



2024 UQ UNJUST ENRICHMENT MOOT

**CAPE YORK TRAVEL PTY LTD (in liq) v RUNTAS
AIRWAYS LIMITED**

BRISBANE, AUSTRALIA

SEPTEMBER 22nd – 25th

IN THE HIGH COURT OF AUSTRALIA

BETWEEN:

CAPE YORK TRAVEL PTY LTD (in liq)

Appellant

and

RUNTAS AIRWAYS LIMITED

Respondent

SUMMARY OF AGREED FACTS

1. Cape York Travel Pty Ltd (“**CYT**”) is a travel agent based in Cairns. At all material times, its business almost entirely comprised selling tickets for flights to Far North Queensland on planes owned by Runtas Airways Limited (“**Runtas**”). Runtas is the national flag carrier airline of Australia and, at the relevant time, was the only airline operating direct flights between Australian capital cities and Far North Queensland.
2. In 1986, CYT entered into a Passenger Sales Agency Agreement (“**1986 PSAA**”) with Runtas. The relevant provisions of the 1986 PSAA may be summarised as follows:
 - (a) Clause 9 provided for Runtas to remunerate CYT “for the sale of air transportation and ancillary services”. Such remuneration was to be “in a manner and amount as may be stated from time to time and communicated to CYT by Runtas”;
 - (b) Clause 12 provided that Runtas was obliged to provide CYT with a ticket allocation of at least 30 tickets per fortnight, but was otherwise entitled to allocate tickets at its sole discretion; and
 - (c) Clause 13 provided that the contract could be terminated by either party with one month’s notice at any time.
3. On 26 October 2020, several Australian travel agents commenced proceedings against Runtas in the Federal Court of Australia for alleged non-payment of commission (“**Non-Payment Proceedings**”).

-
4. On 28 October 2020 at 10.39 pm, Runtas' CEO sent an email to Runtas' Executive Manager (Regional):

Obviously we are liable here, but I cannot afford this right now. If we had known that the agents were going to come after us, we would have lowered their commission rates. Keep the regional agents out of the claims. We have plenty of leverage.

Sent from my iPhone

5. On 1 November 2020, Runtas gave notice to CYT that the 1986 PSAA would be terminated at the end of the month.
6. On 3 November 2020, CYT's fortnightly ticket allocation was immediately cut from 150 to 30. This reduction in ticket allocation had a major impact on CYT. If the reduction continued for much longer, it would put CYT out of business.
7. On 8 November 2020 at 10:22 am, CYT's CEO sent an email to its Contracts Manager:

We had better take this deal, mate. You know as well as I do that we can't afford lawyers right now. I would rather keep Runtas on side. Who knows if this claim has merit anyway.

8. At a meeting on 10 November 2020, CYT signed a new agreement with Runtas ("**New Agreement**"). The relevant provisions of the New Agreement may be summarised as follows:
- (a) Clause 1 incorporated the 1986 PSAA "as if its terms were repeated herein in full";
 - (b) Clause 3 provided that the agreement "supersedes, nullifies, voids and replaces" all previous agreements between the parties;
 - (c) Clause 6 provided that CYT would "release and discharge Runtas from any and all claims, costs, liabilities or actions of any nature whatsoever and howsoever arising which have, may now or in the future arise from, or otherwise be connected in any way whatsoever with any commission or remuneration, or the calculation of the amount of any commission or remuneration, due to CYT from Runtas";
 - (d) Clause 7 provided that CYT would pay an annual "Agency Retention Fee" to Runtas of \$250,000. The Agency Retention Fee was returnable at the end of each financial year, provided that CYT sold at least 60 tickets per month; and
 - (e) Clause 8 provided that the agreement would "remain in force until terminated by either party giving 60 days written notice of termination to the other party".
9. On 1 December 2020, CYT paid \$250,000 to Runtas in accordance with clause 7 of the New Agreement.

