**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[1998] SGHC 344**

Suit 1832/1996

Between

Aircharter World Pte Ltd

*… Plaintiff*

And

Kontena Nasional Sdn Berhad

*… Defendant*

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# GROUNDS OF DECISION

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# Aircharter World Pte Ltd v Kontena Nasional Sdn Berhad

**[1998] SGHC 344**

Suit 1832/1996
Kan Ting Chiu J
15 October 1998

**Judgment :**

**GROUNDS OF DECISION**

1. The Plaintiff claimed from the Defendant US$200,000. This arose out of negotiations to charter of a Boeing 747 aircraft by the Defendant from the Plaintiff to transport peace-keeping troops from Malaysia to Bosnia. That operation was subsequently cancelled and the charter was aborted. Following that the Plaintiff made its claim for US$200,000 against the Defendant, but the basis on which it made its claim was never clear.

Basis for the claim

2. By the statement of claim, the claim was based on an oral agreement made on 14 September 1995. It was for the payment of the "Deposit and Reduced Cancellation Fee which was due and payable under the Agreement" and referred to the Plaintiff's invoice No. 02/09 dated 25 September 1995 to the Defendant. The invoice was for the payment of the "advance contractual fee by ACW to

principal." ACW referred to the Plaintiff, and the principal was Aircharter World (USA).

3. The Plaintiff also relied on the provisions of an unsigned charter agreement, of which there were two drafts, one prepared on 14 September and another on 15 September.

4. The total charter price was US$1,693,000. The same terms of payment appear in both drafts by which clause 4(b) required payment of US$200,000 "as deposit due confirmation."

5. However the second draft contained a cancellation provision, clause 7, which was not in the first draft. Clause 7 reads

> If the Charterer wishes to terminate or cancel this Agreement, the following rates will be paid forthwith by the Charterer to Aircharter World as agreed compensation: (a) 25% of the Charter Price if cancelled upon signing of contract, (b) 100% of the Charter Price if cancelled 48 hours before departure of aircraft to Kuala Lumpur.

The agreement

6. It was common ground that no charter agreement was executed. Two drafts were prepared, but neither was signed.

7. On 12 September 1995 the Plaintiff made a written offer to the Defendant for the charter of an aircraft. Among the terms was clause 4(b) in identical form to that appearing in the two versions of the charterparty, but with no cancellation provision.

8. On 14 September the Freight Forwarding Tender Committee (FTC) of the Defendant met to consider tenders received for the charter, and the alleged oral

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agreement followed the FTC's decision to accept the Plaintiff's offer over bids from three other parties.

The evidence

9. The oral contract was alleged to have arisen from a telephone conversation between Abdul Hamid bin Abdul Momin (Hamid Momin) an executive of the Defendant who has since left the company, and Teo

Keng Leng or Brandon Teo, a director of the Plaintiff. Both of them gave evidence for the Plaintiff.

10. Hamid Momin gave evidence first. In his affidavit of evidence-in-chief he referred to the telephone conversation that

> I spoke to Teo on 14th September 1995 to confirm that the Charter was proceeding. I wanted Teo to confirm to me on the telephone that the contract was firm and he did so confirm. I then on behalf of the Defendants sent the Plaintiffs a confirmation.

11. In the confirmation fax he requested the Plaintiff to "(p)lease forward us the draft copy of the charter agreement for our perusal." In his affidavit he deposed that the Plaintiff sent a draft agreement to him, and exhibited the second draft agreement, but he omitted any reference to the first draft.

12. The fax was sent after the FTC had met and decided to accept the Plaintiff's offer. The minutes of the meeting recorded that the Assistant Manager Government Services, was to enquire from the Plaintiff whether any additional charges were included in the offer.

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13. Hamid Momin gave oral evidence over two days. On the first day he said that he did not speak to Teo before he sent the fax, then he clarified that he called Teo while the fax was being typed. When he called Teo, he had not seen either draft of the charter. They agreed that the Plaintiff was to proceed to book the aircraft. He saw the two drafts on 15 September, spoke with his senior manager, and then called Teo on the telephone. Prior to 15 September there was no discussion between him and Teo on the payment of US$200,000 deposit or cancellation fee and both he and Teo regarded the booking fee as refundable.

14. His evidence of the first day did not support the Plaintiff's case that there was an oral agreement made on 14 September that gave rise to the Plaintiff's claim for US$200,000.

15. However when he continued with his evidence on the following day, his account of the conversation was transformed. He asserted that the oral agreement included the cancellation term, that everything in the second draft charterparty was discussed and agreed to on 14 September, and that the deposit was non-refundable. His explanation for the changes was that "(t)he matter happened in 1995. Now is 1998. I may tend to forget." This was not a satisfactory explanation. There was no expression of any difficulty with his memory when he gave evidence on the first day. He must have known before he came to court that he would be giving evidence on the conversation, and could not have been surprised to be questioned on it. On the second day he was not filling in gaps in his recollection after further reflection. He was making radical overnight changes to his evidence for reasons best known to him.

16. Teo Keng Leng deposed in his affidavit of evidence-in-chief that he had sent a quotation to the Defendant on 12 September 1995. He also deposed that on 14 September 1995 an oral agreement was made between him and Hamid Momin

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that the Plaintiff was to lease an aircraft to the Defendant. Hamid Momin followed up on the conversation with a fax dated 14 September requesting him to "(p)lease forward us the draft copy of the charter agreement for our perusal."

