

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL SIDE

2020/CLE/gen/00354

BETWEEN

FERGS AIR LTD.

First Plaintiff

AND

RUFUS FERGUSON

(t/a Fergs Air Charter Services)

Second Plaintiff

AND

ODYSSEY AVIATION BAHAMAS LIMITED

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Joseph Moxey for the Plaintiffs
Christina Davis-Justin for the Defendant
Adrian Hunt on a watching brief for Phoenix Aviation Ltd.

1 December 2021

DECISION

WINDER, J

On 1 December 2021, after hearing the submissions of the parties, I acceded to the application of the Defendant for an order that it be removed as a party to the proceedings and that the Plaintiff's claim be struck out as against it. These are the promised, brief reasons for my decision.

[1.] The action was brought by specially indorsed Writ of Summons seeking damages in negligence, specifically for occupiers liability in the following manner:

- ...
8. The Defendant knew or ought to have known that it had an obligation to remove standing water and repair any and all potholes in and around the General Aviation Area in which failing to do so would creates (sic) a hazard for air crafts operating in the area.

PARTICULARS OF NEGLIGENCE

- (a) Failure to repair potholes
- (b) Failure to provide proper drainage and run off for standing water
- (c) Failure to provide warning signs of the danger pose by the potholes
- (d) Failure to provide warning signs of the danger of the water
- (e) Failure to provide a marshal to direct air crafts around the potholes

PARTICULARS OF LOSS

(a) Loss of Aircraft	\$ 72,953.00
(b) Los (sic) Revenue (\$1500 per day x 96 days)	\$144,000.00
(c) Removal of Salvage Aircraft	\$ 3,000.00
(d) Storage of Aircraft (\$15.00x30 days)	\$ 450.00
(e) Difference for Replacement Aircraft	\$ 36,497.00

Total: \$256,900.00

[2.] The Defendant filed a Defence, which was settled, in part, as follows:

1. This Defence is served without prejudice to the Defendant's right to apply to have the specially endorsed Writ of Summons filed herein 9 March 2020 ("the Writ") struck out and the claims dismissed, on the grounds that the Defendant is not a proper or necessary party to the claims made herein, and the Plaintiffs' conduct in commencing and pursuing these proceedings against the Defendant is frivolous or vexatious.
2. The Defendant can neither admit nor deny the matters pleaded in paragraph 1 of the Statement of Claim endorsed on the Writ, as the Defendant has no knowledge of the matters therein contained. The Plaintiffs are required to prove the same.

3. Save that it is admitted that the Defendant is a company incorporated under the laws of the Commonwealth of The Bahamas, paragraph 2 of the Writ is denied. The Defendant avers that it neither holds any licenses to carry on business as a Fixed Base Aviation Operator nor provides Aircraft Services to the public as alleged in paragraph 2 of the Writ or at all. The Plaintiffs are put to strict proof of these allegations.
4. The Defendant further avers that it does not carry on any commercial business activity whatsoever in the Commonwealth of the Bahamas. Moreover, the Defendant neither employs, nor exercises any control, power, or authority over any persons employed in connection with Aircraft services provided to the public nor owns, leases, or occupies any premises from which a Fixed Base Aviation business is operated or Aircraft services provided to the public. The Defendant therefore puts the Plaintiffs to strict proof of the allegation that the Defendant carries on business as alleged in Paragraph 2 of the Writ.
5. The Defendant can neither admit nor deny the allegations contained in paragraph 3 of the Writ as the matters pleaded therein are not within its knowledge, and are predicated on a reference to "Odyssey Aviation" which is not defined in the Writ as the Defendant, or otherwise. Further, the Defendant did not at the material time or at any point trade as or otherwise hold itself out as "Odyssey Aviation". The Defendant repeats the above paragraphs 3 and 4 of this Defence.

[3.] The application was brought by Summons filed on 24 November 2021 and supported by the affidavit of Gabriel Brown. The Summons was settled in the following terms:

LET ALL PARTIES CONCERNED attend before the Honourable Mr. Justice Ian Winder of the Supreme Court of the Commonwealth of The Bahamas, on Wednesday, the 1st day of December, A.D., 2021 at 9:00 o'clock in the forenoon on an application by the above-named Defendant pursuant to Orders 15 Rule 6(2)(a), 18 rule 19 (1)(b) and (d), and 31A rule 18 (2) (d) and (s) of the Rules of the Supreme Court 1978 ("the RSC"), and the inherent jurisdiction of the Court for an ORDER THAT:

- (1) The Defendant be removed as a party to these proceedings and/or the Plaintiffs' claims herein be struck out and this Action dismissed as against the Defendant.
- (2) All further proceedings herein be stayed pending the determination of this application.
- (3) The costs of this application be paid by the Plaintiffs to the Defendant, to be taxed if not agreed; and
- (4) The Court grant such further or other relief and directions as may be deemed fitting and appropriate.

