

42/07; [2007] VSC 390

SUPREME COURT OF VICTORIA

IMAGE EVENTS PTY LTD v TAYLOR

Bell J

30 August, 10 October 2007 — [2008] Aust Contract Reports 90-276

CIVIL PROCEEDINGS – PRINCIPAL AND AGENT – AIRLINE TRAVELLERS AND TRAVEL AGENT – TRAVEL AGENT REQUESTED TO OBTAIN TICKETS – TICKETS OBTAINED AND MONEY PAID BY TRAVELLER BY CREDIT CARD – AIRLINE FINANCIALLY COLLAPSED AND CANCELLED TICKETS – CREDIT CARD TRANSACTION REVERSED BY TRAVELLER – TRAVEL AGENT SUED FOR PRICE OF TICKETS – WHETHER TOTAL FAILURE OF CONSIDERATION – FINDING BY MAGISTRATE THAT THERE WAS A TOTAL FAILURE OF CONSIDERATION – TRAVEL AGENT'S CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR.

1. An agent (the travel agent) is entitled to be indemnified by the principal (the traveller); however, the agent is not so entitled (or to a handling charge) where the consideration flowing to the principal has totally failed.

2. Where a travel agent was contracted by a traveller to obtain return airline tickets for specified travel and it did exactly that, it represented full performance of the travel agent's contractual obligations. Once the tickets were issued, the traveller was in a passenger-carrier relationship with the airline operator. It did not destroy the consideration that had already passed from the travel agent to the traveller under the agency contract. Accordingly, the magistrate was in error in dismissing the travel agent's claim.

**BELL J:
INTRODUCTION**

1. Imaje Events Pty Ltd is a travel agent. Acting for John Taylor, it bought from Ansett Airlines 42 return tickets from Melbourne to Hong Kong. Imaje paid for the tickets on Mr Taylor's behalf and recouped the cost, plus its handling charge, from him. Mr Taylor made the payment to Imaje by credit card.

2. Just before the day of intended travel, Ansett financially collapsed and cancelled the tickets. At Mr Taylor's request, Imaje bought substitute tickets from another airline, which he paid for.

3. Mr Taylor then took the matter into his own hands. He instructed his bank to reverse the credit card payment he had made to Imaje for the Ansett tickets and the handling charge, thus transferring the loss arising from the cancellation of the tickets from him to Imaje.

4. Imaje sued Mr Taylor in the Magistrates' Court of Victoria for the cost of the tickets and its handling charge. A magistrate dismissed that claim on the ground that Mr Taylor and the other passengers did not get what they bargained for – actual travel. Imaje appeals to this Court on a question of law under s109(1) of the *Magistrates' Court Act* 1989. The company contends it obtained for Mr Taylor exactly what he wanted – tickets – and their cancellation was Ansett's responsibility, not Imaje's.

THE PROCEEDING BEFORE THE MAGISTRATE

Imaje sued on its agent's indemnity and its contractual right to the charges

5. Imaje brought the proceeding to recover \$36,705.60. It claimed to be entitled, as Mr Taylor's agent, to an indemnity for the cost of the Ansett tickets. According to Imaje, that cost had been properly incurred in the performance of Mr Taylor's instructions as the principal. It also claimed to be contractually entitled to its handling charge.

6. Before the magistrate, it was accepted by the parties that an agent was entitled to be so indemnified by a principal. It was also accepted that an agent was not entitled to be so indemnified, or to a handling charge, where the consideration flowing to the principal had totally failed. The

sole question submitted to the magistrate was whether the consideration flowing to Mr Taylor had totally failed, given that Ansett had cancelled the tickets.

The facts found by the magistrate

7. The facts were found by the magistrate in accordance with those agreed between the parties. No evidence – oral or written – was given. The Ansett tickets were not in evidence. Nor was there any direct evidence about the conditions on which they were issued. What follows is a summary of his Honour’s findings.

