a separate issue. I agreed. Accordingly, it is my judgment that the Plaintiff is not allowed to continue to proceed with his claim on the ground of mis-representation for the purpose of the present summons proceedings.

# Order

1. For the reasons aforesaid, I would grant the application of a declaration that the courts of Hong Kong have no jurisdiction over the Defendant in respect of the subject matter of the claim in this action. It is not necessary for me to make the ruling on the issue of time limit. In the circumstances, I rule the application made by the Defendant successful to the extent that the Hong Kong courts have no jurisdiction in this matter and, accordingly, the Plaintiff’s action is dismissed under Order 33 Rule 7.

# Costs

1. I make an order nisi that costs of this application and this action be to the Defendant, to be taxed if not agreed, with certificate for counsel and the Applicant’s own costs be taxed in accordance with the Legal Aid Regulations. Such order nisi is to be made absolute 14 days after the date of this judgment.

( Stanley Chan )

District Judge

Representation:

Mr. Thomas Lai instructed by Messrs. Au Yeung, Cheng, Ho & Tin assigned by DLA for the Plaintiff.

Mr. Alexander Stock instructed by Messrs. Clyde & Co. for the Defendant.