QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL

|  |  |
| --- | --- |
| CITATION: | Flight Centre v Diane Nochevan & Anor [2022] QCAT 206 |
| PARTIES: |

|  |
| --- |
| Flight centre TRAVEL Group limited  |
| (Applicant) |

 |
|  | **v** |
|  |

|  |
| --- |
| Diane Nochevan |
| (Respondent) |
| william nochevan |
| (Respondent) |

 |
| APPLICATION NO/S: | APL070-21 |
| MATTER TYPE: | Other minor civil dispute matters |
| DELIVERED ON: | 21 June 2022 |
| HEARING DATE: | 13 June 2022 |
| HEARD AT: | Brisbane  |
| DECISION OF: | Judicial Member Forrest SC |
| ORDERS: | 1. Leave to appeal granted.
2. Appeal allowed.
3. The Orders made on 18 February 2021 are set aside.
 |
|  | 1. That of the sum of $18,568 paid by the Respondents to the Appellant by way of deposit for booked travel that could not be undertaken due to COVID-19 related travel restrictions, the Applicant/Appellant is not liable to repay the Respondents any part of the sum of $8,040 that is not refunded to the Applicant/Appellant by the travel providers and suppliers who were booked to provide it.
 |
| CATCHWORDS: | APPEAL – LEAVE TO APPEAL – where the Applicant seeks to appeal a decision by a Magistrate sitting as a Tribunal Member in a Minor Civil Dispute – where leave is grantedAPPEAL – MINOR CIVIL DISPUTE – where the reasons given by the Magistrate were inadequate and erred on a mixed question of law and fact – where the respondents claim a refund of their deposit with the applicant travel agency – where travel could not take place due to COVID-19 travel restrictions – where the terms of the contract protected the applicant from liability to the respondents for loss occasioned to them by actions of government and third-party providers – where the applicant is found not liable to the respondents for any other part of the deposit withheld by providers and not refunded – where the appeal is allowed*Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 3, 4 and 28; ss 142(3)(a)(i) and (3)(b)*Commissioner for Children and Young People and Child Guardian v FCG* [2011] QCATA 291*Pickering v McArthur* [2005] QCA 294 |
|

|  |  |
| --- | --- |
| APPEARANCES & REPRESENTATION: | This matter was heard and determined on the papers pursuant to s 32 of the Queensland Civil and Administrative Tribunal Act 2009 (Qld) |

