IN THE CENTRAL LONDON COUNTY COURT No. C4QZ7G8Z

Thomas Moore Building
Royal Courts of Justice

Monday, 12th June 2017

Before:

DEPUTY DISTRICT JUDGE CASE

B E T W E E N :

JAMES DOVE Claimant

- and -

IBERIA LINEAS AEREAS DE ESPANA S.A. OPERADORA Defendant

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The Claimant appeared in person.

MR M DAVIDSON (instructed by Kennedys Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

(As approved by the Judge)

THE DISTRICT JUDGE:

1 This is my judgment in the case of C4QZ7G8Z, James Dove v Iberia. Mr Dove appears on his own account (although I note that he is counsel himself) and Mr Davidson, counsel, appears on behalf of the defendant. The case involves what to me at any rate is a novel point which concerns the interpretation as far as return journeys on airline tickets are concerned of s.62 of the Consumer Rights Act 2015. I have had the benefit of reading a witness statement on behalf of the claimant and a statement of, I think, Ms Arregui on behalf of the defendant. In fact there is either no or almost no factual dispute between the parties. I did not hear any live evidence but, rather, I heard submissions. Both Mr Dove and Mr Davidson have prepared very helpful skeleton arguments and I was also referred to some authorities and extracts from Chitty on Contract.

2 The factual background is set out succinctly in Mr Davidson's skeleton argument and it is as follows: Mr Dove bought a return ticket from Gatwick to Madrid, the outbound portion of that due to depart on 17th June and the return portion departing Madrid back to Heathrow on 19th June. It is agreed that the contract was with the defendant and although the flights were not operated by the defendant, they were operated by a sister company, one I think Iberia Express and the other British Airways. It is agreed that the terms of the contract between the parties incorporated a provision that reads as follows:

> "Bookings, tickets and name changes, depending on the type of fare, kind of service, stay at the destination, et cetera, you can reserve one way or return flights. Bear in mind that, independently of the fare applied, if one of the segments is not used, remaining segments in the same ticket will be automatically cancelled."

There were also fare rules which formed part of the contract which read as far as is material:

> "The ticket or electronic [which might be read as electronic ticket] is not valid if the first coupon has not been used and will not be honoured if all the coupons are not used in the sequence provided in the ticket or electronic ticket."

3 It is not in dispute that Mr Dove arrived at Gatwick to check in for his flight after the check in had closed nor, I think, is it in dispute that the defendant was entitled to deny him boarding on that flight. It is agreed that the defendant, therefore, in accordance with those terms and conditions that I have already referred to, cancelled the return leg from Madrid to Heathrow and the claimant alleges that that term entitling the defendant to do that is unfair pursuant to s.62

of the Act I have referred to and he claims the agreed cost of that leg in the sum of £178.53.

4 The law is set out in s.62 and s.s.1 that an unfair term of a consumer contract is not binding on the consumer and s.s.4 a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Then in s.s.5, whether a term is fair is to be determined (a) taking into account the nature of the subject matter of the contract and (b) by reference to all the circumstances existing when the term is agreed and to all of the other terms of the contract or any other contract on which it depends.

5 At s.63(1) there is reference to Part 1 of Schedule 2 which it is said contains an indicative, non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this part. It is commonly known as a grey list, that is terms which may be unfair. It is not determinative but it is indicative. Although when the claim was brought, Mr Dove relied upon para.4 and para.5 of Part 1 to Schedule 2, in fact as matters have developed his claim really came to rely solely on para.5. Paragraph 5 provides:

> "A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied."

6 In the course of submissions I suggested to Mr Davidson, for the defendant, that really Mr Dove was in fact only relying upon part of that paragraph and it was accepted on behalf of the defendant that it is in part an either/or stipulation and in this case it is relevant only to this extent, it should be read in this manner, a term which has the object or effect of requiring that where the consumer decides not to conclude or perform the contract, the consumer must pay the trader for services which have not been supplied. This is not a case where the consumer, Mr Dove, is paying a disproportionately high sum in compensation. He is paying, his case is, for services which have not been supplied.

7 In the course of reading the extracts from Chitty, which I have been referred to, I read (although my attention was not directly taken to it) para.38-362 which reminded me that under the Act there is essentially a neutral burden. The assessment of whether a term is fair or not is not one upon which the burden of proof falls on either party. It is a neutral assessment of the term by the court.