8. Between March and June of 2001, Mr Taylor engaged Imaje to act as its travel agent in purchasing 42 airline tickets from Ansett. The return flights were to be between Melbourne and Hong Kong in September of that year. Mr Taylor bought the tickets through Imaje because Ansett would only sell them at the attractive price he sought if they were bought for him by a travel agent. In other words, Ansett refused to sell the tickets directly to Mr Taylor.

9. Imaje bought the tickets from Ansett for Mr Taylor at a price of \$33,191.80, which it paid on his behalf. Mr Taylor made the credit card payment to Imaje of \$36,705.50 (which included the handling charge) on 14 June 2001.

10. The tickets were physically issued by Ansett in the name of the 42 passengers and delivered by Imaje to Mr Taylor. Two days prior to the intended date of departure, Ansett cancelled the tickets and they were rendered not redeemable for any other Ansett flight. It was common ground that the cancellation was due to the financial collapse of the airline.

11. Mr Taylor instructed Imaje to obtain alternative tickets, which it did. He paid for those tickets and no dispute arises in relation to that matter. Mr Taylor subsequently instructed his bank to reverse his credit card payment to Imaje, which it did.

Why the magistrate refused Imaje’s claim

12. The central legal question for the magistrate’s determination was whether there had been a total failure of consideration as between Imaje and Mr Taylor. For reasons which were carefully considered and expressed, his Honour decided that question in the affirmative. Therefore Imaje could not recover the amount it had paid to Ansett, or its handling charge, from him.

13. The magistrate based his conclusion largely on the application of the decision of the High Court of Australia in *MacRobertson Miller Airline Services v Commissioner of State Taxation (Western Australia)*.^[1] As his Honour saw it, MacRobertson stood for the general principle that an airline ticket constituted an offer by an airline to carry a passenger. Applying that principle to the present case, the magistrate held the contract between Mr Taylor and Imaje required the company to obtain such an offer, on a continuing basis up to the occasion of travel, from Ansett. When Ansett cancelled the tickets, it withdrew the offer before Mr Taylor had accepted it by actually travelling, which meant the consideration supplied by Imaje to Mr Taylor had totally failed.

14. On that basis, the magistrate dismissed Imaje’s claim with costs.

THE APPEAL IN THIS COURT

The evidence in the appeal

15. In the proceeding before me, the only relevant evidence was an affidavit by Imaje’s solicitor exhibiting the transcript of the hearing before the magistrate and his Honour’s order. Like the magistrate, I did not have the tickets or any other documents relating to the intended flights or the relationship between Mr Taylor, Imaje and Ansett. The evidence before me therefore consisted of the facts as found by the magistrate on the basis of the facts agreed by the parties.

16. The parties agreed that, if I uphold the appeal, Mr Taylor should be ordered to pay Imaje \$36,705.50, being the amount sued for in the proceeding before the magistrate.

Mr Taylor’s submissions

17. Mr Taylor submitted the appeal should be dismissed because the decision of the magistrate was correct on the central legal question.

18. It was submitted that Mr Taylor went to Imaje to obtain continuing offers of carriage from Ansett for the 42 passengers, which they did not get. The contract between them was executory because Mr Taylor had made payment to Imaje for consideration that would not pass until the passengers travelled. The consideration was obtaining of offers of travel that were capable of acceptance by him and the other passengers up to and including the occasion of actual travel.

19. Mr Taylor submitted this was not a case where the tickets had been cancelled after acceptance by the passengers. The cancellation represented withdrawal of the offers to travel and had occurred before that acceptance. He submitted the commercial risk of that happening fell on Imaje, as the travel agent, not on Mr Taylor and his colleagues, as the passengers. The reasons for the withdrawal were, he submitted, immaterial.

20. On the relationship between the passengers and Ansett, Mr Taylor said there was no contract between those parties until Ansett's offer of carriage was accepted. That, he submitted, could not occur until actual carriage. Until that point, consideration would not flow from Imaje to Mr Taylor and the contract between them would remain executory.

21. It followed that, in Mr Taylor's submissions, Imaje could not fulfil its contractual obligations to him unless the passengers travelled. When Ansett cancelled the tickets, that travel could not and did not occur, resulting in a total failure of consideration. In those circumstances, as decided by the magistrate, Mr Taylor was entitled to reverse his credit card authority for the payment of the Ansett tickets and Imaje's handling charge.