 |

#### REASONS FOR DECISION

1. This is an application for leave to appeal and, if granted, an appeal against the orders of a Magistrate sitting as a Tribunal Member in a Minor Civil Dispute.
2. The dispute arises out of the unfortunate experiences that so many Australians had in 2020 when the COVID-19 pandemic caused the Australian Government to enforce the most serious travel restrictions against Australians leaving this country. The consequences of those travel restrictions significantly impacted the plans of so many Australians, many of whom had expended a lot of money on pre-booked travel arrangements, often through travel agents such as the Applicant/Appellant in this matter.
3. That is what has happened to the Respondents. They planned what might have been the family trip of their lifetimes, working closely with an employee of the Applicant/Appellant. They and their daughter and son-in-law were going to fly to South Africa and spend some time in that country. Their plans included flying to and from some other countries in Africa, including Uganda where they were going to have the wonderful experience of getting up close to some mountain Gorillas.
4. Once their plans and itinerary were fixed by agreement between the female Respondent and the employee of the Applicant/Appellant, an email was sent through to the female Respondent. That set out the total cost of the planned trip and the details of it. It requested, if the Respondents accepted the planned itinerary and arrangements, a deposit of around $18,000 out of a total cost of around $53,000 to confirm acceptance and secure and pay for bookings of the South African Airways African domestic flights, some other land-based accommodation bookings and the Ugandan Gorilla experience that the Applicant/Appellant had booked for the Respondents.
5. Attached to the email were the terms and conditions of the contract that the Applicant/Appellant was inviting the Respondents to accept by paying the deposit.
6. As one might expect, the terms and conditions offered by a company as large and commercially successful as the Applicant/Appellant were clear and precise, though detailed and lengthy. They were made available to the Respondents and they were encouraged to read them before paying the deposit.
7. Excitedly, no doubt, the female Respondent signalled the Respondents’ acceptance of the terms and conditions offered by paying the $18,000 deposit asked of them to confirm the deal and secure the bookings that needed to be locked in. As one might expect, money was sent through to the wholesaler by the Applicant/Appellant and some of that was sent through to South African Airways ($6,720 for tickets for air travel in Africa) paying the full cost of seats on particular flights, as is the usual practice in the airline industry. Several thousand dollars were also sent to Uganda to pay for and secure bookings for the Gorilla experience. Other things were paid for, too, using that deposit money.
8. Unfortunately, the pandemic intervened and the Respondents were not permitted by the Australian Government to travel to Africa in September, 2020. It became clear that they would not be able to travel a couple of months after they had paid their deposit but before they had paid the balance. In essence, they had to cancel their booked trip, not because they wanted to, but because they had no choice but to.
9. The Applicant/Appellant worked to obtain refunds of the monies that had been paid through the wholesaler to various providers in Africa and was successful in most respects. They were not able to obtain a refund of the amount of $6,720 from South African Airways who only offered credits for future travel. They were not able to obtain a full refund of the money from Uganda in respect of the Gorilla experience. On cancellation of that part of the trip, the Ugandans retained $1,320 of the amount paid.
10. The Applicant/Appellant was able to obtain $10,568 that had been paid from the deposit and agreed that was refundable to the Respondents. The sum of $8,040 could not be recovered. The Applicant/Appellant was not retaining any of the deposit paid as payment for any of the service it had provided.
11. Unhappy with that outcome, the Respondents commenced minor debt proceedings in the tribunal claiming the sum of $18,608 owed to them. They also claimed their filing fee of $345.80.
12. The claim was heard by a Magistrate sitting as the Tribunal hearing the minor civil dispute. The Magistrate determined that the Respondents’ loss was $8,040 and that the Applicant/Appellant should bear one-fifth of that loss in the amount of $1,608. Adding that to the amount of $10,568 the Applicant/Appellant was prepared to repay to the Respondents, the Magistrate ordered that the Applicant/Appellant pay the Respondents the sum of $12,176 and $345.80 for the filing fees they had paid.

# The Appeal

1. The Applicant/Appellant seeks leave to appeal that decision.
2. Given this is an appeal from a decision made in the Tribunal’s minor civil dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.[[1]](#footnote-2)
3. Leave to appeal is also required where an appeal is in relation to questions of fact and/or mixed fact and law.[[2]](#footnote-3)
4. Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.[[3]](#footnote-4)
5. The grounds of appeal are extensive. They are as follows.
6. Ground 1 – that the Tribunal erred in law in failing to provide adequate reasons.
7. Ground 2 – that the Tribunal erred in law in failing to have regard to the Applicant/Appellant’s evidence and submissions relating to the contract between the Applicant/Appellant and the Respondents, its terms and conditions and the legal effect of those terms and conditions.
8. Ground 3 – that the Tribunal erred in law in failing to find that the contract was one of agency only, under which the Applicant/Appellant made travel bookings on the Respondent’s behalf and arranged contracts between the Respondents and travel service providers, and failing to find that the Applicant/Appellant concluded a contract between the Respondents and a travel service wholesaler in relation to the supply of flights, accommodation and activities in Africa, and failing to find that a term of the contract between the Applicant/Appellant and the Respondents was that the Respondents’ rights in connection with the provision of travel services (including any cancellation thereof) are against the specific provider and not the Applicant/Appellant, and failing to find that a term and condition of the wholesaler’s contract with the Respondents was that a deposit was “non-refundable”, or, in the alternative, that the Applicant/Appellant was not obliged to refund the Respondents in the event of a cancelled booking unless the wholesaler had provided a refund to the Applicant/Appellant.
9. Ground 4 – that the Tribunal erred in law and in fact by taking into account irrelevant considerations and making findings where there was no evidence to support such findings – namely, that the Applicant/Appellant existed to give confidence to customers that any booking will be honoured; that the Applicant/Appellant had an obligation to its customers to be cautious at a time of uncertainty; that the Applicant/Appellant was in “a far better position” than the Respondent and her family to assess the risks involved; that there was some “unease in the industry as to what then [sic] likely effects of the descending pandemic might be”; and that the loss suffered by the Respondent and her family was $8,040.
10. Ground 5 – that the Tribunal erred in concluding that the Respondents were entitled to a refund from the Applicant/Appellant in the amount of $1,608.

