Claim No. 2YN75483

IN THE TELFORD COUNTY COURT

B E T W E E N :

MR FIRST PASSENGER

Claimant

-and-

DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT
T/AS LUFTHANSA GERMAN AIRLINES

Defendant

Note of Judgment
given by XX XXXXX
following Trial on 15 August 2013

Order
Judgment in favour of Claimant. Defendant to pay:
Damages: £8,871.50
Interest: £351.46
Costs: £11,730

1.
'This claim concerns some airline tickets that Mr PASSENGER booked on theDefendant's website in March last year. Mr PASSENGER is a businessman and an extremely frequent flyer for business and pleasure. On 12 March he saw on the Defendant's website prices for flights between Prague and Cape Town. He explained in evidence that he needed to make two trips to Cape Town in the months thereafter and that he took advantage of these prices, given that they were extremely low, by booking two return tickets, the first for dates in July and the second for dates in August and September. The price for each return was £1,252.52. The fares were actually priced on the Defendant's website in Czech krona at 35,590 each, inclusive of taxes.

2.
'Having checked that he could set up his business arrangements in South Africa on the relevant dates, on 14 March 2012 Mr PASSENGER booked the two return tickets and paid the purchase price by credit card.

3.
'On 26 March 2012, the Defendant sent Mr PASSENGER a letter by recorded delivery, explaining that the prices in question had been an error and that his tickets would be cancelled. The Defendant offered replacement tickets at 182,700 CZK each, net of taxes which had already been paid. According to the Defendant, the correct price for the tickets should have been 203,000 CZK but someone in the Defendant's pricing department had entered the erroneous figure of 20,300 into the Defendant's system, missing off a zero. It is clear that Mr PASSENGER did not receive theDefendant's letter until 16 April 2012. Prior to

that date, Mr PASSENGER was in Argentina, having been flown there, ironically enough, by the Defendant.

4.
'A series of emails then followed between the parties. The Defendant had in fact already cancelled the tickets and refunded the purchase price before 16 April 2012, and before the expiry of the 14 day cancellation period referred to in the Defendant's letter.

5.
'Mr PASSENGER now sues for damages in order to compensate him for the difference in price between the two tickets he purchased from the Defendant and those he bought from Emirates Airlines by way of replacement, together with the value of the air miles that he would have received from the Defendant. Mr PASSENGER did not accept the replacement flights offered by the Defendant because he found asignificantly cheaper deal with Emirates, which was offering return tickets between Prague and Cape Town at £4,400.46 each.

6.
'The Defendant's case is that there was an error and that the contract entered into via the internet was void for unilateral mistake. That requires me to spend some little time determining the present state of the law on unilateral mistake. There is a surprisingdearth of authorities. Chitty, at paragraph 5-076 of the 31st edition, says this:

"It is not clear whether for the mistake to be operative it must actually be known to the other party, or whether it is enough that it ought to have been apparent to any reasonable man. In Canada there are suggestions that the latter suffices, but the Singapore Court of Appeal has held that the common law doctrine of mistake applies only when the non-mistaken party had actual knowledge of the other's mistake. In England there is no clear authority, but two cases suggest that if the other party ought to have known of the mistake, he will not be able to hold the mistaken party to the literal meaning of his offer."I note also that a unilateral mistake will only invalidate a contract if the mistake is one as to the contract's terms. The two relevant cases referred to in Chitty are
Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd
[1983] Com LR 158and
O.T. Africa Line Ltd v Vickers Plc
[1996] 1 Lloyd's Rep 700. In addition, counselfor Mr PASSENGER has referred me to an older case, that of
Hartog v Colin and Shields
[1939] 3 All ER 566.

7.
'*Hartog* is a brief report. Its headnote correctly encapsulates the judgment and says that a party seeking to validate a contract will only fail if he knew that a mistake had been made by the other party regarding one of the contract's terms.

8.
'*Centrovincial Estates* is the judgment on an appeal from an order granting summary judgment. It is not a trial at all. It contains obiter comments suggesting that the Court of Appeal assumed that one party's constructive knowledge of the other party's mistake was sufficient for the principle of unilateral mistake to apply.

9.

