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THE HIGH COURT

1981/2238P

McG.

BETWEEN/

ENDA McGUILL — Plaintiff

.v.

AER LINGUS TEORANTA
and
UNITED AIRLINES INCORPORATED — Defendants

Judgment of Mr. Justice McWilliam delivered the 3rd day of October 1983

This action is brought by the Plaintiff for damages alleged to have been sustained by him by reason of the breach of a contract whereby United Airlines Incorporated (hereinafter called United) agreed to carry 234 passengers, members of the Vintners' Federation of Ireland, from New York to San Francisco and from there to Hawaii and back from Hawaii to New York via Los Angeles and Las Vegas.

Aer Lingus Teoranta (hereinafter called Aer Lingus) agreed to carry the group from Dublin to New York on 3rd April, 1979, and back from New York to Dublin on 11th May, 1979. No claim is made with regard to this contract but both Defendants are sued in negligence and for misrepresentation. The employment of

two airlines was necessary because Aer Lingus did not operate any services within the United States of America and United did not operate any services to or from places outside the United States.

Each of the Defendants claim to be indemnified by the other against any damages awarded against it. Alternatively they claim contribution by the other party.

Due to labour disputes with its employees, United was unable to carry the group and alternative arrangements were made whereby the group was taken to Hawaii by alternative air companies but at a considerably increased expenditure and without completing the itinerary originally arranged.

This is the gist of the case, but the circumstances are somewhat involved and have led to a certain conflict of evidence and to different submissions of law.

The Plaintiff is not a travel agent and describes himself as a tour promoter. He has other occupations, of which the principal one appears to be that of insurance agent. He stated in evidence that he has been associated with the Vintners' tours since 1971. His brother, Mr. Matt McGuill, is a travel agent in

a business started by their father a very considerable time ago. The brothers carry on their respective businesses in different parts of the same premises in Dundalk and the Plaintiff does all his bookings through his brother. It appears that the Plaintiff was vice-president of the Vintners' Federation in 1970, that the tours by the Federation commenced in or about that time and that, at first, the tours were organised by Mr. Matt McGuill but the organisation of the tours was taken over by the Plaintiff in 1978. It is clear that the brothers were closely associated in making the arrangements for the Federation's tours. There had been previous tours to the United States and Canada but this was the first time a tour had been arranged with United although Mr. James Reddings, sales manager for United in the United Kingdom and Ireland, had previously been involved in the Federation's tours as the representative of other air companies.

The negotiations with United for the tour commenced in the summer of 1978 and, by autumn, terms had been arranged. On 5th October, 1978, Aer Lingus confirmed flights for the group as 23rd April, 1979, Dublin/Shannon/New York and 10th May, 1979, New York/Shannon/Dublin. On 16th November, 1978, United confirmed flights New York, San Francisco, Honolulu, Los Angeles,

Las Vegas, New York.

On 24th January, 1979, the Plaintiff sent United a cheque for $8,853 by way of deposit for the American part of the tour and, on the pleadings, this date is agreed by the Plaintiff and United as the date of the agreement I have mentioned above.

Mr. Reddings states that he came over to Ireland on 13th or 14th March, 1979, and drove down to Dundalk and brought 600 blank tickets to Mr. Matt McGuill for completion by him. Mr. McGuill denies that tickets were brought to Dundalk or that he was asked or refused to complete them. It is agreed that there was a meeting at which the tour was discussed and that they spent the evening together. Mr. McGuill's recollection is that Mr. Reddings had other business as well. This is denied by Mr. Reddings who stated that the sole purpose of his visit was to bring the blank tickets to Mr. McGuill to complete and that Mr. McGuill said there was too much work involved in filling them up. However this may be, it is agreed that no tickets were left with Mr. McGuill and Mr. Reddings states that he took them back to London the next day. Whether Mr. Reddings produced the tickets on that occasion or not or whether Mr. McGuill refused to complete them or not, it was not suggested by Mr. Reddings

that any industrial trouble in United was discussed or mentioned.

Mr. Reddings returned to Ireland on 23rd March and met the Plaintiff and his brother at the International Hotel at the airport. Mr. Connellan, secretary to the Vintners' Federation was also present, but he was not asked to give any evidence about this meeting. There was the same conflict of evidence as to Mr. Matt McGuill being asked to complete the tickets on this occasion and a further conflict of evidence as to the practice with regard to the issue of the tickets, whether this should be done by the travel agent or the air company. Whichever version is correct, the parties approached Aer Lingus, and Mr. Power of Aer Lingus joined the meeting and was asked as a favour to try to arrange to have the tickets completed on an Aer Lingus machine. This was agreed, but it transpired that the United tickets could not be used on the Aer Lingus machine and it was arranged that the United tickets would be completed on Aer Lingus forms. Whatever the practice about travel agents issuing tickets for groups it is clear that it was always intended that there should be two sets of tickets, one set issued by Aer Lingus for the journeys to and from New York and

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another set issued by or on behalf of United to cover the journeys through the United States.