# The Magistrate’s Decision

1. In determining the dispute, the learned Magistrate said:-

The dilemma is who should bear the cost of the unexpected and far from predictable closure of international travel. It seems to me unfair that where a consumer approaches a travel agency to make a booking that cannot be honoured, the consumer should be denied a refund. Certainly, if the deposit was held – still held by the Flight Centre, there would be – there could be no hesitation in the refund. The difficulty is that the party refusing to refund is not Flight Centre, but an organisation.

If I digress briefly to contemplate the situation where a consumer contracted by those same parties where – whether there would be any recourse in this tribunal, and I think the answer is no. And it is for that very reason that companies such as Flight Centre exist, to give confidence to travellers that a booking – that any booking made will be honoured. I am referred to the Australian consumer law, and I am not able to conclude that anything that Flight Centre did offended the code. They have simply paid for something that cannot be enjoyed by Mrs Nochevan and have been unable to secure a refund from that third party. If those third parties were in Australia, I do not doubt that action could be taken against them. But they are not. I have had cause to have other considerations to having regard to the industry that Flight Centre is in, and the expertise that they have as a result of their exposure to the travel industry and the obligation that they have to their customers to be cautious at a time of uncertainty. It seems to me that around the time the deposit was taken there would have been some unease in the industry as to what the likely effects of the descending pandemic might be. They would have been in a far better position than Ms Nochevan and her family to make an assessment of those risks – of the risk involved, and, as such, I’ve formed a view that they should share some of the loss that has been incurred.

The assessment of how much that should be is really an appreciation of what is fair in the circumstances, and I’ve settled on the figure that each of the parties should bear a proportion of the loss. There are really five parties to the loss; Flight Centre and the potential tourists. The loss incurred is $8040. Each of the parties should, I think, bear equally that loss. One-fifth of the loss is $1608 and that is the cost that should be borne by Flight Centre.

1. The Applicant/Appellant had put evidence and written submissions before the Magistrate. That evidence included certain terms and conditions of the contract of service between the Applicant/Appellant and the Respondents. Their submissions referred to that evidence and the submitted effect of those terms and conditions, having regard to the law of contract, on the outcome of the case.
2. In the passage cited above, which is the extent of the reasons given by the learned Magistrate in determining the dispute, the learned Magistrate was, as required, dealing with it, I have no doubt, in a way that he considered was fair, just, quick, informal and economical.[[4]](#footnote-5)
3. The Tribunal’s reasons do not have to be long and detailed but they do have to give appropriate and sufficient reference to the relevant evidence, the material findings of fact that were made, and the applicable law and the reasons for applying it in the way expressed in the decision.[[5]](#footnote-6) They did not do that in an appropriate way. As such, they cannot be considered adequate. Ground 1, I find, is made out. Further, they show no real engagement with the evidence and the submissions that were made by the Applicant/Appellant, particularly on the law, and, therefore, I am satisfied that Ground 2 is also made out.
4. Clearly, the learned Magistrate did make his final determination on the basis of findings of fact that were not available to him on the evidence. Some of those findings were that companies like the Applicant/Appellant exist to give confidence to consumers that bookings will be honoured and that they had an obligation to their customers to be cautious in a time of uncertainty and that the Applicant/Appellant was in a far better position than the Respondents to assess the risks involved. There was no evidence at all upon which such findings could be soundly based. With respect, the learned Magistrate appears to have let things influence his decision in what was essentially a contractual case that had no bearing on such a case and no basis in the evidence that was before him. In doing so, he erred on a mixed question of law and fact. I am satisfied that Ground 4 is made out.
5. The learned Magistrate was tasked with determining if the Applicant/Appellant had an obligation to pay the Respondents all of the deposit they had paid. The Applicant/Appellant conceded that it would pay the Respondents all but $8,040 of the deposit they had paid. The written submissions put to the Tribunal put the Applicant/Appellant’s case squarely as one of contract. To the extent that the Respondents relied on the Australian Consumer Code, as they apparently did, the Magistrate found that the Applicant/Appellant had not offended that.
6. The evidence included relevant terms and conditions of the contractual relationship between the Applicant/Appellant and the Respondents. For the Applicant/Appellant it was submitted that those included provisions that contractually protected them from liability to the Respondents for any of the balance of $8,040 that it said could not be repaid.
7. Relevantly, those terms and conditions included the following:-

…the following change and cancellation fees apply to all bookings:-

* Cancellations to international bookings … will incur a fee of $300 per passenger per booking **in addition to supplier fees**

…

 Where you seek a refund for a cancelled booking for which payment has been made to the supplier, we will not provide a refund to you until we receive the funds from that supplier.