-
10. On 22 May 2021, CYT went into liquidation.
 11. On 5 July 2021, Allsop CJ of the Federal Court of Australia delivered an *ex tempore* summary judgment against Runtas in the Non-Payment Proceedings. Runtas did not appeal.
 12. On 11 October 2021, the liquidators of CYT initiated the present proceedings against Runtas for underpayment of \$1.5 million in commission under the 1986 PSAA and restitution of the \$250,000 Agency Retention Fee. In its concise statement, CYT raised the same arguments that had been vindicated in the Non-Payment Proceedings. It further claimed that the New Agreement was voidable on the grounds of economic duress and that Runtas was liable to repay the Agency Retention Fee on that ground.
 13. Runtas filed a concise statement in response on 28 October 2021. Runtas did not dispute that CYT would have been entitled to recover the \$1.5 million in additional commission if it had joined the Non-Payment Proceedings. Instead, Runtas argued that CYT had waived its right to pursue the present claim. It further denied that the New Agreement was voidable for duress, or that it was liable to make restitution of the Agency Retention Fee.
 14. On 13 December 2021, Allsop CJ determined that the present case was of sufficient importance that it was appropriate for a Full Court hear the matter pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth).
 15. On 1 June 2023, the Full Court of the Federal Court of Australia delivered judgment in favour of Runtas, upholding the validity of the New Agreement and denying restitution of the Agency Retention Fee. The Court's unanimous judgment included the following:

[21] At the hearing, both parties accepted that Runtas had not acted in breach of contract, or otherwise unlawfully, in November 2020. That concession was properly made.

...

[137] We are satisfied, on the balance of probabilities, that Runtas believed in November 2020 that it was liable to CYT for underpaid commission. We found Runtas' CEO to be a wholly unreliable witness, and we have accepted his testimony only to the extent that it is corroborated by the contemporaneous documents or constitutes an admission against interest.

...

[182] In *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149, the Court of Appeal of the Supreme Court of New South Wales rejected the existence of lawful act duress. Although the correctness of that decision was expressly left open in *Thorne v Kennedy* (2017) 263 CLR 85, we cannot depart from *Karam* unless we believe it is plainly wrong: *Farah Constructions Pty*

Limited v Say-Dee Pty Limited (2007) 230 CLR 89 at [135]. For the reasons below, we have not formed such a belief.

[183] Our concern is best summarised by Peter Birks in *An Introduction to the Law of Restitution* (Clarendon Press, rev ed, 1989) at 177:

Can lawful pressures also count? This is a difficult question, because, if the answer is that they can, the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality. In other words, the judges must say what pressures ... are improper as contrary to prevailing standards. That makes the judges, not the law or the legislature, the arbiters of social evaluation.

...

[219] Even if lawful act duress does exist in Australia, we still would not have regarded Runtas' pressure as illegitimate. In this respect, we gratefully adopt the reasoning of the majority in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2023] AC 101.

....

[232] If we are wrong on these points, we take the view that, although CYT genuinely believed it had to enter into the New Agreement in November 2020, it had another reasonable option to it, namely to join the Non-Payment Proceedings alongside Runtas' other creditors. The New Agreement cannot therefore be set aside, even if it was in fact induced by illegitimate pressure on the part of Runtas.

...

[245] Based on the email of 8 November 2020, we find that Runtas' pressure was 'a factor' in CYT's decision to enter into the New Agreement, but that the evidence is insufficient to show that CYT would not have entered the New Agreement 'but for' that pressure. In light of our conclusions above, it is unnecessary for us to decide whether these facts are sufficient to establish causation as a matter of law.

16. On 23 June 2023, CYT filed an application for special leave to appeal to the High Court of Australia.
17. CYT's application was considered on the papers. On 18 February 2024, the High Court of Australia granted special leave to appeal with respect to the following issues:
 - (1) Was the pressure that Runtas applied to CYT illegitimate?
 - (2) Does the availability of a reasonable alternative to entering a contract preclude rescission of that contract, or restitution of monies paid under it on grounds of duress? If so, did CYT, have any other reasonable option open to it other than to enter into the New Agreement, so as to preclude rescission of that agreement and restitution of the Agency Retention Fee?

(3) In order to rescind a contract and obtain restitution of monies paid under it on the ground of duress, is it sufficient for the rescinding party to prove that illegitimate pressure was merely ‘a factor’ in their decision to enter the contract? Did Runtas’ pressure legally cause CYT to enter the New Agreement?

18. Both CYT and Runtas have briefed new counsel to take over the case in the High Court. Senior Counsel have been asked to address issue 1. Junior Counsel have been asked to address issues 2 and 3. Chief Justice Gageler has re-introduced the Brennan Court’s strict time limits for oral address.