COURT OF QUÉBEC

Small Claims Division

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL
TOWN OF MONTREAL
Civil Division

No: 500-32-703165-177 and 500-32-703166-175

DATE: December 11, 2020

PRESIDED BY THE HONOURABLE DAVID L. CAMERON, J.C.Q.

AVERY CAMPBELL (500-32-703165-177)
Plaintiff

v.

BRITISH AIRWAYS PLC
Defendant

-and-

JACOB PORTER (500-32-703166-175)
Plaintiff

v.

BRITISH AIRWAYS PLC
Defendant

JUDGMENT

I. Introduction of the Parties and Proceedings

[1] This matter was assigned to the undersigned Judge by the Chief Justice of the Court pursuant to article 326 of the Code of Civil Procedure[1] (C.C.P.), on June 4, 2020. The case had advanced to the closure of the hearing when the judge then seized of the file became unable to act. The undersigned established with the parties, as provided in the article of the C.C.P. that judgment would be rendered on the basis of the undersigned's reading of the file materials and listening to the electronic recording of the hearing.

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[2] The Plaintiffs in these two actions, Avery Campbell and Jacob Porter, each claim from the Defendant British Airways PCL ("British Airways") $ 15,000 as compensatory

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[1] CQLR c C-25.01.

damages for the cancellation by British Airways of their tickets for round-trip first-class air travel between London, UK and Guayaquil, Ecuador.

[3] The reservation was made and the tickets were purchased on October 2, 2017 for a departure from London, Heathrow on August 6, 2018, returning August 10, 2018 from Guayaquil.

[4] The reason given by British Airways for its unilateral cancellation of the tickets was that the price obtained by the Plaintiffs, US$1,069.09, equal to approximately CAN$1,344, was incorrect for a first-class fare to this destination. British Airways asserts in these proceedings that the mistake resulted from a manual input error made when the fare was filed in the computer system.

[5] British Airways alleges that the error, by which the first-class fare was coded as the applicable economy-class fare, was noticed a few hours after the fare was first disseminated and was corrected immediately. Thereafter, the flight was offered at the correct price.

[6] Later, on or about October 5, 2017, British Airways emailed each person who had made a booking at the allegedly incorrect price informing them of three options, that of applying the price paid for the ticket toward a flight to the same destination in economy class, that of the customer retaining the booking by paying the difference between the price already paid and the correct first-class fare for the journey, or, failing the acceptance of one of these options, that of a cancellation of the booking and refund of the sum advanced for the ticket. In cases where no answer was given by a certain date, British Airways would cancel the tickets unilaterally and refund the fare to the person who had paid it.

[7] In the case of the Plaintiffs, since no answer was forthcoming from them, British Airways cancelled the tickets and refunded the fare in full.

[8] Thus, British Airways pleads error resulting in the nullity of the contract.

[9] The Plaintiffs raise the Consumer Protection Act[2] ("C.P.A."), article 224 (c) as prohibiting the imposition by a merchant of a higher price than that advertised for a service and challenge the Defendant's defense of mistake leading to nullity of the contract.

[10] The Plaintiffs compute the amount of their claim with reference to the cost for a first-class journey on the same flights as quoted after they were informed of British Airways' proposal, US$19,857.78, equal to approximately CAN$24,968. Calculated this way, their loss would be greater than the upward limit of the Court's small-claims jurisdiction and they voluntarily reduce their claim to this maximum, $ 15,000.

II. Issues

[11] At the hearing, the judge presiding the trial raised, on her own motion, the issue of the division of the claim. If the loss alleged by the two Plaintiffs is one claim, within

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[2] CQLR c P-40.1.

the meaning of article 538 of the C.C.P. the actions, which would seek to divide the claim into two parts in order to benefit from the small-claims procedure, would be irregular.

This preliminary issue is therefore:

> Have the Plaintiffs unlawfully divided their claim?

[12] The substantive issues relate to the application of the C.P.A. and the theory of mistake in the formation of contracts in the Civil Code of Québec.

[13] These issues can be stated as follows:

1. Did the Defendant commit a fault in imposing a higher price for the travel than the price advertised, contrary to the provisions of the Consumer Protection Act?
2. Was the Defendant in a position to annul the contract represented by the tickets with each Plaintiff because of its error in stipulating the wrong price? This is the issue of excusable error vitiating the party's consent.
3. In the event that the Court finds that the Defendant's conduct constituted a fault, what is the quantum of the prejudice suffered by the Plaintiffs as a consequence?

III. Factual material

[14] A review of certain details pertaining to the facts already mentioned in the above introduction are necessary at this stage.

