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Spoiled Holidays: Damages for Disappointment or Distress

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Abstract

Generally damages for disappointment or distress following a breach of contract will not be awarded to the innocent party under common law. However where the object of the contract is to provide relaxation or enjoyment, for example, an ocean cruise or a package holiday, damages may be recoverable for disappointment or distress. Damages of this type may also be awarded where there is a breach of the consumer protection provisions of the *Trade Practices Act 1974* (Cth). This paper discusses a number of 'spoiled' holiday cases where damages were awarded for disappointment or distress. The liability of travel service providers under the *Trade Practices Act 1974* (Cth) is also discussed.

Introduction

At common law, breaches of contract are usually remedied by an award of damages. The object of awarding damages is to compensate the injured party for the actual loss incurred. Compensation means an award of money to place the aggrieved party in the position he or she would have occupied if the contract had been performed in accordance with its terms.¹ The object of damages in contract is to compensate the aggrieved party and not to punish the party in breach even if the breach was wilful or malicious.²

Limits on damages

It would be neither just nor practical to hold the party in breach for every consequence of a breach of contract no matter how unusual or unexpected those consequences may be. Consequently at common law damages are limited to consequences that are not too remote³ and damages will only be recoverable for losses that:

1. arise naturally from the breach; or
2. are actually contemplated as a probable result of the breach.

For example, in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*⁴ a laundry contracted to buy a boiler for use in its business. In breach of a term relating to time of delivery, the boiler was delivered some five months late. The laundry sued for the loss of the profits it would have earned had the boiler been delivered at the specified time plus the loss of profits from a dyeing contract it had entered into in anticipation of the delivery of the boiler. The laundry was entitled to recover the lost profits that would have been made on the ordinary cleaning work. As the supplier should have contemplated that profits from the normal cleaning work would be lost as a consequence of his failure to deliver the boiler on time, the damage was not too remote. However the laundry was unsuccessful in its claim for damages arising from the failure to undertake the dyeing contract. The dyeing contract work was unusual for the laundry and the loss could not have been

¹ *Robinson v Harman* (1848) 154 ER 363, 365; approved by the High Court in *Commonwealth of Australia v Amman Aviation Pty Ltd* (1991) 174 CLR 64.

² *Butler v Fairclough* (1917) 23 CLR 78, 89; *Ruxley Electronics v Forsyth* [1996] 1 AC 344.

³ *Hadley v Baxendale* (1854) 156 ER 145.

⁴ [1949] 2KB 528.

reasonably contemplated as a consequence of the late delivery.

Other limitations on recovery

In addition to situations where damages will not be recoverable because they are too remote, there are other species of loss or damage not recognised by the common law of contract. For example, damages will not generally be recoverable for injured feelings, disappointment or distress. The principle is that such damages are too remote, and secondly, most breaches of contract are likely to cause some disappointment to the innocent party. It is therefore a well-settled principle of common law that where a contract involves an ordinary commercial transaction, damages for disappointment will not be awarded. For example, in *Falco v James McEwan & Co Pty Ltd*⁵ the court refused to award damages for disappointment when the defendant failed to perform its contractual obligations with respect to the supply and installation of an oil heater in the plaintiff's home. The court held that the contract between the company and Falco was an ordinary commercial contract, for breach of which Falco was not entitled to recover damages for inconvenience and mental distress, the measure of damages being limited to the monetary loss involved in remedying the breach by the company to fully install the heater.

The legal principle underpinning this rule is that disappointment and distress is no more than a mental reaction to the breach and the financial consequences that flow from it. Applying the principle in *Hadley v Baxendale*, the damage is too remote to be recoverable.

Physical inconvenience

Where, however, the innocent party has suffered anxiety or distress as a consequence of physical inconvenience occasioned by the breach, damages may be recoverable.