8 Very helpfully, Mr Davidson took me to cases decided under the preceding legislation which, it is not in dispute between the parties, assist in an interpretation of the 2015 Consumer Rights Act which applies in this case. In

particular I was taken to the paragraph contained in the supplement to the most recent version of Chitty, para.38-251A which refers to the Supreme Court case well known in this court, *Parkingeye Ltd v Beavis* [2015] UKSC 67, which was a case concerning the fairness or otherwise of charges for either overstaying or parking in a car park and where consumers enter such a contract having parked in a car park at which a notice is displayed giving a charge for overstaying or parking at all. The paragraph in Chitty reads in part as follows:

> "In considering the fairness of the term imposing the charge under the 1999 Regulations, the Supreme Court followed the guidance of the Court of Justice in *WE v Aziz*, which it saw as the leading case on the topic provided by that court. They noted Advocate General Kokott's advice in *Aziz*, which was followed by the Court of Justice, that the requirement that there was significant imbalance in the contracting parties' rights and obligations to the detriment of the consumer should be contrary to good faith allows account to be taken of the legitimate interests of the parties to organise their own legal relationship even in a way which derogates from national legal rules otherwise applicable. In this respect, the Supreme Court noted that the formula used by the Court of Justice to assess good faith by reference to the hypothetical test of whether the seller or supplier 'could reasonably assume that the consumer would have agreed to such a term in individual negotiations,' and that the views of Advocate General Kokott on the relevant circumstances for this purpose are such as whether the term would be surprising (*as here*). The majority of the Supreme Court, therefore, held that the contract term on which the £85 charge was based was fair within the meaning of the regulations while the term did create an imbalance on the parties' rights and obligations to the detriment of the consumer. Both the management company and the owners of the car park had a legitimate interest in imposing a liability on the consumers in excess of any damages recoverable in inducing them to observe the two hour time limit. Indeed charging overstayers £85 underpinned the business model which enabled members of the public to park for free for two hours and was fundamental to the contractual relationship created by consumers' acceptance of the terms of the notice whose whole object was the efficient management of the car park."

9 Having taken me to that case and by reference to that, to the case of *Aziz* in the Court of Justice of the EU, Mr Davidson invited me to consider the market as a whole and relied in his skeleton argument on various parts of the IATA recommended practice 1724 General Conditions of Carriage, Passenger and Baggage and I remind myself that IATA is the International Air Transport Association. What Mr Davidson said is that it represents approximately 275 airlines and helps to formulate industry policy on critical aviation issues. Mr

Dove, I think, acknowledges that but, importantly, reminds me that it is not a consumer body. Nevertheless, it might reasonably be said that the guidance represents at least some evidence of market practice or industry practice and in para.3.3 of that guidance, there is at 3.3.2 reference to this particular type of situation. The guidance says:

> "The ticket may not be valid and Carrier may not honour the passenger's ticket if the first flight coupon, or in the case of an electronic ticket, an electronic coupon, for international travel has not been used and the passenger commences his or her journey at any stopover or agreed stopping place."

10 In this case of course that would be Madrid. He goes on in his skeleton argument to refer to an IATA guidance document published in 2013 entitled Coupon Sequence and Use, and he summarises the explanation that is given in that document for the suggested term that I have just read and I will return to that in due course but in short it says that market differentiation is important in the airline industry and that would be undermined if a term preventing a consumer from using only part of a leg of a multi-leg journey was not to be permitted.

11 The claimant, for his part, made reference to what he said was by contrast the approach taken by two other airlines. I did not strictly hear evidence of this but it was not, it appeared to me, in dispute and that was that in the case of EasyJet and Ryanair as long as the intending traveller arrived within one or two hours of the scheduled departure time the return ticket or the return portion of a return ticket was not automatically cancelled and the consumer was entitled on payment of a fee to be booked on the next outward journey that was available. Mr Dove relies upon that as evidence that the market can and does operate successfully without the automatic cancellation of the return leg in the event of the consumer not turning up for check in on time. He also, perhaps prompted by me, suggested that it is the lack of a refund in circumstances where there is a cancellation that is the unfairness rather than the cancellation itself.

12 In answer to those two points, Mr Davidson said that as far as the one and two hour window is concerned, that might be fairer (and I am paraphrasing his submissions) but that does not mean that the term that is in issue in this case is unfair and in relation to the defendant providing a refund, he said that it would be administratively burdensome and complicated to run such a system and it might be dependent on whether the seat that was cancelled or the part of the journey that was cancelled could be resold.