 …

 We exercise care in the selection of reputable service providers, but we are not ourselves a provider of travel services and have no control over, or liability for, the services provided by third parties. All bookings are made on your behalf subject to the terms and conditions, including conditions of carriage and limitations of liability, imposed by these service providers. … Your legal rights in connection with the provision of travel services are against the specific provider and, except to the extent a problem is caused by fault on our part, are not against us. Specifically, **if for any reason**, (excluding fault on our part) any travel service provider is unable to provide the services for which you have contracted, your rights are against that provider and not against us.

 …neither Flight Centre Travel Group Limited … accept any liability in contract, tort or otherwise for any injury, damage, loss (including consequential loss), delay, additional expense or inconvenience caused directly or indirectly by the acts, omissions or default, whether negligent or otherwise, of third party providers over whom we have no direct control, force majeure or any other event which is beyond our control or which is not preventable by reasonable diligence on our part.

 [Emphasis added]

1. It was completely without fault of any of the parties that the travel plans of the Respondents were cancelled. It was because of government policy in response to a deadly pandemic. The terms of the contract set out above were relied upon by the Applicant/Appellant as protecting them from liability to the Respondents for the loss occasioned to them by the actions of government and third-party providers in response. The terms of the contract between the Applicant/Appellant and the Respondents, properly construed, do provide them with that protection, I am satisfied. By not finding that, the Tribunal did err in law. I am satisfied of that, too, so Ground 3 is made out.
2. I am quite satisfied that the Applicant/Appellant was not liable to the Respondents in the sum of $1,608 or any other part of the amount of $8,040 withheld by providers and not refunded. Ground 5 is made out.

# Leave to Appeal

1. Though the amount of money in question in this case is correctly described as “a commercially modest amount”,[[6]](#footnote-7) a substantial injustice has been done to the Applicant/Appellant by the clear errors in the learned Magistrate’s approach to the determination and the clear errors of law demonstrated. As I have found, the learned Magistrate failed to give any considerations to the Applicant/Appellant’s submissions, failed to consider material evidence and took irrelevant and unsupported considerations into account.
2. There is also a significant public interest in the proper determination of this matter in dispute, in addition to the Applicant/Appellant’s own commercial interest. There would be many thousands of customers of the Applicant/Appellant, no doubt, in the same position as the Respondents.

# Outcome of the Appeal

1. It follows, that I grant the Applicant/Appellant leave to appeal and uphold the appeal and set aside the Tribunal’s decision. I substitute my own decision for the decision set aside. It is in the interests of the parties to not have to argue this matter again at first instance. I consider that I am in as good a position as the Tribunal at first instance, with all the same evidence and submissions before me, to be able to make a decision. My decision is that of the sum of $18,568 paid by the Respondents to the Appellant by way of deposit for booked travel that could not be undertaken due to COVID-19 related travel restrictions, the Appellant is not liable to repay the Respondents any part of the sum of $8,040 that is not refunded to the Appellant by the travel providers. The intent of such Order that I make is to provide that the Applicant/Appellant should only pay to the Respondents any part of the remaining $8,040 of the deposit paid about which there remains dispute, if it receives any further refund of all or any part thereof from either of the providers or suppliers of the travel service that was cancelled who have withheld refund.
2. I make the orders that are set out at the commencement of these written reasons.
1. *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(3)(a)(i). [↑](#footnote-ref-2)
2. *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(3)(b). [↑](#footnote-ref-3)
3. *Pickering v McArthur* [2005] QCA 294. [↑](#footnote-ref-4)
4. *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 3, 4 and 28. [↑](#footnote-ref-5)
5. *Commissioner for Children and Young People and Child Guardian v FCG* [2011] QCATA 291 at [47]. [↑](#footnote-ref-6)
6. The Applicant/Appellant’s written submissions at [51]. [↑](#footnote-ref-7)