In *Hamlin v Great Northern Railway Co*⁶ the plaintiff purchased a rail ticket for travel from London to Hull. Due to the default of the defendants, the train was considerably late. The plaintiff, who was a tailor, sought damages for his loss of business as a consequence of the delay and also for his trouble and inconvenience. The trial judge stated:

that generally in actions upon contracts no damages can be given which cannot be stated specifically and the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for disappointment of the mind occasioned by the breach of contract.⁷

Similarly in *Hobbs v London and South Western Railway Co*⁸ the plaintiffs were passengers on a train travelling from Wimbledon to Hampton Court. They were deposited some distance from their destination and were forced to walk home on a wet night. They were awarded 8 pounds for the inconvenience they suffered. However the court noted:

For the mere inconvenience, such as annoyance and loss of temper, or vexation or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting you cannot recover damages.⁹

Contracts to provide entertainment or enjoyment

Where the disappointment is not simply a reaction to the breach but is by itself the resulting damage, damages for disappointment and distress may be recovered. This is the situation which may result where the object or purpose of the contract is to provide enjoyment or relaxation; for example a package holiday or ocean cruise.

In *Stedman v Swans Tours*¹⁰ the plaintiff made arrangements with travel agents that his party of six

⁵ [1977] VR 447.

⁶ (1856) 156 ER 1261.

⁷ (1856) 156 ER 1261, 1262.

⁸ [1875] LR 10 QB 111.

⁹ [1875] LR 10 QB 111, 122.

¹⁰ (1951) 95 Sol Jo 727.

would be taken by air to Jersey and be provided with superior rooms with a sea view in a first class hotel. When they arrived in Jersey they found that the rooms reserved for them were very inferior and had no sea view. They were unable to obtain accommodation elsewhere and as a result the whole holiday was described as 'spoilt.' The plaintiff was subsequently awarded damages for appreciable inconvenience and discomfort, in the amount of 63 pounds. By comparison the original cost of the package was 207 pounds.

In *Jarvis v Swans Tours*¹¹ Mr. Jarvis booked and paid for a two week skiing holiday in Switzerland. The information in the brochure issued by Swans Tours referred, in part, to the charming owner speaking English, proximity to the snowfields, welcome party on arrival, afternoon tea and cake for seven days, Swiss dinner by candlelight and a farewell party in the bar. Mr. Jarvis booked the holiday in reliance on the information in the brochure but was very disappointed in what he experienced. His experience was far from that which had been represented in the brochure. The issue for the court was the amount of damages to which Mr. Jarvis was entitled as compensation for Swan Tours' breach of contract. The court unanimously held that where the object of the contract is relaxation and enjoyment, then damages can be awarded for the disappointment, distress, upset and frustration caused by the breach.¹² Mr. Jarvis was awarded an amount of 125 pounds in compensation for his disappointment. The original cost of the holiday was 63 pounds.

It should be noted that damages for disappointment or distress when awarded will not only be available to the party making the contract, but also to family members such as a partner or children.¹³

The Australian courts

The Australian courts have followed the principles in the above decisions by determining that damages for disappointment or distress may be awarded following breaches of contract by travel service providers.

In *Athens – Macdonald Travel Service Pty Ltd v Kazis*,¹⁴ Mr. Kazis' claim arose from a breach of contract by a travel agency to provide him and his family with the travel facilities for a three month holiday in Cyprus. The breach occurred as a consequence of Mr. Kazis being misled as to the duration of his holiday, and being forced to leave Cyprus 21 days before the date planned. The travel agent admitted liability and the case proceeded as an assessment of damages only. The Supreme Court of South Australia found that the plaintiff's high hopes for a happy holiday for himself and his family in the land of his birth were cruelly dashed. The Court, while acknowledging that no amount of money could ever turn the holiday into the sort of holiday the plaintiff contracted for, and reasonably expected to get, awarded the plaintiff \$400 for disappointment and distress.