13 I remind myself that ultimately the test is whether there is a significant imbalance. The words in the Act are those which are the starting point, the

term is unfair if, contrary to the requirement of good faith, there is a significant imbalance to the detriment of the consumer.

14 It is the defendant's choice whether to cancel the return leg or not and the defendant in this case may wish to do so in order to prevent a distortion in the market. If they do, however, and do not refund the claimant a portion of that which they paid for the return ticket, then that potentially does give rise to a significant imbalance but I have to consider if that imbalance is sufficiently against or to the detriment of the consumer for me to conclude that the term is unfair contrary to the requirement of good faith.

15 Mr Davidson in his skeleton argument at para.16 through to para.18 gives a number of justifications for the term. I have already alluded to them in a general sense but taking them in turn, he said that market segmentation was critical to pricing and air travel and I accept that submission. He said that the key to market segmentation is having rules which allow various products to be differentiated from each other. In my judgment, either allowing a refund of part of a return ticket or, alternatively, operating a window such as was said to be operated by Ryanair or EasyJet, would not undermine that market segmentation.

16 He says that one of the most important rules is that flight segments must be used completely and in sequence. I can see that there might be a different argument in a case where, as I put to counsel in the course of submissions, I was dealing with or the court was dealing with multiple segments on an outward journey or multiple segments on a return journey so, for instance, a flight to Cape Town that involved changing planes in Dubai; in that situation, one could, in my judgment, easily see the importance of flight segments being used completely and in sequence. There might be different immigration laws in Dubai. There might be different international agreements between countries about taking on new passengers in Dubai and if this was a case where the claimant was seeking a refund in circumstances where he was or had attempted to use only part of an outward journey, perhaps attempting to join a flight in, in my example, Dubai, the situation would be very different but, in my judgment, I consider that is a very different set of circumstances where a passenger is flying from point A to B, point B being the destination.

17 Mr Davidson says that different prices are provided for different segments of the journey depending on the passenger's place of departure and place of destination. That is still the position if the defendant does not cancel the ticket. Mr Davidson says removing the ability of carriers to control the sequential use of flight segments will eliminate airlines' willingness and ability to compete in indirect markets and as a result reduce competition in those markets to the cost of the travelling public. I think what is being suggested is the sort of situation that I have considered where an outward journey is split into different

segments with stopovers at different airports, perhaps to change planes, perhaps not to change planes, but, as I have already indicated, I do not consider that that is a particularly helpful consideration in a case like this where a consumer is travelling from point A to point B and then returning from point B to point A, although I acknowledge in this case that it was flying from Gatwick and returning to Heathrow but the point is still a good one. The consumer is intending to return to the same city.

18 Then Mr Davidson says that it is not unreasonable for airlines to assume that if passengers do not use their first booking without contacting the airline it is unlikely they will use any subsequent bookings. I agree but the airline makes the choice to cancel or not and if they do not cancel they have still been paid. They will fly back an empty seat potentially. It may in fact involve some saving because there will be no one occupying the seat and so less fuel would be consumed but it is the airline who makes that choice whether to cancel or not.

19 Mr Davidson says it may happen that a return ticket is cheaper than a one-way ticket but that is up to the airlines how they choose to price their single and return flights. He refers to P & O terms of business. There seems to be some dispute between the parties as to what those really say but I am not particularly assisted by what a ferry company's terms and conditions say in determining this case which is about an airline's terms and conditions.

20 Then in para.18 of his skeleton argument Mr Davidson says that if the disputed term is not included in contracts of carriage that would lead to a distortion of the market because airlines would be unable to assess the demand for routes and would be unable to predict how many passengers would be flying on a particular flight which may lead to aircraft running unnecessary routes with empty seats. That may be the case but they would still be being paid for it.

21 So, taking all those factors into account and weighing that against the feature of this case which is that the claimant did intend to travel, albeit that he turned up late at the airport, and yet in those circumstances the defendant cancelled the return journey which he, Mr Dove, could otherwise have taken advantage of, even though he would have had to have paid to get out to Madrid, I find that there is a significant imbalance in circumstances where using the words or adopting the words in para.5 of Part 1 of Schedule 2 of the Act, he is paying for services which have not been supplied and, in my judgment, that is a significant imbalance to his detriment, significant enough for me to determine that it is an unfair term and one, therefore, which, pursuant to s.62, he should not be bound by.

22 Accordingly, I give judgment for what I take to be the agreed sum which is £178.53.