‘*O.T. Africa Line* was a High Court trial in which it seems to me authoritative statements were made by Mance J. Two extracts from the judgment were cited to me that indicate that constructive knowledge is sufficient for the principle of unilateral mistake to apply. Mance J. stated as follows: “… I further proceed on the basis that Vickers would not be bound if they could show that OTAL, or those acting for OTAL, either knew or ought reasonably to have known that there had been a mistake by Vickers or those acting for Vickers… The authorities contain no support for any more widely expressed principle qualifying the binding nature of an apparent agreement…” Mance J. subsequently reiterated the point: “The question is what is capable of displacing [an] apparent agreement. The answer on the authorities is a mistake by one party of which the other knew or ought reasonably to have known.” I note also that Mance J. observed: “There would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he or she said.”

10.
‘These three cases were very different from the case I am trying today.
Hartog concerned the sale of hare skins. These had always been sold by the piece not the pound; one party mistakenly quoted a price per pound. It was held that the other party knew that the price should have been quoted per piece.

11.
‘In each of the other cases, pre-contractual negotiations between the parties were involved.
Centrovincial Estates concerned negotiations in relation to a lease.
O.T. Africa Line concerned negotiations to settle a shipping dispute.

12.
‘I consider it reasonable to distil the position from these cases as follows. The court is concerned as to whether Mr PASSENGER knew or ought to have known that there was an error on the Defendant’s website in respect of the pricing of the tickets under dispute. I must be satisfied that there was sufficient information available to Mr PASSENGER for him to question the pricing. If there existed no sufficient reason for Mr PASSENGER to question the pricing, he will have been entitled to take advantage of what he saw to be a good deal.

13.
‘On the face of the arrangement between the parties, there was a valid and binding contract. The Defendant must therefore satisfy me that (a) there was a mistake; and that (b) Mr PASSENGER knew that there was a mistake, or (c) Mr PASSENGER ought to have known that there was a mistake on the basis of the information available to him.

14.
‘Was there a mistake? Ms AIRLINE, who gave evidence on behalf of the Defendant, said that there were in fact two mistakes. First, a zero was missed off when the ticket price in question was entered into the Defendant’s system; and then, despite an attempt being made to rectify this mistake, some other employee of the Defendant continued to work with the erroneous data. I find this to be an astonishing series of mistakes made by an international corporation of the Defendant’s size and standing.

15.
‘Ms AIRLINE was not involved in the pricing of the tickets bought by Mr PASSENGER. It is very odd that the Defendant has called no direct evidence to prove the error. Ms AIRLINE is the Defendant’s UK customer care manager. I would expect her to deal with customer issues

but it is clear that she has no direct knowledge of the events in dispute and instead relies on information provided to her by one Mr Hennecke. Nonetheless, it seems to me obvious that the Defendant would not have gone through with this litigation if it had not thought that a mistake had been made. Despite the Defendant's short and deficient evidence, therefore, I am satisfied that there was an error.

16.
'Did Mr PASSENGER then know that the price of the tickets that he bought was wrong? There is no evidence at all that he did.

17.
'The case therefore turns on the question of whether, on the date when the contracts were entered into, Mr PASSENGER ought to have known of the Defendant's error.Was sufficient information available to him to indicate that the ticket price was not just a "good deal" but was in fact "too good to be true"?

18.

'I am satisfied that Mr PASSENGER knew of the deal from a friend or fellow traveller or colleague. Counsel for the Defendant suggested that someone must have let Mr PASSENGER know that an amazing deal was available and I consider this likely to have been the case. I also consider it likely that this person made it known to Mr PASSENGER that the deal had been running for some time and that Mr PASSENGER should not delay if he wanted to take advantage of it.

19.
'I am also satisfied that Mr PASSENGER is an extremely experienced flyer.
Mr PASSENGER agreed in oral evidence that he was in the first tier of the Defendant's frequent flyer programme. He accepted that he was used to finding and getting air fares at the best price and that he had a good knowledge of airline pricing structures. Indeed, Mr PASSENGER said that he never paid the full price for an air fare because it was always possible to get a discount, sometimes a very good one.

20.
'All this being said, while Mr PASSENGER is a highly experienced flyer, he is also still a consumer. He is not an airline insider and does not have access to information that is known to airline employees. Ms AIRLINE at the end of her oral evidence commented that she feels that the price of the disputed tickets was obviously too good to be true. But she is an airline insider. Mr PASSENGER is a highly experienced passenger but not an insider. This distinction is important.