[15] The Plaintiffs, who are spouses, acting together, decided to avail themselves of a very attractive price for a first-class round trip from London to Guyayquil. Mr. Campbell explained that he is an avid traveller who hunts for cheap flights. He enjoys short trips and the very inexpensive flight offered by British Airways was the sort of bargain he was looking for. He booked the two tickets under one reservation and paid for both, for himself and on behalf of his spouse.

[16] He did this on line on October 2, 2017 through the American Express travel agency. E-tickets were issued immediately.

[17] The next day, he called British Airways and was welcomed by a recorded message to the "British Airways Executive Club for Gold Members". After about ten minutes in the queue, he was answered by an agent to whom he asked whether British Airways would honour the tickets despite the low price. After going through a process of identification, the exchange, which Mr. Campbell recorded and transcribed, reads as follows:

> Avery Campbell [...] I just wanted to know, can you validate the ticket and confirm that British Airways will be honoring the price?
>
> British Airways Validate the ticket to honor the price...Is the ticketed confirmed PNR?

Avery Campbell So, it's a valid booking and British Airways is honoring the price? Is honoring the ticket?

British Airways Yeah.

Avery Campbell Okay. Because, I think the price is quite low. So I just wanted to make sure everyone's on the same page.

British Airways Yeah. I can see it's [inaudible 00:18:13] at the three American Express travelers. There's 1,069 US dollars 9 cents. It's been ticketed so we have no issues because it's been ticketed.

Avery Campbell Okay. That's confirmed in first class?

British Airways It's first class for your London to Miami and your Miami London, uh, Business for your American part of the leg.

Avery Campbell Okay perfect. Thank you so much.

British Airways No problem. Anything else I could do for you today?

Avery Campbell Nope. Have a great day.

British Airways Yourself too. Take care then.

Avery Campbell Bye bye.

British Airways Thank you. Bye bye.

[18] Mr. Campbell followed up with an email sent to British Airways on October 3, 2017 at 4:15 p.m. giving the booking reference number and the date of travel and asking: "Enquiry: Can you please confirm that this is a valid booking that BA is honouring? Thanks!"

[19] The response, emailed on October 5 2017, quoting the booking reference number, reads: "Thank you for your email. I can confirm this reservation has been ticketed on the 2 October. I have resent through the confirmation on a separate email."

[20] Also on October 5, 2017, British Airways sent the circular informing the Plaintiffs of the alleged error.

[21] The text refers to "a manifestly incorrect fare":

> BA always takes great care to ensure that all published fares are correct. However, on rare occasions mistakes are made which cause the display of incorrect fares. Unfortunately, this has happened in relation to the recent booking you made, and the fare you paid was incorrect.
>
> In circumstances where a booking has been concluded on the basis of a manifestly incorrect fare, as is the case here, we cancel the booking.
>
> If you wish to retain the booking, you must pay the difference between the incorrect advertised price and correct price for this journey. Should you wish to do this, and retain the ticket, please **contact** your local BA contact centre by **Monday 9 October 2017 at 5:00pm UK time or two days before your travel date**, whichever is earlier.

> If we do not hear from you by this time, your ticket will be cancelled and you will receive a full refund. We are sorry for any inconvenience caused.
>
> Alternatively, BA can offer you the option of applying the value of the ticket you have purchased toward a flight to the same destination in economy class. This will be a new booking, but you will travel on the same flights, and no additional fare or fee will be payable. Please **contact** your local BA contact centre by **Monday 9 October 2017 at 5:00pm UK time or two days before your travel date**, whichever is earlier if you wish to do this. BA's Conditions of Carriage will apply to this new contract for carriage. Any appropriate tax refunds will be applied by the BA contact centre.
>
> Given that the fare was manifestly incorrect, BA cannot accept any responsibility for any costs or losses incurred as a result of the booking made.

[22] British Airways' representative at the hearing explains the error as having occurred because an employee of Iberia, a related airline company in the "One Word" group, when setting up the pricing for the flight, entered into the computer the letter "A" which, in Iberia's nomenclature, represents a rather low economy fare. In the British Airways codes, the letter "A" means First Class. This "one-letter typo" caused the computer to post a low economy fare for a flight advertised and sold as a first-class flight.

[23] When asked if there was any documentary proof of this, the British Airways representative had none to offer. The perception of the undersigned is that this explanation of the problem is sincerely believed by the witness, but it is a belief about a fact, not the proof of that fact.

[24] British Airways takes the position that the fare is manifestly an error because it is so low in relation to the normal first-class fare, an amount for which the only evidence in the case is the new fare posted when the change was made.