A particularly dramatic example of a spoilt holiday arose in the case of *Baltic Shipping Company v Dillon*.¹⁵ In this case, Mrs. Dillon contracted with the defendant's travel agency to take her on a 14 day cruise Sydney to Sydney via the South Pacific Ocean on the cruise ship *Mikhail Lermontov*, for an amount of \$2,205. On the 16th February 1986, the ninth day of the cruise, the ship struck a rock off the coast of the South Island of New Zealand and sank. Mrs. Dillon was one of 123 passengers who commenced actions against the defendant and its travel agent. The defendants admitted liability for a breach of the cruise contract, in particular the breach of an implied term that reasonable care would be exercised by the ship owner in the navigation of the vessel. At trial Mrs. Dillon was awarded an

¹¹ [1973] QB 233.

¹² [1973] QB 233, 238.

¹³ *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

¹⁴ [1970] SASR 264.

¹⁵ (1993) 176 CLR 344.

amount of \$1,417 described as restitution of fare and \$5,000 as compensation for disappointment and distress at the loss of entertainment.

The NSW Court of Appeal confirmed the trial judge's decision and the matter proceeded to the High Court. The High Court held that to award the plaintiff restitution of the cruise fare in addition to damages for disappointed feelings would overcompensate the plaintiff, particularly in view of the generous award of damages for disappointment, which was twice the cruise fare.

The reasoning of the High Court

In its reasoning, the High Court determined that there were three categories where damages could be recovered under contracts for mental distress, that is:¹⁶

1. distress caused by breach of contract, the object, or an object of which is to provide enjoyment pleasure or relaxation;
2. distress caused by breach of contract to prevent molestation or vexation; and
3. distress consequent upon physical injury or inconvenience caused by the breach.

The Court had no difficulty in applying the first category to Mrs. Dillon's claim. Brennan J stated:¹⁷

in the present case, the plaintiff was promised a holiday cruise, an interlude to relax the mind and refresh the spirits. Or at least, the defendant promised to exercise all reasonable care to provide such a cruise. ... The 'disappointment and distress' in respect of which the trial judge awarded an amount of damages was a result of the shipwreck that occurred in breach of the defendant's contractual obligation ... an award of damages for 'disappointment and distress' was therefore right in principle.

Although there was comment by each of the members of the Court that the amount awarded to Mrs. Dillon for

her disappointment was a little over-generous (particularly when added to the amount of \$35,000 that she was awarded for damages for personal injury) the High Court declined to reduce the trial judge's assessment of damages for disappointment. Consequently, travel companies and travel agents should be aware that amounts of this magnitude may well be the norm in any future spoiled holiday case.

Difficulties in quantification

In each of the cases discussed above, the general question of how the courts could compute damages for disappointment and loss of comfort was an issue. In such cases determining how much the plaintiff should be compensated because of the defendant's breach is extremely difficult to prove. While the court requires the plaintiff to plead the quantum of damages with as much certainty and particularity as possible, where this is difficult or where the loss is of a speculative manner, the court will determine the amount of damages 'by the exercise of a sound imagination and the practice of the broad axe.'¹⁸

Similarly, a court will award damages even if it has to crystal ball the amount it should award. For example in *Jones v Schiffman*¹⁹ it was stated that '[a]ssessment of damages ... does sometimes of necessity involve what is guess work rather than estimation.'

The Trade Practices Act 1974 (Cth)

The consumer protection provisions in Part V of the *Trade Practices Act 1974 (Cth)* (the TPA) provide a range of statutory remedies for breaches of provisions of the TPA for corporations engaged in trade or

¹⁸ See Isaacs J in *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 81 who quoted Lord Shaw in the case of *Watson, Laidlaw & Co. v. Pott, Cassels & Williamson* [1914] 31 R.P.C. 104, 117-118.

¹⁹ (1971) 124 CLR 303, 308; see also *Enzed Holdings Ltd v Wynthea* (1984) 57 ALR 167, 183.

¹⁶ (1993) 176 CLR 344, 363.