Why Mr Taylor's submissions must be rejected

22. The central legal issue in the appeal must be determined in the context of the legal incidents of the relationships between the parties as those relationships are revealed by the magistrate's findings (based on the agreed facts).

23. Let me begin with Mr Taylor and the other passengers. To shorten things, I will refer only to Mr Taylor.

24. Mr Taylor was Imaje's principal in a principal-agent relationship. Their relationship was contractual. Imaje was Mr Taylor's agent, not Ansett's. The handling charge was paid by him not Ansett.

25. Mr Taylor had a passenger-carrier relationship with Ansett which was initiated via the agency of Imaje. I say "relationship" because Mr Taylor contends the issuing of the tickets by Ansett constituted only an offer that had not been accepted by him. Whatever the precise incidents of that relationship may be, Mr Taylor had such rights against Ansett as were possessed directly by an intending passenger having the kind of ticket that he bought through Imaje. The agency relationship between Mr Taylor and Imaje in no way influenced Mr Taylor's rights against Ansett in that regard.

26. I turn now to Imaje.

27. That company was a travel agent, not a carrier. It owned no aircraft and did not operate the business of providing carriage of passengers by air or otherwise. As Imaje was Mr Taylor's travel agent, there was privity between it and him under an agency contract, but not under a carriage contract. In its dealings with Ansett, Imaje acted on behalf of Mr Taylor as a disclosed principal. When Imaje paid Ansett for the tickets, it did so on his behalf. As Imaje was not Ansett's agent, there was no privity under any relevant contract between those two companies. The handling charge was payable by Mr Taylor under his contract with Imaje.

28. Lastly there is Ansett.

29. That company was an airline carrier. Ansett's relationship with Mr Taylor mirrored the ones I have already described. Fundamentally, by the agency of Imaje, Ansett entered a passenger-carrier relationship with Mr Taylor. Ansett did not have a direct contractual relationship with Imaje.

30. I am prepared to assume that this relationship between Ansett and Mr Taylor fell squarely within the type described by Barwick CJ in *MacRobertson Miller Airline Services v Commissioner of State Taxation (Western Australia)*.^[2] Accordingly, I will assume “the airline operator was not in contractual relations with the intending passenger until it had provided him with a seat on the aeroplane.”^[3] I point out, however, that the terms of the ticket were proved in that case, and were important to the result. The terms of the tickets were not proved in the present case, and I am not prepared to infer them. But I will proceed on the stated assumption, for it is the one most favourable to Mr Taylor, who will be the losing party in this appeal.

31. Imaje sued on its agent’s indemnity, and on its contractual entitlement to the handling charge. Mr Taylor relied on a total failure of consideration. It was critical to both the claim and the defence to identify the terms of the contract between Imaje and Mr Taylor. In particular, it was necessary to identify what Imaje had contracted to do for Mr Taylor, for that was the consideration in respect of which the company was entitled to incur indemnified expenses and collect its handling charge.

32. The magistrate decided Imaje had contracted with Mr Taylor to obtain from Ansett offers of carriage capable of acceptance up to the occasion of actual travel. You will note this was not an agreed fact. What then was the exact legal character of his Honour’s decision in that respect? I think it was a finding of fact about the terms of the agency contract made by inference from the found facts (reflecting the agreed facts).

33. The magistrate was entirely correct to think he had to make a finding about that matter, and by inference. The question is whether his Honour drew the proper inference from the facts as found, which is a question of law,^[4] remembering that “respect and weight”^[5] must be given to his view in my analysis of the question on appeal.