17. Teo set out in his affidavit the terms of the draft charter agreement. By his account a draft agreement was forwarded which included the cancellation clause found in the second draft of the agreement. No mention was made of the first draft agreement without that clause. When he was cross-examined he conceded that two drafts were sent, the first on the evening of 14 September and the second on 15 September and that the cancellation clause was present only in the second draft.

18. He explained that upon receiving the Defendant's confirmation, the Plaintiff confirmed the booking of an aircraft with its principal, Aircharter World (USA) and became liable to pay Aircharter World (USA) a non-refundable booking fee. No documents relating to the agreement between the Plaintiff, Aircharter World (USA) and the owner of the aircraft were disclosed, except for a letter from the principal dated 18 September 1995 stating that the lessor was prepared to reduce the cancellation fee from US$396,000 to US$200,000, which led to the issuance of the Plaintiff's invoice to the Defendant on 25 September.

19. He said that the cancellation clause was agreed to on 14 September. When he realised that the clause was omitted from the first draft agreement sent to the Defendant, he instructed the second draft to be prepared and he called Hamid Momin on the morning of 15 September to advise him of the amendment.

20. The Defendant's counsel asked him whether the Plaintiff's claim was for the deposit or the cancellation fee. His reply was that it was for the "(d)eposit to fix the aircraft." When asked if the deposit was refundable or non-refundable,

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he said that they had not spoken on that. When it was pointed out to him that the invoice was for the advance contractual fee paid by the Plaintiff to its principal, he said it was for the down payment, then he said "This $200,000 is to fix the aircraft contracted, whether cancellation or deposit it is my contract with Kontena Nasional (the Defendant)" and finally he stated that it did not matter to him whether that sum was payable as a cancellation charge, a reduced cancellation charge, advance contractual fee, or deposit, because the Plaintiff wanted the Defendant to bear the payment it had to pay to its principal to secure the aircraft.

The defence

21. The Defendant disputed that there was any contract made on 14 September 1995. It also contended that Hamid Momin did not have the authority to contract on its behalf, but this defence was not pursued during the trial.

22. The only witness for the Defendant was its Senior Manager Improvement, Azmin Bin Che Yusoff, who chaired the FTC meeting of 14 September 1995. He was not involved in or briefed on the conversation between Hamid Momin and Teo.

23. His evidence was that the Plaintiff's offer of 12 September 1995 was not presented or discussed at the meeting. The committee had only decided to accept the Plaintiff's rates at that meeting. The committee had directed that clarification was to be sought if there were other charges that may be payable, and the matter was to be discussed further by the committee.

Review of the evidence

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24. Hamid Momin was unsure if he spoke to Teo on 14 September or 15 September. He also contradicted himself on whether they spoke about the deposit and cancellation fee. He and Teo only referred to the second draft charter agreement of 15 September in their affidavits, and failed to disclose the first draft agreement of 14 September which did not have the cancellation clause.

25. Hamid Momin's evidence was that the second draft agreement was faxed to him after he told Teo on 14 September that he had not received the first draft. Teo's evidence, however, was that he sent the second draft on his own accord when he realised that the cancellation charges clause was omitted, and he called and told Hamid Momin of the amendment. There was no evidence from Hamid Momin that he received this call from Teo.

26. I found their evidence to be confused and unsatisfactory, and that it left a serious doubt over whether the cancellation fees were brought up on 14 September.

27. The unsigned draft agreements were significant. The Defendant had asked for the agreement for its perusal, not for execution. From the minutes of the FTC meeting, the committee accepted the Plaintiff's price over that offered by the other bidders, but it did not approve the terms of the charter agreement which was not before it. The committee wanted more information from the Plaintiff, and Azmin bin Che Yusoff's evidence that the matter had to be considered further by the FTC was not disputed.

28. Indeed Hamid Momin's evidence was

> A: … The committee decided to award to Aircharter World. During the meeting they instructed me to liaise with Brandon Teo that they are awarding the job to Aircharter World.

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> Q: The committee wanted you to inform Brandon Teo that they were awarding the job to the Plaintiffs and you were to liaise with him?
>
> A: Yes. …
>
> Q: What liaison were you required to do?
>
> A: To inform that the committee had agreed to award the job to Aircharter World.

It was clear from his answers that he was not instructed to discuss or settle the terms of the charter agreement with Teo that day.

29. In the circumstances, I found that there was no oral agreement made on 14 September on the deposit or the cancellation fee.

30. Although the statement of claim described the US$200,000 claimed as deposit and reduced cancellation fee payable under the oral

agreement, it was not really for that. The Plaintiff's invoice was for advance contractual fee paid by the Plaintiff to its principal. This was not provided for in either draft of the charter agreement and was not alleged to have been discussed or accepted in the conversation.

31. The uncertainties and confusion in the Plaintiff's claim were not resolved. Serious doubts remained over whether there was an oral agreement made on 14 September, whether it included the deposit and cancellation provisions and whether the claim came within the alleged agreement. In the result the action was dismissed.

Kan Ting Chiu

Judge

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Kan Ting Chiu J

Yap Teong Liang with Yap Pett Chin (Salem Ibrahim & Partners) for the plaintiff
Ragbir Singh s/o Ram Singh Bajwa with Zaminder Singh Gill (Kertar & Co) for the defendant

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