[25] Mr. Campbell challenges this allegation of manifest error, giving examples from British Airways advertising of first-class flights between London and destinations on the American continents for under £2,000 in 2017.

[26] He mentions as well that this destination is not "high volume" and is a "low yield" route, such that the pricing would not have been an obvious error. This additional evidence might be true, but it is not admissible, being opinion evidence.

[27] British Airways points out that this was not a logical journey that the Plaintiffs really intended to make, with a departure across the Atlantic from Montreal, where they reside and with a stay in Ecuador too short to permit a trip to Galapagos. It asserts that Mr. Campbell was not sincere: he is a person who "trolls" the internet looking for errors and in this case made the call and the email communications as an exercise to build a case, knowing full-well that this was a fare quoted in error, hoping to make a windfall when the tickets would be cancelled.[3]

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[3] Much of British Airways case consists in argument « ad hominem », with references to extraneous evidence of his publications concerning consumer-related issues.

[28] Mr. Campbell answers that he is a frequent flyer but not a typical traveller. He mentions that he, for example, would gladly fly to Switzerland for a weekend visit. He also mentioned that he looks for deals and that he would never accept to fly economy for full price. He admits having benefited from an airline's mistake 10 years earlier by taking a Montreal to Santiago de Chile flight for $ 700. He says that when he discussed the mistake with American Airlines, he was told "Go have fun on the tickets". But he does not admit that in this case he knew it was a mistake, nor that it was an obvious mistake.

IV. Analysis

The preliminary question, division of the claim

[29] It is useful to quote the applicable law, articles 538 and 539 of the C.C.P.

> **538.** A plaintiff may voluntarily reduce the amount claimed to $15,000 or less, but cannot divide a claim exceeding that amount into two or more claims not exceeding that amount, under pain of dismissal of the application.
>
> However, a plaintiff is not deemed to have divided a claim if it arises from a credit contract providing for repayment by instalments or from a contract involving the sequential performance of obligations, such as a lease, an employment contract, a disability insurance contract or other similar contract, and if the amount claimed in the application does not exceed $15,000.
>
> **539.** Two or more creditors may join their applications if they have the same juridical basis or raise the same points of law and fact and none of them exceeds $15,000. The court may separate the applications at any time.

[30] The jurisprudence recognises that this principle, which is of public order, can apply in cases where there are more than one plaintiff joining in the same case. An example is plaintiffs exercising an indivisible recourse arising from an undivided right of ownership in property damaged by the fault of the defendant.[4] Only one claim could be brought.

[31] The same result can occur when two parties jointly enter into a contract for services[5].

[32] Conversely, parties can join in a contractual situation for services where one client pays for the group, but each receives the services separately. In one such situation the provider of services could sue each client separately for his unpaid balance, the consideration being that the services, courses for piloting helicopters, were provided to each client individually.[6]

[33] The jurisprudence of the Court of Québec on the application of article 538 is abundant and covers numerous facets of the problem. An exhaustive review of this jurisprudence is best left for another occasion.

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[4] *Centauro c. Hydro-Québec,* 2016 QCCQ 5782.
[5] *Rodrigue Michaud c. Gingras*, 2013 QCCQ 12550.
[6] *Hélipsair inc. c. Bédard,* 2015 QCCQ 5980 ; *Hélipsair inc. c. Bédard,* 2015 QCCQ 5981 ; *Hélipsair inc. c. Marcogliese,* 2015 QCCQ 5982.

[34] In the present matter, though the matter was raised by the trial judge on her own motion, the evidence that came in on the issue clearly shows, in the undersigned's view, that each of the plaintiffs has an individual claim: each claim is not part of a divided claim.

[35] The fact that is perhaps misleading in this case is that the tickets were booked as part of an online booking for the two passengers on the same flight. The two contracts for carriage were formed simultaneously, the Plaintiffs sat together and booked the flight using Mr. Campbell's credit card. Mr. Campbell had authority from Mr. Porter to bind him to the contract formed online: this was a relationship of mandate. Through the mandate, a separate contract was formed between Mr. Porter and British Airways for a distinct ticket.

[36] The booking, made for the two passengers acting together did not create a single indivisible right. This is evident firstly in that the language of the General Conditions of Carriage (P-3) governed by Canadian law and international conventions. Written in plain English, it refers to an individual whose rights are in respect of a ticket issued to the passenger and usable only by the latter, not a collective right indivisibly owned by two individuals.