34. With respect, I think the inference the magistrate drew was not the proper inference on the facts as found. In my view, Mr Taylor engaged Imaje to obtain from Ansett on his behalf the bundle of legal rights or opportunities that inured in the tickets. In short, he contracted with Imaje for the company to buy the tickets. These found facts positively demand that conclusion:

- Imaje was Mr Taylor’s agent, not Ansett’s
- Mr Taylor came to Imaje to buy tickets from a particular airline, at a particular price, for travel to and from a particular destination and within a particular time frame
- the tickets were bought by Imaje on behalf of Mr Taylor and the other passengers and were issued and delivered to, and accepted by, him and them
- when Mr Taylor made a credit card payment to Imaje for the cost of the tickets, this was not a payment to Ansett but to recompense Imaje for having paid that cost on his behalf
- Mr Taylor’s credit card payment also covered Imaje’s handling charge, which was for the work that Imaje did on Mr Taylor’s behalf as his travel agent
- as between Mr Taylor and Imaje, there was no express term that the tickets would be incapable of cancellation or, to use the words of Mr Taylor’s submissions, would be offers to travel remaining capable of acceptance up to the occasion of actual travel.

35. Therefore, in regard to the agency contract between Mr Taylor and Imaje, there was no total failure of consideration. Imaje did for Mr Taylor exactly what the terms of the agency contract required. It bought for him and the other passengers the tickets, with whatever legal rights and opportunities tickets of that type with that airline involved.

36. The appeal must therefore be dismissed.

CONCLUSION

37. Imaje Events Pty Ltd sued John Taylor in the Magistrates’ Court of Victoria to recover the cost of 42 airline tickets that it bought from Ansett Airlines as his travel agent. It also claimed its handling charge. The amount claimed was \$36,705.60. Mr Taylor had paid that amount to Imaje by credit card. When Ansett financially collapsed, it cancelled the tickets, forcing Mr Taylor to buy

replacements. His unilateral response was to instruct his bank to reverse the payment to Imaje.

38. In the proceeding before the magistrate, Imaje claimed to be entitled to the amount claimed under its agent's indemnity (as to the cost of the tickets) and its agency contract (as to the handling charge). Mr Taylor's defence was that the consideration under the agency contract had totally failed because Ansett had cancelled the tickets. More exactly, it said Imaje had been required to obtain open and continuing offers to travel from Ansett, and that obligation could not be satisfied until the passengers were in their seats on that company's aeroplane, which never happened.

39. The magistrate accepted Mr Taylor's defence and dismissed Imaje's claim with costs. Imaje has appealed to this Court on a question of law under s109(1) of the *Magistrates' Court Act* 1989.

40. With respect, the magistrate should not have accepted Mr Taylor's defence. It was based on an incorrect characterisation of the consideration required of Imaje under the agency contract. The consideration had to be identified as a matter of proper inference from the facts found by the magistrate (reflecting the agreed facts). In my view, the proper inference to draw from those facts was that Imaje was contracted to obtain for Mr Taylor and the other passengers 42 return airline tickets from Ansett for the specified travel. Acting as their travel agent, Imaje did exactly that, which represented full performance of its contractual obligations. Once the tickets were issued, Mr Taylor and his colleagues were in a passenger-carrier relationship with Ansett. The cancellation of the tickets was Ansett's responsibility. It did not destroy the consideration that had already passed from Imaje to Mr Taylor and his colleagues under the agency contract.

41. For those reasons the appeal will be upheld. The decision of the magistrate will be set aside. There will be an order for judgment in favour of Imaje for \$36,705.60. I will hear submissions on the question of costs.

^[1] [1975] HCA 55; (1975) 133 CLR 125; 8 ALR 131; 423 CB 549-551; 5 ATR 696; 50 ALJR 348.

^[2] [1975] HCA 55; (1975) 133 CLR 125, 134; 8 ALR 131; 423 CB 549-551; 5 ATR 696; 50 ALJR 348.

^[3] *Ibid.*

^[4] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321, 355; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.

^[5] *Warren v Coombes* [1979] HCA 9; (1978-1979) 142 CLR 531, 551; (1979) 23 ALR 405; (1979) 53 ALJR 293.

APPEARANCES: For the plaintiff Imaje Events Pty Ltd: Mr NGK Healy, counsel. For the defendant Taylor: Mr SGR Wilmoth, counsel. Anderson Rice Lawyers.