A strike by United employees commenced on 31st March 1979 and a message was sent to United's managers at most principal centres, including London, directing them to notify all airlines in their areas that, due to suspension of services, all carriers were requested not to issue tickets on United airlines until advised of resumption of service and that pre-paid ticket authorities would not be accepted for ticket insurance by United after 30th March and until further notice. It has not been established that Aer Lingus was officially notified but it is agreed by its representatives that they became aware of the strike within a couple of days. Notwithstanding this, Aer Lingus went ahead with the preparation of the tickets for the group and these were issued on 6th April.

Mr. Reddings stated that he got in touch with Mr. Matt McGuill on 2nd April although Mr. McGuill thinks it was not until 4th April. Whichever date it was, both agree that Mr. Reddings said he would do everything to help if the strike continued. On 4th April, Mr. Connellan also had a conversation

with Mr. Reddings. Both Mr. McGuill and Mr. Connellan are satisfied that Mr. Reddings stated that, if the strike went on the group could be carried by a management crew. I am satisfied from the evidence of Mr. Reddings that it is probable that this solution was seriously discussed and that Mr. Reddings was still relying on it to some extent when he telephoned Mr. Dunham on 9th April but was then informed that there was no possibility of any further management flights. By this time the tickets had been issued and it is not suggested that Mr. Redding had instructed Aer Lingus specifically to withhold these tickets apart from the general instructions which had been sent to all the United agents on 31st March. He merely stated in evidence that he give no instructions to Aer Lingus to issue the tickets. As he maintained that he had originally brought the tickets over to Mr. Matt McGuill to complete, it is difficult to see what further instructions he proposed to give to Aer Lingus to issue them. As a telex message had also been sent to him personally on 31st March stating that all United flights were cancelled through 9th April but that there was no need for alarm with regard to the Vintners' Association at that stage, it is unlikely that it was contemplated that the tickets had not

already been issued or were not then intended by United to be issued immediately, more particularly as Mr. Reddings agreed in cross-examination that, when the strike began, he regarded the members of the group as already ticketed. It appears also that the United States Air Board had waived certain restrictions on the operations of local carriers when the strike commenced and it may be assumed that this influenced United during the first week when considering the possibility of an alternative carrier to Hawaii being obtained. This waiver was rescinded during the second week of the strike but Mr. Reddings continued hopeful that the strike would be resolved before the date of the tour.

On 6th April Mr. Reddings sought assistance from his head office in the United States in obtaining an alternative carrier or alternative carriers. Between 9th and 18th April the London office of United appears to have left the efforts to obtain alternative transport to the representatives in America who, it may be assumed, would have been in a better position to get in touch with American internal airlines. On 18th April, Mr. Reddings received information from United in America that Trans

International Airlines (T.I.A.) would consider providing carriage from San Francisco to Honolulu. He thereupon arranged a meeting with the Plaintiff and his brother and a representative of T.I.A. in England for the following day. At this meeting, negotiations were conducted with other airlines which United had consulted. Although the details of this meeting are in dispute, particularly with regard to alleged claims and admissions as to responsibility for the extra charges, the result was that it was arranged that Pan American Airways would fly the main part of the group from Dublin direct to San Francisco with the balance flying from London to San Francisco, and that T.I.A. would take the group from San Francisco to Hawaii and back from Hawaii to Las Vegas. There was no arrangement at that time for the return journey from Las Vegas to New York, but a telex of 18th April from a representative of United indicates that United was then still hoping to retain the journey from Las Vegas to New York. In the event, the strike was not settled and the group returned to New York direct from Hawaii through San Francisco.

I am satisfied that the Plaintiff at all times intended to hold United responsible for the extra cost of the tour and that

United was not under any illusion about this. I am also satisfied that various representatives of United were sympathetic to the Plaintiff's claim but I do not accept that they gave any undertaking to discharge it.