AND TAKE NOTICE THAT the grounds of this application are that the Defendant is neither a proper nor necessary party to this Action, and the

maintenance of this Action against it is conduct that is frivolous, vexatious, and/or an abuse of the Court's process.

[4.] The Affidavit of Gabriel Brown provided in part as follows:

...

3. I have read the specially indorsed Writ of Summons and the Statement of Claim filed on 9 March 2020 ("the Writ"), in which the Plaintiffs allege that [Odyssey Aviation Bahamas Limited] carries on business as a Fixed Base Aviation Operator providing "Aircraft Services" to the public. The Plaintiffs further allege that on 15 May 2019, the Second Plaintiff was returning from Fresh Creek Andros in the First Plaintiff's Aircraft and landed safely at Lynden Pindling International Airport, but while taxiing into the General Aviation Ramp Area of "Odyssey Aviation " ("the Premises"), the aircraft fell into a pothole which caused it to collapse, causing damage to the First Plaintiff's aircraft ("the Alleged Accident").
 4. [Odyssey Aviation Bahamas Limited] filed a Defence on 29 January 2021 ("the Defence"), in which it avers that it does not carry on business as a fixed Base Aviation Operator or conduct any commercial business activity whatsoever in the Commonwealth of The Bahamas. It is further averred in the Defence that [Odyssey Aviation Bahamas Limited] does not own, lease, or occupy any premises from which a Fixed Base Aviation business is operated or from which aircraft services are provided to the public. Moreover, the Defence set out [Odyssey Aviation Bahamas Limited]'s position that it did not trade as or otherwise hold itself out as "Odyssey Aviation" at the material time or at all.
 5. I am advised by Mr. Adrian Hunt, a Litigation Partner in my firm, and counsel for Phoenix Aviation Limited ("PAL") that he was instructed on behalf of PAL, as the entity licensed to operate the Premises. I am further advised by Mr. Hunt and verily believe that Mr. Jason Goldstein, of the Florida based law firm, Goldstein & Company was retained at US Counsel by PAL's Insurers with respect to the Alleged Accident. True copies of emails from Mr. Goldstein to Mr. Joseph Moxey, the Plaintiffs' Counsel of Record, dated 2 and 12 June 2020 ("the Goldstein Emails"), advising that PAL is the correct entity and that Mr. Hunt was authorized to accept service of an amended Writ naming PAL as the Defendant...
 6. The Goldstein emails were followed by an email from Mr. Hunt to Mr. Moxey dated 17 July 2020. The said email, ... forwarded copies of the Business Licence Certificates granted for the year 2020 to PAL, trading as Odyssey Aviation Bahamas, to operate the Premises. In the email, Mr. Hunt invited Mr. Moxey to amend the Writ, or provide any basis for the Plaintiffs' refusal to do so.
- ...
9. By a reply email dated 7 October 2021, Mrs. Davis-Justin wrote to Mr. Moxey, enclosing copies of the 2021 Business License Certificates

granted to PAL to operate the Premises. Mrs. Davis-Justin's email, ... also forwarded the first page of a Land Sub-Lease Agreement ("the Lease") between the Nassau Airport Development Company, and PAL, doing business as General Aviation Center ("the Lease"). The term of the Lease is twenty-five (25) years commencing from 9 August 2010, in respect of approximately ten (10) acres on Coral Harbour Road also known as General Aviation.

10. I am advised by Mrs. Davis-Justin that she attended Mr. Moxey's chambers on 14 October 2021 together with Mr. Hunt, to allow Mr. Moxey to view the entire Lease. Mrs. Davis-Justin followed up on the meeting by email dated 10 November 2021, to which Mr. Moxey replied later that day. Based on the said exchange, ... the Plaintiffs are maintaining that [Odyssey Aviation Bahamas Limited] is the proper Defendant to this Action.

[5.] The Plaintiff has not responded to the Gabriel Brown Affidavit, the evidence is therefore unchallenged.

[6.] The Plaintiffs have succinctly identified the principal issue for the Court in this application as "*whether or not the true Defendant in the matter is Odyssey Aviation Bahamas Limited or Phoenix Aviation Limited*".