21.
'Mr PASSENGER accepts that he compared air fares online, using sites such as Expedia. There is no evidence that there was either a promotion or a sale on at the time Mr PASSENGER purchased his tickets; nor, on the other hand, is there any evidence that the existence of a discount depended upon any such promotion or sale. I have not been provided with any information in this regard such as I would have expected.

22.
'The tickets purchased by Mr PASSENGER were first class Category A. The Defendant's Category A tickets are subject to certain restrictions. The Defendant's Category F tickets are

subject to no restrictions. If one has a Category F ticket, one can change its dates. Ms AIRLINE said, and I know from my own experience, that tickets subject to restrictions are sold at greater discounts. Ms AIRLINE tells me, but there is no documentary evidence to confirm, that Category A tickets are subject only to one restriction, namely that they cannot be cancelled within 24 hours of the date of travel. Mr PASSENGER says that he did not know, and still does not know, what restrictions applied to Category A tickets. In the absence of any further information, it seems to me that I must accept that the tickets were first class Category A and subject to certain, unclear restrictions.

23.
'It is the Defendant's case, and Mr PASSENGER accepts, that numerous factors affect the pricing of airline tickets. The route from London to New York, for example, is a premium route, whereas the route from Cairo to Singapore is nothing like as busy or expensive. The economies of the countries of departure and arrival are important factors. Flights from or to third world countries are likely to be inexpensive, flights from or to first world countries expensive. Market forces are also relevant: is the competition charging less? An airline may also have a desire to promote a particular route.

24.
'By way of comparison, Mr PASSENGER has adduced in evidence the details of several flights that he has taken with the Defendant in the past. The first is from Manchester to San Francisco. This is, I would have thought, a premium route. Mr PASSENGER paid £3,032.91, inclusive of taxes, for a first class Category A return ticket. The second is a flight from Manchester to New York. This again appears to me to be a premium route, on which it would have been difficult to obtain a substantial discount. Mr PASSENGER bought two first class Category A return tickets for approximately £2,600 each, inclusive of taxes. The third is a flight from Cairo to Jakarta, for which Mr PASSENGER bought a first class Category F ticket – that is, a ticket without restrictions and which one would therefore expect to be sold at the highest price – for £2,807.90. The fourth is a flight from Manchester to Singapore, for which Mr PASSENGER bought a business class ticket, which was then upgraded to first class using air miles, for £1,083.71, inclusive of taxes.

25.
'It is argued on behalf of the Defendant that I should ignore this last comparator on the basis that the ticket was business class. But the flight was from one premium destination to another. The distance involved was also very substantial, and this cannot be irrelevant. There was, presumably, plenty of competition for such a fare. I must take such factors into consideration.

26.
'Mr PASSENGER's principle reason for relying on these comparators is not the bare figures in themselves but the percentage discount on the full price fare that they represent. This discount could be as great as 80%. No issue was taken on this point by the Defendant in its evidence. It is accepted, in other words, that Mr PASSENGER could and frequently did pay 20% of the full market price.

27.
'In the case of the present two contracts, the price of the tickets amounts to some 10% of the full market price: without taking taxes into account, each ticket cost approximately £650. The Defendant says that Mr PASSENGER, as a frequent and knowledgeable traveller, must have known that such a discount was a mistake. Mr PASSENGER says that he searches for cheap

air fares, and often finds them at 20% of the full market price. Why, he asks, should a fare at 10% of the full market price be so much more surprising?

28.
‘The Defendant relies on a number of factors. It points to Mr PASSENGER’s substantial experience as a flyer and to the small net cost of each ticket. It emphasises that Mr PASSENGER booked not just one but two flights. However, this seems to me irrelevant: Mr PASSENGER had business in South Africa; he would not fly there twice without reason. The Defendant says that Mr PASSENGER is aware of the factors involved in the pricing of air fares. This is true, but Mr PASSENGER is also aware that air fares are regularly discounted. The Defendant questions Mr PASSENGER’s comparators and argues that only flights on the same route could provide a true comparator. But the evidence is that Mr PASSENGER has not previously flown between Prague and Cape Town and so has no prior knowledge of the cost of tickets on this route.

29.
‘While I accept that the perfect comparator must be based on the same route, it seems to me the comparators that have been adduced do show that very substantial discounts are achievable if one takes the trouble to find them and if one can be flexible about travel dates. The Defendant says that it ran no promotion nor otherwise attempted to highlight the prices for the disputed tickets and that this should have prompted doubts in Mr PASSENGER’s mind. But Mr PASSENGER also says that he gets many heavily discounted tickets without any obvious promotion.

