

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 310/94

BETWEEN: Islena de Inversiones S.A. de C.V. (Islena Airlines)  
- PLAINTIFF

AND: Jefferson Travel Services Ltd. - DEFENDANTS

For the Plaintiff: Raul Henriquez Q.C. and Mr. Richard Clement

For the Defendants: Pierre Lamontagne Q.C. and Mr. Graham Hampson

Before Harre CJ

JUDGMENT

21 By a letter dated 2nd August 1991 the plaintiff, which operates an air service between

22 George Town, Grand Cayman and Honduras, appointed new representation in the

23 Cayman Islands. That letter was addressed to Mr. John Jefferson Jr., Jefferson Travel

24 Services Ltd., George Town, Grand Cayman and read as follows -

25  
26  
27 "Dear Mr. Jefferson:

28  
29 ISLENA AIRLINES of Honduras C.A. formally appoint  
30 you as Representative of our Airlines in the Cayman  
31 Island as of August 30, 1991.

32  
33 ISLENA AIRLINES will be conducting flights between  
34 Grand Cayman and La Ceiba, Honduras and Vice versa.

35  
36 ISLENA AIRLINES will pay Jefferson Travel Ltd a 10%  
37 commission on all Sales conducted by the above Agency  
38 or your Assistant Mrs. Norma Jean Bennett, under the Cayman  
39 rules and Civil Aviation regulations."  
40  
41



1 Mr. Wood is the President and General Manager of the plaintiff. I shall refer to the  
2 plaintiff as Islena and shall need to refer to other contemporary documents in some  
3 detail to indicate my view of the contractual arrangements between the parties.

4  
5 A letter dated the previous day, 1st August 1991 relating to the appointment had been  
6 written to the Director of Civil Aviation. It read as follows -

7 "Dear Sir:  
8

9 ISLENA AIRLINES has decided to change our Representative -  
10 Mr. Graham Thompson to Mr. John Jefferson Jr. Assistant  
11 Mrs. Norma Jean Bennett (JEFFERSON TRAVEL SERVICE LTD)  
12 as of August 30, 1991.  
13

14 I also request you give Mr. Jefferson all the assistance you have  
15 rendered to our past Agent Mr. Thompson, to continue serving  
16 the Cayman Island, with our Airlines Services uniting your  
17 Country with Honduras and Latin America.  
18

19 Respectfully,  
20

21 ARTURO ALVARADO WOOD  
22 GENERAL MANAGER"  
23

24  
25  
26 There was a further letter dated 29th August from Mr. Wood to the Acting Director,  
27 Civil Aviation Mr. Pat Johnson, in the following terms -  
28

29 "I WISH TO CONFIRM MY REQUEST TO HAVE MY  
30 PERMIT NO. 19/1991 REISSUED ON NO. 6 OF SAID  
31 PERMIT TO READ AS OR LOCAL REPRESENTATIVE  
32 MR. JOHN D. JEFFERSON JR. (OF JEFFERSON  
33 TRAVEL SERVICE LTD) TO REPRESENT ISLENA AIRLINES  
34 AS OUR NEW AGENT IN THE CAYMAN ISLAND AS  
35 OF AUGUST 30, 1991: ALL OTHERS POINTS SHOULD  
36 REMAIN THE SAME .  
37  
38

IF THERE IS NO INCONVENIENCE TO THIS MATTER.

1 WE HOPE OUR REQUEST BE APPROVED IMMEDIATELY.”

2

3

4 There is an issue as to whether the appointment was for Jefferson Travel Services Ltd.

5 Mr. John Jefferson Jr or both. The present case concerns the termination of the

6 agreement and its consequences.

7

8 The plaintiff's principal witness was Mr. Arturo Wood. He described the nature of

9 the arrangement between the parties and this is common ground to the extent I now

10 describe. Revenue was collected by the agent from ticket sales, express letters and

11 excess baggage charges. From the gross revenue the agent was entitled to deduct 10%

12 commission and office expenses. There is some disagreement as to the extent of the

13 latter entitlement but it is not significant. It was the agents responsibility to pay from

14 revenue banking fees, the price charged by Texaco for aviation fuel, general services

15 by Cayman Airways (“CAL”) such as baggage handling and checking in of

16 passengers. CAL was responsible for collecting excess baggage charges and passing

17 over the money to the agent.

