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[2022] 3 F.C.R. D-14

AIR LAW

Related subjects: Federal Court Jurisdiction; Practice; Transportation

Appeal from Federal Court decision dismissing proposed class action seeking relief for appellant, other passengers of foreign airline who experienced flight delays on flights to or from Canada — Respondent Portuguese airline operating passenger flights to and from various cities in Canada — Appellant claiming to be entitled to compensation due to delay in flight of more than four hours — Alleging that her entitlement to compensation stemming from contract of carriage — Federal Court dismissed motion for order to certify action as class proceeding on basis appellant failed to satisfy five required conditions in *Federal Courts Rules*, SOR/98-106, r. 334.16(1) — Granted respondent's motion to have appellant's amended statement of claim struck out without leave to amend pursuant to r. 221(1)(a) — Determined that action doomed to fail because Federal Court lacked jurisdiction to hear matter, that claim, which is for fixed compensation without proof of damage, barred by *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Montréal, May 28, 1999, being Schedule VI to the *Carriage by Air Act*, R.S.C., 1985, c. C-26 (Montreal Convention) — Issues whether Federal Court erred in concluding that: (1) pleading should be struck out for lack of jurisdiction; (2) pleading should be struck out because claim barred by Montreal Convention; (3) conditions for certification as class proceeding not satisfied — To decide first issue, whether pleading should be struck for lack of jurisdiction, three-step *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 test applied (ITO test) — Claim satisfying step 1 of ITO test on plain, obvious standard because there is good argument that claim "recognized" under federal law — Licences issued by Canadian Transportation Agency may be subject to terms, conditions on specified matters which include "tariffs, fares and carriage of passengers" — By requiring carrier to comply with terms, conditions specified in tariff, arguable that *Air Transportation Regulations*, SOR/88-58 (Regulations) recognizing contractual obligations of carrier to passengers — Since these obligations pleaded as including compensation that appellant seeks, not plain, obvious that Regulations do not recognize appellant's claim — Federal Court rejected this view, followed *Donaldson v. Swoop Inc.*, 2020 FC 1089 — However, Court in *Donaldson* erred when it concluded that *Canada Transportation Act*, S.C. 1996, c. 10 (CTA), s. 116(5) implies there is a general scheme for jurisdiction of courts in CTA — For these reasons, not plain, obvious that step 1 of ITO test not satisfied — Next, reasonably arguable that degree to which CTA, Regulations govern contracts of carriage sufficient to satisfy plain, obvious test with respect to step 2 of ITO test — *Carriage by Air Act* essential to disposition of action, nourishes grant of jurisdiction — Finally, with respect to step 3 of ITO test, not plain, obvious that any federal law relevant in this case is constitutionally invalid — Amended statement of claim therefore not doomed to fail for lack of jurisdiction in Federal Court — As to second issue, whether pleading should be struck out because barred by Montreal Convention, *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211, released after hearing of present matter, making it clear that Federal Court erred in finding that claim doomed to fail because of Montreal Convention — Montreal Convention not prohibiting Canada from introducing laws that provide standardized compensation for flight delays — Finally, as to third issue, Federal Court did not err when it concluded that requirement in r. 334.16 (class proceeding preferable procedure for just, efficient resolution of common questions) not satisfied — Open to Federal Court to find respondent's evidentiary burden satisfied by evidence

which describes applicable legislative scheme — Also open to Federal Court to consider legislative, regulatory provisions applicable to Canadian Transportation Agency in assessing preferability — In conclusion, Federal Court erred in concluding it was plain, obvious that pleading did not disclose reasonable cause of action — Federal Court did not err in concluding that requirements for certification not satisfied — Federal Court order set aside to extent that it struck out amended statement of claim — Appeal allowed.

BERENGUER V. SATA INTERNACIONAL - AZORES AIRLINES, S.A. (A-138-21, 2023 FCA 176, Woods J.A., reasons for judgment dated August 16, 2023, 26 pp.)