[37] From the definitions section we read:

> **1. <u>What particular expressions mean in these conditions</u>**
>
> **You, your**-any person holding a **ticket who is to be carried or is carried on an** aircraft, except members of the crew, or, in relation to **ticket** refunds, the person who paid for the **ticket.** (See also the definition of **passenger**.)
>
> [...]
>
> **Passenger** - any person holding a **ticket** who is carried, or is to be carried, on an aircraft, except members of the operating crew. (See also the definition for **you, your**.)
>
> [...]
>
> **Ticket** - either a document called 'Passenger ticket and baggage check' or an **electronic ticket**, which **we** or **our authorised agents** have issued to **you**.
>
> [...]
>
> **3.Tickets**
>
> **3a) General**
>
> **a1) We** will only carry **you** if **you** are the **passenger** named in the **ticket**. **We** may ask **you** to prove that this is the case.
>
> [...]
>
> **3a4) Your ticket** is **our** property at all times if it was issued by **us** or our **authorised agents**. If **your ticket** was issued by or on behalf of another airline, it is the property of the airline which issued it.
>
> **3a5)** Except where you have an **electronic ticket, you** will not be entitled to be carried on a flight unless you have presented a valid **ticket** to **us** containing: -

- the **flight coupon** for that flight
- all other unused **flight coupons** and
- the **passenger coupon**

You will not be entitled to be carried on a flight if the **ticket you** have presented is spoiled, torn or damaged or if it has been altered or tampered with unless **we** or our **authorised agents** have made the alteration.

If **you** are travelling on an **electronic ticket**, **you** will not be entitled to be carried on a flight unless the **electronic ticket** was issued in **your** name and **you** can prove to us that you are the person named on it.

[38] There are a number of similar clauses in the General Conditions of Carriage to the same effect. The passenger at the gate is treated as an individual passenger, not as part of a group. Each passenger must comply with certain obligations before boarding. The drafters of these clauses of the adhesion contract went out of their way to individualise the rights of the passenger under the ticket. An exception is made for the right of refund which is made exclusively to the person who paid for the ticket, requiring proof of payment. The fact that this clause is needed, to preclude reimbursement to a passenger whose ticket was funded by a third party, indicates that, but for that clause, the ticket holder could seek a reimbursement. This is a confirmation that the ticket holder is the party to the contract.

[39] British Airways representative at the hearing confirmed in her testimony that the same package could have been sold separately to each passenger. It is obvious upon reflection that one passenger could decide to cancel, the other to fly alone: It would not require the cancellation of both tickets to cancel one of them. In the present case, British Airways could not have compelled one of the Plaintiffs to accept an economy ticket because the other had done so or refuse a boarding pass to one if he was not in the company of the other. Clearly this is not a joint right to be severed, it is truly two separate rights under two separate contracts entered into with two individuals acting at the same time and with one acting for the other.

[40] The case is clearly distinguishable from cases where the right is indivisible and where the parties are claiming the same object.

[41] The preliminary issue is therefore decided in favour of the Plaintiffs. Each of their separate claims is validly brought within the monetary limit of the Division.

Substantive issues

Consumer-protection issues

[42] The rules of the Civil Code of Quebec concerning vitiated consent apply generally to all contracts, consumer contracts being a sub-set thereof. The purpose of the legislating prohibiting the imposition of a price greater than the one advertised is a rule about conduct that is deliberate and that places a consumer, a vulnerable party, at a disadvantage. In the Court's view, a party to a consumer contract is not precluded by article 224 c) from raising excusable error as a grounds for nullity of contract under article 1400 of the C.C.Q. The legislative intent in enacting article 224 c) of the C.P.A.

was not to permit a consumer to take advantage of a merchant's excusable error as defined in the C.C.Q. to make a windfall, it was to sanction the practice of advertising a price to lure a consumer into a situation where a higher price can be required. A similar consideration arises on the prohibition on making representations that are false or misleading with a view to misleading the consumer. The allegation that British Airways makes about mistake implies the position that there was neither a fault under the principles of proper advertising nor those relating to contractual representations. If British Airways cannot succeed on the issue of error, then, obviously, it is liable both under the C.P.A. and under the general principles of contract law set out in the Civil Code for the simple fact that it did not respect its contractual obligations. The determining issue in this case is therefore the second issue raised above, that of error.

Excusable and inexcusable error

[43] The notion of excusable error is fundamental in the law concerning vitiated consent leading to nullity.

> **1400.** Error vitiates the consent of the parties or of one of them where the error relates to the nature of the contract, to the object of the prestation or to any essential element that determined the consent.
>
> An inexcusable error does not constitute a defect of consent

[44] It is also clear that the burden of proof of an excusable error lies on the party alleging it as a means to avoid a contract, in this case the Defendant:

> **2803.** A person seeking to assert a right shall prove the facts on which his claim is based.
>
> A person who claims that a right is null, has been modified or is extinguished shall prove the facts on which he bases his claim.