18

19 According to Mr. Wood, a weekly report and accounting of the balance was to be

20 made to Islena. Mr. Jefferson's evidence was that that was changed to once every two

21 weeks. In the event neither arrangement was complied with.

22

23 The evidence of Mr. Wood, which I believe, was that after a while his accountants

24 kept coming to him to ask him to speak to Mr. Jefferson to find out why the weekly

1 reports and cash remittances were not arriving on time. Matters took a more serious  
2 turn in 1994. A letter dated 9th February 1994 was sent in the following terms to Mr.  
3 Wood in Honduras by the Director of Civil Aviation in Cayman -

4  
5 "I refer to fax of Feb. 3rd, 1994 and write to confirm  
6 that the Civil Aviation Authority have no objection  
7 to Islena's proposed schedule effective February 12th, 1994.  
8 However we do note that your operating permit issued by  
9 the Air Transport Licensing Authority expired on December  
10 31st, 1993. Please ensure that you received the necessary permits  
11 from the ATLA for your operation."  
12  
13  
14

15 At the foot of the letter is the following handwritten note from Mr. Wood to Mr.

16 Jefferson -

17  
18 "JOHN JEFFERSON  
19 GCM  
20

21  
22 PLEASE HAVE AN INTERVIEW WITH ATLA AT CIVIL AVIATION  
23 CONCERNING THE ABOVE LETTER, FOLLOW-UP AND ADVISE YOU  
24 ARE ISLENA REPRESENTATIVE AND CAN SIGN FOR ME.  
25

26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
SINCERELY

A. Wood"

31 The annual licence renewal was also the subject of a letter dated 3rd March 1994  
32 addressed to Mr. Jefferson by the Secretary of the Air Transport Licensing Authority.  
33 It approved his application dated 1st March and contained the following passage -  
34

35 "A sum of C1\$700 or US\$853.65 must be paid to the Civil Aviation  
36 Authority in respect of Air Operations Permit within 30 days or this

1 approval becomes void.”

2  
3 No payment was made until after the agency agreement was terminated.  
4 Nevertheless, the agent's report to Islena dated 30th April 1994 showed a deduction of  
5 \$853.65 in respect of "Islena Licence." Mr. Jefferson's explanation for this was that  
6 the payment had simply been overlooked. On any view, the failure to attend to such  
7 an important matter as the payment of the Air Operations Permit Fee even after  
8 reminders and the warning in the letter dated 3rd March from ATLA was a serious  
9 default.

10  
11 The next significant event took place sometime in May 1994. Mr. Wood's evidence is  
12 that he was visited in Honduras by three officials of Cayman Airways, Mr. Mike  
13 Adams and two of his assistants, Mr. Walter and Mr. Bodden. Their visit concerned  
14 amounts they said were owed by Islena for ground handling charges. Mr. Wood's  
15 response was to produce the agent's reports showing that the money had been  
16 deducted in Cayman. On seeing these, Mr. Adam refused to accept money from Mr.  
17 Wood and said he would take the matter up with Mr. Jefferson on his return to  
18 Cayman.

19  
20 When giving evidence Mr. Jefferson questioned whether Mr. Adams and his  
21 colleagues had visited Honduras in this way at all, but acknowledged that he had no  
22 knowledge one way or the other. There being no evidence to the contrary, I accept  
23 Mr. Wood's account.

24

1 Another issue between the parties had arisen in May 1994. On 11th May, Mr.  
2 Jefferson had written - on paper headed John D. Jefferson Jr. MLA but signed John D.  
3 Jefferson Jr. MLA, Jefferson Travel Services Ltd, President/Chairman - to the Airport  
4 Manager of Cayman Airways Ltd. It notified him that "we (my emphasis) have  
5 agreed to allow Air Agencies Ltd to serve as our (my emphasis again) Customer and  
6 Ground Handling agent." Various complaints are set out in the letter as factors  
7 influencing the decision.