¹⁷ (1993) 176 CLR 344, 371.

commerce. The consumer protection provisions of the TPA are particularly relevant to the travel industry.²⁰

The relevant sections of the TPA

The following sections of the TPA are some of the provisions relevant in the context of travel services:

1. Section 52 which prohibits conduct that is misleading or deceptive or likely to mislead or deceive;
2. Section 53(e) which prohibits a company from making a misleading representation about the price of goods or services;
3. Section 53(c) which requires that if a representation as to any part of the price of a good or service is made, then the full cash price is to be stated; and
4. Section 54 which prohibits a company from offering gifts, prizes or other free items in connection with the supply of goods or services if it does not intend to provide them as offered.

By way of example, in May 2001 following an intensive Australian Competition and Consumer Commission (ACCC) investigation into possible breaches of ss 52 and 54 of the TPA, Ansett Airlines were required to credit Global Rewards Frequent Flyers members who were able to show that they were awarded fewer frequent flyer points than they expected for full economy class travel on Singapore Airlines with the correct number of points. Analogous with damages for disappointment and distress, any affected member was also given an additional 5000 points for their inconvenience.²¹

²⁰ See Australian Competition & Consumer Commission, *Media Release MR 117/02: All Inclusive Pricing in the Travel Industry; Airlines* (2002) <www.accc.gov.au> at 13 May 2002.

²¹ Australian Competition & Consumer Commission, *Media Release MR 114/01: ACCC Action Credits Ansett Frequent Flyers* (2001) <www.accc.gov.au> at 15 May 2001.

With reference to price advertising the ACCC has placed the travel industry on notice that it expects all forms of travel price advertising to comply with the TPA if that pricing is to be all-inclusive.²² The ACCC gave travel industry operations until 30 June 2002 to ensure price advertising complied with the provisions of the Act.²³

Who does all-inclusive pricing apply to?

In its media release of 13 May 2002,²⁴ the ACCC stated that all-inclusive pricing would apply to all travel industry businesses including:

1. airlines;
2. travel agents;
3. internet travel sellers;
4. accommodation providers;
5. television and radio travel programs; and
6. all other industry operators.

What travel products are included?

The ACCC media release of 13 May 2002 also stated that all-inclusive pricing would apply to the following travel products:

1. domestic and international airfares;
2. holiday packages;
3. cruises;
4. accommodation; and
5. tours and car hire.

Damages under the TPA

The remedies under the TPA are frequently pursued together with actions at common law, arising out of the same facts. The relevant section dealing with damages under the TPA is s 82(1) which provides that:

²² ACCC, above n20.

²³ The ACCC has provided compliance guidelines for the travel industry through its website at www.accc.gov.au.

²⁴ ACCC, above n20.

[a] person who suffers loss or damage by conduct of another person that was done in contravention of the provision of Part IV or V may recover the amount of the loss or damage by action against that person or against any person involved in the contravention.

While the focus of this paper is on the issue of compensatory damages, it should be noted that Part VC of the TPA provides that a Court may also impose a fine if it is satisfied that the person (including a body corporate) has contravened a provision of Part V of the Act (with the exception of s 52). The maximum penalty under Part VC of the Act for offences relating to unfair practices is \$1,100,000.²⁵

Damages for disappointment under the TPA

Section 82 of the TPA is very broad and does not contain any limitation on the kinds of loss or damage that may be recovered under the section. Unlike the common law limitations on damages there is no express indication that some kinds of loss or damage are too remote to be recoverable. The section is therefore unrestricted, except by the requirement that the loss or damage suffered by the applicant occur as a result of the respondent's contravention of the relevant section of the TPA. There are a number of examples where claims have been made by travel clients for damages for disappointment or distress following alleged breaches of s 52 of the TPA. In view of the importance of this section its meaning and scope will be briefly considered.

Misleading or deceptive conduct under the TPA

Section 52(1) of the TPA, which is perhaps the most well known provision of the TPA, states, 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead and deceive.'