Analysis and Disposition

[7.] According to Mrs Davis-Justin, on behalf of the Defendant:

7. Firstly, the Defendant submits that it is not a proper or necessary party to the instant Action, and therefore ought to cease being a party. The Plaintiffs have commenced an action in which negligence is asserted against the Defendant. Essential to any claim of negligence is establishing that the alleged tortfeasor owed the plaintiff a duty of care.
8. Considering the pleaded case in the SOC, in order to establish that the Defendant owed a duty of care the Plaintiffs must show that the Defendant is the owner or occupier of the Premises. At common law, an occupier is defined as a person or entity that has some degree of control over the area or property concerned. Control is generally attributed to or associated with some form of presence in, use of, or activity on the property.
9. Not only have the Plaintiffs failed to adequately plead this allegation against the Defendant in this regard, but the evidence, or lack thereof, does not support any assertion that the Defendant had any degree of

control over the Premises at the material time, or at all. As gleaned from the GBK Affidavit, the Defendant does not own or lease the Premises. Neither does the Defendant operate any fixed base aviation business, aircraft business or conduct any activity on the Premises as alleged.

10. Furthermore, the Defendant is a separate and distinct legal entity from the entity which operates the business on the Premises, and has possession and control of the Premises. The Defendant has provided proof that another entity is the leaseholder of the Premises and holds the licenses to operate the relevant activities under the trade names General Aviation Center and Odyssey Aviation Bahamas. These trade names are not connected to or affiliated with the Defendant. The Defendant does not employ, or exercise any control, power, or authority over any persons employed in connection with the aircraft services provided to the public on the Premises. In light of these facts, which the Plaintiffs have not disputed, it is unclear how the Action can be maintained against the Defendant.
11. Notwithstanding the foregoing, the Plaintiffs continue to rely on an invoice which bears the address for the General Aviation Center and the logo of Odyssey Aviation Bahamas in support of its position that the Defendant is the proper party. It is trite law that companies maintain their own separate and distinct legal identity. Thus, the rights, liabilities and obligations attached to the entity trading as "Odyssey Aviation Bahamas" are separate and apart from the Defendant. The two are not, and cannot be treated as, one in the same.
12. Having regard to the foregoing, no acts or omissions complained of herein can be attributed to the Defendant. As such, there is no legal or factual nexus between the Defendant, and the Plaintiffs and their complaints. In the premises, the Plaintiffs had no basis for commencing this Action against the Defendant, and more importantly have no basis for pursuing and maintaining this Action against the Defendant. Accordingly, Order 15 rule 6(2)(a) ought to be engaged by this Court to remove the Defendant from these proceedings.

...
[8.] I agree with the Defendant's submissions.

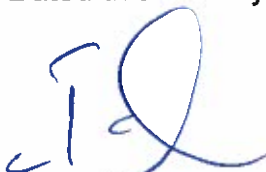
[9.] On the evidence, Phoenix Aviation Limited is undoubtedly the occupier of the premises and the legal person in control of those premises. Not only is it the leaseholder of the premises upon which the tort is alleged to have occurred, it is the only entity licensed to operate a fixed based operation from those premises. It is Phoenix Aviation Limited which, on the unchallenged evidence, is insured for the alleged risk which the Plaintiffs' complain in the Statement of Claim. Conversely, the Defendant has no interest in the premises and has no license to lawfully operate any

Defendant and the ownership or operation of the premises where the incident is alleged to have occurred.

[10.] The Plaintiffs rely on a fuel receipt, received from the operator of the premises, which displays the trade name "Odyssey Aviation Bahamas". The Plaintiffs accept that the receipt does not say Odyssey Aviation Bahamas Limited, which is the proper name of the Defendant. Despite the similarity, the Defendant does not hold or own the trade name "Odyssey Aviation Bahamas", which, on the undisputed evidence, is held by Phoenix Aviation Limited. The Defendant is merely a subsidiary of Phoenix Aviation Limited, the leaseholder and operator of the premises. It is trite law that a company has a separate corporate personality distinct from its members and directors. (**See: *Salomon v Salomon & Co. 1897 AC 22* and *Section 24 of the Companies Act***). As such, a claim against a parent company could not be made to cause liability to the subsidiary.

[11.] In the premises, I found that the Defendant was not a proper party to the action and that the claim against it must be struck out. The Defendant is entitled to its reasonable costs to be taxed in default of agreement.

Dated this 9th day of December AD 2021



Ian R. Winder

Justice