30.
‘Mr PASSENGER booked the tickets under dispute on 14 March 2012. We know that the tickets had been on the Defendant’s website at the price in question since 10 February 2012, that is, by my calculation, for a period of 4 weeks and 4 days. As I have said, I am satisfied that the great likelihood is that whoever told Mr PASSENGER of the deal would also have told him that time was running out and that he should get on it. If Mr PASSENGER did know that there was that lengthy period during which the price in question was advertised, is it to have been taken by him that the price was an error? Would he not have expected the Defendant to have rectified any problem? This very delay must have given Mr PASSENGER comfort that the tickets were indeed a ‘good deal’ and not ‘too good to be true’.

31.
‘In fact, towards the end of his closing submissions, counsel for the Defendant said that the available information ‘hints’ at a mistake. It was put no higher than that. But a ‘hint’ is not enough. However, I do not think that the circumstances hinted at a mistake at all. Looking at all the evidence, I think that Mr PASSENGER thought that he had found a really good deal, took the benefit of it, and was entitled to do so. There was nothing like enough in the surrounding circumstances for him to suspect any error.

32.
‘The Defendant has therefore failed to satisfy me of its case on the balance of probabilities and Mr PASSENGER accordingly succeeds on liability. I hold that there was a valid contract, which was breached by the Defendant in its letter to Mr PASSENGER of 26 March 2012.

33.
‘Mr PASSENGER is therefore entitled to damages to put him in the position that he would have been in had the contract been performed. There is no argument between the parties that

Mr PASSENGER has failed to mitigate his losses. Mr PASSENGER looked at the price of the replacement tickets offered by the Defendant and found cheaper tickets with Emirates. He did the reasonable thing but thereby lost the air miles that he would otherwise have received from the Defendant. Counsel for the Defendant conceded that Mr PASSENGER was entitled to contract with Emirates and that he is therefore entitled to the claimed loss of the value of the air miles.'

34.
Damages were accordingly awarded in favour of Mr PASSENGER for the total claimed sum of £8,871.50. In light of the current economic climate, the Judge was unwilling to award interest at 8% p.a. as claimed and instead ordered interest at 3% p.a., amounting at the date of trial to £351.46 since 19 April 2012, the date on which Mr PASSENGER purchased replacement tickets with Emirates.

35.
On the question of costs, the Judge stated as follows: 'I agree with counsel for the Defendant that the average of the Grade B and Grade D hourly rate listed on the Claimant's costs schedule is about right. I consider, however, that 14 hours (or more) is an enormous amount of time for Mr PASSENGER's solicitors to have spent on client correspondence. I note that his solicitors spent an additional 4.1 hours on the telephone to him. A total of 28.7 hours were spent on documents. While the bundle in front of me contains quite a lot of documents, only one statement per party has been adduced in evidence, and there has been no expert evidence. I take the view that Mr PASSENGER's solicitors could have prepared entirely properly for today's trial in around 18 hours. I also find that 3.8 hours spent instructing counsel is excessive. Taking all this into consideration, I will assess Mr PASSENGER's solicitors' profit costs at £7,000. Under the CPR, the recoverable costs in respect of counsel's brief fee are limited to £690.'

36.
Costs were accordingly awarded in favour of Mr PASSENGER in the total sum of £11,730, inclusive of disbursements and VAT.

37.
Counsel for the Defendant then asked for permission to appeal on the grounds that: (a) the Judge had held Mr PASSENGER to too low a standard of knowledge as a frequent flyer; (b) the Judge should have concluded that Mr PASSENGER was more aware of the factors contributing to ticket pricing; (c) the absence of any advertisement or promotion should have been taken properly into account; and (d) the comparators adduced by Mr PASSENGER were not the proper basis for assisting the court to determine the reasonable extent of a reasonable person's knowledge.

38.
The Judge refused permission to appeal, stating that he had dealt with each of the submitted grounds in his judgment, had heard the evidence and seen the witnesses, and had carried out the necessary balancing exercise in reaching his findings. It would be, he said, entirely inappropriate to grant permission.

39.
If my instructing solicitor requires any further information or has any queries, she should not hesitate to contact me in Chambers.

XXXXX XXX

19 August 2013

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