On these facts, the Plaintiff claims that there was an unconditional contract by United to carry the group on the tour and that United must bear the additional costs occasioned by the strike. As against Aer Lingus it is claimed that the issue of the tickets by Aer Lingus was a representation that the tickets were binding on United and also that the issue of the tickets after the strike had been declared was negligent. On application being made on behalf of Aer Lingus at the close of the Plaintiff's case, I dismissed the Plaintiff's claim against Aer Lingus. Whichever version of the arrangement for the printing of the tickets by Aer Lingus is correct, Aer Lingus was acting as agent for one or other of the Plaintiff and United. On the evidence on behalf of the Plaintiff, Aer Lingus was acting as agent for United and United was then saying that the group would still be carried. As agent for a disclosed principal Aer Lingus could not be held liable in contract. I do not accept that the

evidence on behalf of the Plaintiff established that there was any negligence on the part of Aer Lingus in issuing the tickets. Aer Lingus was instructed to print the tickets by one of the parties with the consent of the other. No other instructions were given to Aer Lingus. In any event, no argument was addressed to me as to the effect on the contract of 24th January 1979, made between the Plaintiff and United for the issue of the tickets. All the terms of the contract having been agreed when Aer Lingus was requested to print the tickets, I do not see how the issue of the tickets could affect the contract. Nor do I accept the proposition that the issue of the tickets by Aer Lingus on behalf of United with the prior consent of the Plaintif could, under the circumstances, constitute any form of guarantee by Aer Lingus that the contract would be carried out by United.

As presented to the Court, the defence of United was made on two main grounds. First, that, on being informed of the strike, the Plaintiff took a calculated risk that Untied would be able to carry the group and that he should have cancelled the tour immediately. Secondly, that the contract was

frustrated by the outbreak of the strike.

For the Plaintiff it was argued with regard to frustration that the strike was caused by the employees of United, that the refusal of the employees to operate the planes is a refusal by United and therefore United is liable. It was also argued that United did not, at any time during the alternative arrangements to have the group carried, claim that the contract had been frustrated but was holding on in the hope that the strike would be settled.

I was referred to a number of authorities on the question of frustration. They were: Davis Contractors Ltd. .v. Fareham U.D.C. (1956) 3 W.L.R. 37; Pioneer Shipping Ltd. .v. B.T.P. Tioxide Ltd. (1981) 3 W.L.R. 292; Paradine .v. Jane (1647) Aleyn 26; The Penelope (1928) P. 180. I was also referred to Halsbury, Ed 4, Vol.9 and to Chitty on Contracts Chapter 23. Although it was not referred to during the hearing I note the following passage in Chitty, Ed.24, at paragraph 1417. "If one party foresaw the risk but the other did not, it will be difficult for the former to claim that the occurrence of that risk frustrates the contract". The reference given is to Walton Harvey Ltd. .v. Walker & Homfrays (1931) 1 Ch. 274. I have also considered

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this report.

From these authorities, the following principles appear to apply when considering a claim that a contract has been frustrated.

1. A party may bind himself by an absolute contract to perform something which subsequently becomes impossible.

2. Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed.

3. The circumstances alleged to occasion frustration should be strictly scrutinised and the doctrine is not to be lightly applied.

4. Where the circumstances alleged to cause the frustration have arisen from the act or default of one of the parties, that party cannot rely on the doctrine.

5. All the circumstances of the contract should also be strictly scrutinised.

6. The event must be an unexpected event.

7. If one party anticipated or should have anticipated the possibility of the event which is alleged to cause the frustration and did not incorporated a clause in the contract

to deal with it, he should not be permitted to rely on the happening of the event as causing frustration.

It does not appear, from the authorities to which I have been referred, what principle is to apply in considering frustration of a contract in circumstances such as the present so as to establish when a contract comes to an end. No evidence was tendered on behalf of United to indicate that United claimed at any particular time that the contract had come to an end and no submission was made as to the time of the termination of the contract. The suggestion on behalf of United seems to be that, once the parties became aware of the strike, a new agreement must be implied that the contract would continue until it was clear that the strike would not be settled in time to enable United to carry the group. Although the decision in the Pioneer Shipping case appears to support this proposition to some extent, I am not satisfied that such a proposition should be extended to the circumstances of the present case.

A significant circumstance in the present case is the fact, stated by two witnesses for United, that there had been a "cooling-off" period of sixty days in operation prior to the

strike being declared and taking effect. This must have been within the knowledge of United at all times during that period, that is to say, from 30th January, 1979. It can hardly be suggested that there had not been some threat of industrial action before the "cooling-off" period started to run and that, whatever the dispute was about, there had not previously been negotiations in progress between United and their employees. At no time was any communication about these circumstances made to the Plaintiff and I conclude that this was because United felt that, if the Plaintiff were made aware of the possibility of a strike, he might try to get another airline to carry the group. In my opinion this means that United, being aware of the threat or possibility of a strike, and the evidence is that United had had a somewhat similar strike a few years previously, but being anxious to obtain the business, took the risk of entering into the contract without including a provision to safeguard its position in the event of a strike taking place.

Under these circumstances I am of opinion that United is not entitled to succeed on its defence that the contract was frustrated.

I do not accept the argument made on behalf of the Plaintiff that a strike by the employees of a party cannot cause frustration of a contract. In my opinion it depends entirely on the circumstances whether it does or not, but, on the view I have formed as to the position of United, it is not necessary for me to deal with this further.