[45] In the civil law of Quebec, the question of the manifest or obvious quality of the mistake is not directly relevant to the issue of the question whether the mistake, assuming it was made, was an excusable error on the part of British Airways. At best, is one of a number of elements that form the context in which the Court must assess whether the error, if it was made, was an excusable one.

[46] British Airways seeks to prove that the price was put in place by error without making the direct proof of that, relying on presumptions. To British Airlines, the fare was manifestly or obviously an error, because it was so low in relation to the full price of such a ticket. The mere fact of the extremely low price, without direct evidence of the mistake itself, could, in certain contexts establish the error. Considering the facts of the *Costco* case[7], for example, the advertising of a two dollar (2$) computer was obviously an error, because a retail store does not offer valuable merchandise for nominal consideration. Even in a liquidation, a substantial price would be stipulated. Another

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[7] *Faucher c. Costco Wholesale Canada Ltd,* 2015 QCCQ 3366 ("*Costco*"). Reasonable error was not raised, the case being limited to an assessment of whether the merchant was at fault for false or misleading representations. The obviousness of the error was an essential element in the lack of any prejudice to a consumer who would not have been misled because of the patent error of a purely nominal consideration.

example would be *Néron*[8] where the consideration paid for a luxury two-week vacation was characterized by the judge as "une inadéquation claire". The question whether a price is so low as to constitute proof of an error is largely a question of fact or a mixed question of law and fact, to be left to the trial judge deciding on a specific case.

[47] In our case the Plaintiffs made proof that the fare was advertised at approximately US$19,000 in the following days. British Airlines did not bring evidence of what it would consider to be the normal market price and gave no hint as to its pricing practices. What was the range of possible prices for this itinerary in 2017? Where would the reasonable consumer draw the line between a surprisingly good deal and an obvious error? Does British Airways often obtain buyers for its First Class and Business Class tickets at the maximum price or is that staggeringly high price mostly theoretical? Does it sell off surplus seats in the premium cabins at lower prices; does it allow economy-class passengers to upgrade for a nominal fee and, if so, how often and when? Is there a ratio between full price and sale price below which an airline will prefer to leave the seat vacant sometimes or always? Are these parameters knowable by consumers?

[48] British Airlines did not contest the documentary proof of advertisements produced by the Plaintiffs, for transcontinental flights from London toward points West in 2017, all for less than £2,000. None of the advertised itineraries is identical to the London Guyaquil flight in issue here, but this undisputed evidence does illustrate that British Airlines fares can vary and that first class fares can be surprisingly low. From this it can be inferred that it is not necessarily a mistake when BA advertises a fare that is quite low.

[49] In the present matter, a fare of over CAN$1,000 is, for the consumer, a substantial, not a purely nominal, consideration. Even if it could be shown to represent a loss for the airline, which has not been done here, it would not necessarily be proof of an obvious error. There are a limited number of first-class seats on a commercial aircraft and they can be left empty without the flight being cancelled. The average person, however reasonable, cannot be expected to know when a low price is an error and when it is a calculated marketing decision of the air carrier.

[50] When Mr. Campbell took the step of calling customer service to verify whether the tickets, despite the very low price, would be honoured, the customer-service representative, despite being prompted to doubt the regularity of the fare and thus the validity of the tickets, simply confirmed that, since the tickets were issued, they were valid and would be honored. British Airways' representative at the hearing argued that the customer-service representative would not have any knowledge of pricing matters. If that is true, it would mean that this rep would be in the same position as a consumer to perceive a price as being an obvious error. This particular rep had no such perception, as far as we can see. The evidence we have here tends to undermine the Defendant's theory that the price was an obvious or manifest mistake. If it were, would not the rep have escalated the call to a higher level, or at least make a comment or an enquiry before taking it upon himself to confirm the validity of the tickets?

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[8] *Néron c. Vacances Sunwing*, 2014 QCCQ 1615 ("*Néron*").

[51] The fact that Mr. Campbell made the call shows that he knew that the fare was unusually low. His purpose in calling was to point this out. British Airways relies upon this as part of its argument that he was fully aware it was a mistake, that he made the call and taped it in order to build his case, that the entire episode was carried out by Mr. Campbell in bad faith.