Whilst the term 'corporation' is used, s 52 will also apply to both unincorporated bodies and individuals as a

consequence of s 6(3) of the TPA where the misleading or deceptive conduct has occurred during the use of the post or telecommunications. Actions for breaches of s 52 are not confined to consumers and in fact many s 52 actions are commenced by industry competitors. Consequently its application has affected all forms of business activity and in particular the area of advertising.

The meaning and scope of s 52 were stated by Lockhart J in *Henjo Investments Pty Ltd v Collins Marrickville Holdings Pty Ltd (No 1)*:²⁶

Misleading or deceptive conduct generally consists of misrepresentations whether express or by silence; but it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation. The section is expressed briefly, indeed tersely, in plain and simple words. ... There is no need or warrant to search for other words to replace those used in the section itself. Dictionaries, one's own knowledge of the developing English language and ordinary experience are useful touchstones, but ultimately in each case it is necessary to examine the conduct whether representational in character or not, and ask the question whether the impugned conduct of its nature constitutes misleading or deceptive conduct.

The principles to be applied in relation to an s 52 claim have been summarised in *Equity Access Pty Ltd v Westpac Banking Corporation*.²⁷

Examples of misleading or deceptive conduct

In *Steiner v Magic Carpet Tours Pty Ltd*,²⁸ a tale of a honeymoon that went awry with unhappy consequences for the applicants, the applicants booked a package holiday to Bali. They were to be picked up from the airport upon arrival and taken to their holiday accommodation. They alleged that they were not picked up and when they found their own way to the accommodation were told that there was no

²⁵ Section 75AZC.

²⁶ (1988) 79 ALR 83, 93.

²⁷ (1990) ATPR 40-994, 50, 950.

²⁸ (1984) ATPR 45-639.

accommodation booked for them. They sought damages for general distress occasioned to both of them and for the mental distress suffered by Mrs. Steiner as a consequence of a breach of s 52 of the TPA. On the evidence their claim failed. However the trial judge, Wilcox J, noted that s 82 of the TPA does not contain any limitation on the kinds of loss or damage that may be recovered under the section.²⁹

In *Baxter v British Airways*³⁰ the applicants alleged a breach of s 52 of the TPA and claimed they had suffered disappointment and distress upon learning that their hopes of realising a holiday in Israel could not be fulfilled simply by the use of an around the world ticket. Again on the evidence the Court held it was unable to find that any damage was sustained. However, Burchett J commented that he was in agreement with the dictum of Wilcox J in *Steiner v Magic Carpet Tours Pty Ltd* in that s 82 is sufficiently wide to include damages for the loss of enjoyment of a holiday and the distress and inconvenience which might be caused by the unavailability of proposed accommodation.³¹

Other remedies under the TPA

In addition to damages, s 87 of the TPA allows the Court to make a wide range of orders against persons who have engaged in conduct contrary to the provisions of the Act. These orders include:³²

1. an order declaring the whole or any part of the contract to be void;
2. an order varying the terms of a contract; and
3. an order directing the refund of money.

Conclusion

Where travel service providers either expressly or implicitly promise to provide clients with an enjoyable and relaxing holiday or travel experience and in breach

fail to do so in full or part, under common law, the victim of a 'spoilt' holiday will be able to recover damages for disappointment and distress. They will be able to do this even in the absence of physical inconvenience. Difficulties in determining the amount of compensation will not prevent the Court from awarding damages.

The ACCC has placed the travel industry on notice that it will closely monitor advertising practices in the industry. Unlike the common law, damages under the TPA are unrestricted and, coupled with the ancillary orders of s 87, can result in serious consequences for travel industry members who breach provisions of the TPA.

²⁹ (1984) ATPR 45-639, 43-642.

³⁰ (1988) 82 ALR 298.

³¹ (1988) 82 ALR 298, 305.

³² Section 87(2).