Evidence was also tendered by each party which suggested that the other party had accepted responsibility for the extra expense caused by the alternative arrangements. In effect this means that the parties entered into a new agreement. As already stated, I am satisfied that no such new agreement can be implied, although I accept the evidence that the representative of United did suggest that the Plaintiff himself should cancel or consider cancelling the tour and therefore terminate the contract. It is clear that the Plaintiff did not agree to do this.

On the question of damages, I have found great difficulty in collating the various sets of figures produced and I propose now merely to state what items the Plaintiff is entitled to recover.

These are:-

1. The increase in air fares over the contract price;

2. The increase in the hotel bills;

3. The extra cost of Miss Boylan's visit to Las Vegas;

4. The extra cost of ground transport.

5. The cost of long distance phone calls which did not relate to the proposed legal proceedings.

I will not allow the following items:-

1. The travel agent's commission;

2. The legal fees;

3. The accountant's fees;

4. The cost of the advertisement in the brochure;

5. The booking at the Flamingo Hotel, Las Vegas;

6. The expense of the Washington and New York meetings with lawyers;

I will not award any damages for mental distress, upset or inconvenience. First, there was no medical evidence. Second, I cannot see any justification for giving damages to a man who found that the strain of conducting one particular transaction in the course of his chosen business was too much for him.

Certainly I have never heard of such a claim and no authority to justify it has been cited to me.

I will not allow interest on the basis of the figures produced from the Allied Irish Banks Ltd. as I am not satisfied that these figures relate solely to the additional expenses of the trip. I do accept the principle that, if the Plaintiff had not had to expend the extra money, he would either have paid off debts due to the bank and so saved interest payments, or he would have been in a position to place the money so as to earn interest on it. In either case this is a loss sustained by him and I will allow interest at the rate of £10 per centum per annum on his extra expenditure from the time when it should have been repaid to him. This I consider should have been within a period of two months from his return.

I do not accept that there is any validity in the argument made on behalf of United that the Plaintiff should have mitigated his damages by cancelling the tour. In effect this argument means that he should have repudiated or agreed to waive the contract, neither of which courses constitutes mitigation.

If the parties cannot agree on the various figures, the matter may be re-entered before me.

There remains the claim by United against Aer Lingus for an indemnity. This claim is based on negligence by a gratuitous agent. I was referred to Bowstead on Agency, Ed.14, where it is stated, at page 122 that the degree of care and skill owed by a gratuitous agent to his principal is such care and skill as persons ordinarily exercise in their own affairs. It is submitted that Aer Lingus in issuing the tickets when aware of the strike at United were negligent, and more particularly so if they had received a telex from United stating that, due to the suspension of services, all carriers were requested not to issue tickets for travel on United airlines.

Several matters arise on this contention. As already stated, these tickets were being issued in respect of a contract, already made. This was not a case of a scheduled flight for which the purchase of tickets normally constitutes the contract. As it was a charter flight, the terms of which were already agreed, tickets seem to me to have been issued purely for the administrative purposes of United and, although probably

necessary for those purposes, could not affect the contract. As to the telex, I am of opinion that this could only have been intended to prevent any further contracts being made on behalf of United. Also, United, which had either directed the printing of the tickets by Aer Lingus or agreed to their being printed, took no step specifically to cancel the printing and the delivery of the tickets to the travel agent. Finally, the telex of 31st March from United in New York to United in London, stating that "all United flights were cancelled through 9th April - that if the strike extends to 23rd April it will be extremely difficult to protect Irish Vintners on West Coast-Honolulu flights" but adding no need for alarm at this point, makes it clear that United was not cancelling the flight at this time and considered the contract still binding.

I am of opinion that United is not entitled to any indemnity or contribution from Aer Lingus.

ENDA McGUILL

.v.

AER LINGUS TEORANTA
and
UNITED AIRLINES INCORPORATED

There will be a decree for the sum of 61,215 American dollars and £350 Irish pounds.

The way this is made up is as follows:-

The increase in the cost of the air fares was 43,024 dollars In making this calculation, I have adopted the amount of the original fares without deducting the commission due to Mr. Matt McGuill as, on the case made on behalf of the Plaintiff, this would have had to be paid in full and the commission was a matter for Mr. Matt McGuill.

The extra cost of hotels was 15,724 dollars due to an extra night in San Francisco and a night in New York which latter included the cost of a hospitality room.

The extra surface transport cost 1945 dollars.

Miss Boylan's trip to Las Vegas cost 522 dollars.

In the absence of detailed evidence of telephone calls etc., I am allowing the sum of £350 in respect of extra administration

expenses incurred by the Plaintiff.

The sums awarded will carry interest at the rate of 10% from 16th July 1979