[52] A recent case in the Court of Appeal[9], *Holcome*, sheds light on the notion of the bad faith of the party against whom error is pleaded. The *arrêt* provides a discussion of the possible effect of manoeuvres and omissions to inform the other party made by the co-contracting party at the time of the formation of the contract to surprise the party that later invokes the error. Such conduct can make excusable an error that would otherwise be inexcusable. Even though the trial judge had found that the consumer in a vehicle sale and refinancing contract must have known there was probably some sort of an error in the calculations, the Court of Appeal agreed with the first judge that this did not lead to a finding of bad faith in the circumstances where the consumer was seeking the best price and the merchant was looking for business.

[53] The application of this principle hinges upon causality. If the conduct of the co-contracting party at the time of the formation constitutes bad faith and this conduct causes the other party to err, then the error can be thought of as being excusable on the part of the party who has been tricked or misled. The case that British Airways seeks to make is fraught with difficulty on this point as it will often be the case in consumer cases such as *Holcome* where the merchant is in a stronger position in terms of knowledge of the products, pricing and of procedural anomalies that can lead to pricing errors.

[54] The law does not presume bad faith. On the basis of the evidence, it is more likely that Mr. Campbell, because the price was "quite low", may have suspected that British Airways might later allege mistake or raise some other reason to avoid honouring the contract. This apprehension about British Airways' reliability is not proof of knowledge on his part that the fare was a mistake, nor is it proof of an objectively obvious mistake. At the time the flight was booked, the Plaintiffs did not know if and when the posted price would be changed and they did not know that British Airways would try to annul the tickets. British Airways makes much of the fact that Mr. Campbell knew that the posting of the low fare had been taken down when he called to obtain confirmation of the issue of the tickets and their validity. This may lead to the inference that he suspected the price might be an error when he booked, and that, after the price change was made, he had more reason to believe that this was the case, but it does not, with respect, show that, when he booked the flights and before the price was changed, he **knew** that the price he had obtained was an error. It is also not evidence, as British Airways alleges, that he never had the intention to travel and was simply engaging in an exercise to further a lawsuit against British Airways. Nor is there any suggestion that he caused British Airways to err in the contractual formation stage. He could not have done so as he was not dealing with a human contact, but with a

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[9] *Île Perrot Nissan c. Holcomb,* 2003 CanLII 39504 (QC CA); on appeal from *Île Perrot Nissan c. Holcomb*, 2001 CanLII 21212 (QC CQ) (*"Holcome"*).

computer algorithm when he booked on line. The human representative that he spoke to later ratified the contract.

* * *

[55] *Comtois* c. *Vacances Sunwing inc.*[10] is an example of cases that give little or no weight to the purported obviousness of the error in the determination of the inexcusable nature of the error. In that case, the price offered after the error allegedly discovered was several times the price paid at the time of the formation of the contract for an all-inclusive resort package. The Defendants argued that the obvious disproportion in the pricing made it an obvious error.

[56] The court applied the C.P.A., article 224 c) finding that the written publicity was a written advertising, that the clauses in the internet site purporting to permit the merchant to unilaterally change the price were without effect. (In the present case there is no contractual clause dealing with the issue of pricing error or price changes).

[57] Moving to the issue of mistake, the court considered the alleged mistake of pricing, in the context of the vague explanations given by a sophisticated and large enterprise in the travel field, could not be considered other than a serious negligence. The paragraphs directly on this point merit a careful reading:

> [49] Dans la présente instance, *Sunwing* invoque l'erreur sur le prix affiché et qu'en conséquence, elle ne peut être liée par l'acceptation des demandeurs.
>
> [50] Bien que généralement, l'erreur économique ou encore l'erreur sur la valeur de l'objet d'une prestation n'est pas considérée comme un motif de nullité, elle peut l'être lorsqu'elle constitue un élément essentiel du contrat.
>
> [51] L'erreur sur le prix constituera un vice de consentement à moins qu'il ne soit inexcusable au sens de la loi. (Art. 1400 C.c.Q.).
>
> [52] S'il n'est pas possible de donner une définition rigoureusement précise du caractère inexcusable d'une erreur, il faudra toujours une négligence d'une certaine gravité. Autrement, l'erreur ne pourrait plus être invoquée comme cause de nullité puisque l'on sait bien après coup, qu'elle aurait presque toujours pu être évitée, en prenant des précautions additionnelles[1].
>
> [53] Ce degré de négligence doit être apprécié compte tenu de toutes les circonstances prévalant au moment où l'erreur a été commise. Donc, l'aspect inexcusable de l'erreur doit être apprécié *in concreto*. En d'autres mots, le caractère grossier ou inexcusable d'une erreur s'évalue en fonction des circonstances particulières de chaque dossier[2].
>
> [54] En appliquant ces principes aux faits de la présente affaire, nous devons constater que l'erreur invoquée par *Sunwing* n'a pas été prouvée. La vague explication que quelque part quelqu'un a commis une erreur ne nous apparaît pas satisfaisant pour conclure qu'il n'y a pas eu une négligence d'une certaine gravité.

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[10] *Comtois c. Vacances Sunwing Inc.*, 2015 QCCQ 2684 (*"Comtois"*).

[55] *Sunwing* est une entreprise de grande envergure dans le domaine des voyages. Elle dispose en tant que grossiste d'un réseau sophistiqué pour offrir des produits aux consommateurs.

[56] Elle offre ses forfaits, entre autres, sur internet où les consommateurs peuvent réserver et acheter directement.

[57] Les demandeurs ont suivi les étapes requises et conformément à la documentation de la défenderesse à l'étape 4 du processus d'achat, ils ont eu les confirmations des supposément prix mis à jour.

[58] En l'absence de preuve de ce qui aurait provoqué l'erreur et à quelle étape de l'affichage, il est difficile de qualifier cette erreur dans le cœur même des opérations de *Sunwing* à une étape cruciale de la relation contractuelle avec le consommateur, autrement qu'inexcusable.

[59] On ne peut pas perdre de vue non plus que ce grossiste, en omettant d'afficher le prix correct, contribue à la commission d'une pratique interdite par la Loi. Cela confirme dans une certaine mesure que cette erreur inexpliquée ne peut être due qu'à une négligence grave.

[60] En l'absence d'explications, cette erreur à caractère économique portant sur la valeur de la prestation d'un grossiste commerçant en semblable matière, ne peut être que le résultat d'une négligence évidente de sa part dans la gestion de son entreprise. Les précédents déposés devant le Tribunal démontrent que ce n'est pas la première fois que de telles erreurs sont invoquées par *Sunwing*.

[61] La répétition de semblables erreurs nous apparait démontrer une négligence grossière qui empêche maintenant *Sunwing* d'invoquer l'erreur car elle nous apparait inexcusable.

[62] Les clauses de limitation de responsabilité et des conditions de vente sur Internet peuvent dans certaines circonstances exonérer de la faute ou d'une erreur commises.

[63] Cependant à notre avis, elles ne peuvent permettre de justifier une faute inexcusable.

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1 *Légaré c. Morin Légaré*, AZ-50141864, 2002 R.J.Q. 2237.
2 J.-L. Baudoin et P.J. Jobin, Les obligations, 5e édition, Les Éditions Yvon Blais Inc., 1998, no. 210, p. 205-207.

[58] In this analysis, the unreasonable character of the error makes inapplicable the contractual clauses that limit the seller's liability and confirms the application of the sanctions of the *Consumer Protection Act*. There is no effect given to the seller's allegation that the rates of the package were "dérisoires", in other words, the obviousness of the error because of a very low price is not in play at all in this judgment (except to show that a serious economic error that played out in the heart of the contractual process is clearly negligent). Other cases[11] show a similar absence of

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11 *Labelle c. Voyages Destination inc.*, 2009 QCCQ 12265; *Boghgegian c. Voyages à rabais inc.*, 2017 QCCQ 2410 (*"Boghgegian"*).

application of this issue in favour of the merchant, even where the price difference is dramatic.[12]

[59] In the present case, British Airways does not direct its arguments and evidence to the question of the excusable or inexcusable nature of the alleged error, seeking to explain the nature of the error and the rare occurrence of such errors to show that it is an error in good faith. To the Court, the explanation given, assuming it is an accurate reflection of the facts, shows an inexcusable error. A business as large and sophisticated as British Airways operating within a consortium of airlines known as One World surely has the capacity to build into its booking system programming safeguards to protect the integrity of its on-line system from the type of human error that was allegedly made here. The operation of a business as complex as a major international airline requires information systems that are complex and state of the art. British Airways, who has the burden of proof on the issue, made no attempt to overcome this hurdle.

[60] The explanation that an employee made a clerical mistake based on the difference between an Iberia code and a BA code "A" begs the question of how such an error could be tolerated in an automated and highly computerised environment producing a high number of reservations each day. The documentary evidence in the file shows other examples of British Airways cancelling flights because of "manifest error". The example of the flight to Tel Aviv shows British Airways invoking obvious error in a situation where the reader is left very unconvinced. Such errors can create consternation and confusion in the market and cause prejudice to a traveller who has relied upon a booking and the issuance of a prepaid ticket. This potential for harm to the market and to individual travellers should provide strong incentives to a responsible corporation such as the Defendant to build into its systems a failsafe means of preventing such an error of data entry to be possible to get into the public market online before it is corrected. If the ratio between the posted price and the intended price is high, surely a logarithm can be devised to scan and red-flag such mistakes before they cause harm. This is especially the case if BA considers, rightly or wrongly, the price differences to be "manifest".

[61] In summary on this point, the Court concludes that British Airways has not fulfilled the burden of proof on the issue of excusable error.

The quantum of prejudice

[62] The third substantive issue raised above is the quantum of damages. Cases that we have already referred to such as *Comtois*[13] and *Martel*[14] take the approach to damages that is mathematical: the difference between the price as advertised and contracted for and the price that the merchant sought to impose, failing the acceptance of which the contract would be considered annulled. *Rochefort*[15] is an interesting case

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[12] See for example *Martel c. Transat Tours Canada Inc.*, 2018 QCCQ 7018 (*"Martel"*); *Rochefort c. Vacances Sunwing inc.*, 2015 QCCQ 3141 (*"Rochefort"*).

[13] *Supra* note 10.

[14] *Supra* note 12.

[15] *Ibid*.

where the consumers, in the face of an increased price, abandoned their plans for travel to a resort. The judge in that case assessed moral damages only.

[63] The present case calls for a more complex consideration of the true prejudice caused to the Plaintiffs. The claims are based on the full-price ticket for the same itinerary on the same travel dates as posted by British Airways immediately after the alleged erroneous price was taken down. But this price would have never been paid by the Plaintiffs. Mr. Campbell was clear in his testimony that he travels very frequently, typically at bargain prices and that he would not consider taking this particular trip on the normal economy fare. He is chiefly interested in travelling at low fares, and is adept at finding ways to do so. He has visited many countries this way and intends to continue doing so. The flight to Ecuador was not essential to the Plaintiffs: they booked it because it was such a good deal, not because they were planning a trip to that destination in particular.

[64] It stands to reason that, to mitigate their loss, they would fill the gap left by this cancelled flight, scheduled several months hence, by finding a suitable flight for an interesting destination at as low a price as possible. The measure of their damages, in the context of such a mitigation, cannot be based on the full price The evidence produced showed that British Airways, for one, often has surprisingly low first-class and business-class flights, for example those that were advertised around the same time at fares under £2,000 for transatlantic flights from London. The Plaintiffs would have certainly mitigated their damages by finding the best deal possible in this same period.

[65] Neither of the parties would have been in a position to establish, as of the date of the events, the exact price and trip the Plaintiffs would have settled upon and the Court has limited information about what constitutes a low price. The recourse to expert evidence would not have been warranted here because of the principle of proportionality. This is the Small Claims Division and it is important that the cost to the parties of the proceedings not exceed the value of the claim.

[66] The Court must arbitrate the damages based on reasonable assumptions in cases such as this one, where a scientific quantum assessment is not possible.

[67] In focussing on the Plaintiff's proof of the deals offered by British Airways in the relevant period, in the range of £2,000 for the flights offered to points less distant than Ecuador, it is not unreasonable to infer that the Plaintiffs would have found a trip for that period for something as interesting in the range of £4,000. The conversion rate in October 2017 was roughly what it is currently, approximately one Canadian dollar buying £0.60. It would have cost about CAN$6,700 for such a ticket, i.e. an excess of approximately $ 5,350 more than the approximately CAN$1,350 paid.

[68] In the Court's arbitration, the Plaintiffs would be made whole by an award of that amount. The Parties may also wish to compromise the judgments through an alternative means, such as passes or upgrades, but that is a matter left to their good judgment.

[69] There will be no award of costs since the damage award is greatly reduced from the amount claimed and the previous attempts at a mediated result were sincere.

V. Conclusions

BY THESE REASONS, THE COURT,

In case no. 500-32-703165-177

CONDEMNS the Defendant British Airways PLC to pay the Plaintiff Avery Campbell the sum of $ 5,350, with interest at the legal rate of 5% per annum and the additional indemnity provided at article 1619 of the Civil Code of Quebec calculated from the date of the institution of the proceedings.

In case no. 500-32-703166-175

CONDEMNS the Defendant British Airways PLC to pay the Plaintiff Jacob Porter the sum of $ 5,350, with interest at the legal rate of 5% per annum and the additional indemnity provided at article 1619 of the Civil Code of Quebec calculated from the date of the institution of the proceedings.

Each party paying its costs.

David L. Cameron, J.C.Q.

Date of hearing: October 8, 2019. Taken under advisement October 18, 2019. Order made June 4, 2020 for the case to be continued and terminated by another judge. Consent given by parties under article 327 C.C.P. July 20, 2020.