8  
9 On receipt of a copy of this Mr. Wood sent a fax to Mr. Jefferson saying that he  
10 urgently needed to talk with him about Air Agencies. His evidence was that he was  
11 so concerned that he wrote the message himself without getting his secretary.

12  
13 On the same day, 11th May 1994, Mr. Wood sent the following message to Mr.

14 Jefferson with a copy to Cayman Airways-

15  
16 "NO INSTRUCTIONS FROM THIS OFFICE HAS BEEN ISSUED  
17 TO YOU, OR TO AIR AGENCIES LTD. FOR GROUND SERVICES  
18 FOR ISLENA AIRLINES.

19 I HAVE INSTRUCTED VIA PHONE TO MR. MIKE ADAMS TO  
20 CONTINUE GIVING MY AIRLINE TO NECESSARY  
21 ASSISTANCE WHILE OPERATING TO AND FROM THE  
22 CAYMAN ISLAND; PLEASE PUT UP TO DATE ALL  
23 CHARGES THAT YOU BALANCE CAYMAN AIRWAYS FOR  
24 THERE SERVICES ALSO OUR BALANCE TO ISLENA  
25 AIRLINES. THAT IS PAST OVERDUE.

26  
27 PERSONALLY I WILL BE TRAVELLING TO GRAND CAYMAN  
28 VERY SHORTLY TO TAKE CARE OF ALL MATTERS."  
29  
30

31

1 There are two more letters on this topic dated 12th May from Mr. Jefferson. One is to  
2 Mr. Wood, the other to Mr. Adams of Cayman Airways. In each he refers to his  
3 dissatisfaction with the service provided by Cayman Airways and also acknowledges  
4 that sums are due to Cayman Airways for handling charges. He disputes the amount  
5 but offers to make arrangements to pay once the correct amount has been determined.

6  
7 There is also correspondence addressed to Mr. Jefferson from the General Accountant  
8 of Islena during May 1994, culminating in the following on 1st June -

9 "I'M TO REMIND YOU AGAIN THAT YOU HAVE NOT SEND  
10 ANY SALES REPORT TRANSACTION FOR THE MONTH OF  
11 MAY, AND HAVEN'T PUT NO INTEREST ABOUT THE VALUE  
12 SUBTRACTED FOR THE COPY MACHINE AND THE AIR  
13 CONDITION, SO PLEASE SEND ME THE TRISECTIONS FOR  
14 MAY AND THE VALUE SUBTRACTED.  
15

16 THANK YOU FOR YOUR ATTENTION,"  
17

18 Matters came to a head during the first week of June. On the 3rd Mr. Wood wrote to  
19

20 Mr. Jefferson as follows -

21  
22 "DATE: 3RD JUNE, 1994  
23

24 COMPANY NAME: JEFFERSON TRAVEL SERVICES  
25

26 FROM: ARTURO A. WOOD  
27

28 Mr. John Jefferson,  
29 Georgetown,  
30 Grand Cayman,  
31 B.W.I.  
32

33  
34 Effective 4th June, 1994, I have taken the decision to relieve you  
35 from the responsibility as Islena Airlines Representative in the  
36 Cayman Islands.  
37  
38

1 Past correspondence between you and Cayman Airways and  
2 outstanding bills has forced me to take these steps.

3 Please put up to date all monies you have for Islena Airlines, and also  
4 accounts outstanding to Cayman Airways and all others.  
5

6  
7 Sincerely Yours

8  
9 Arturo Avarado Wood  
10 President & C.E.O."  
11  
12

13 Mr. Wood and a colleague visited the office of Jefferson Travel Services Ltd and  
14 removed records relating to the Islena agency. Mr. Jefferson's response is to be found  
15 in the following the following two letters which he wrote to Mr. Wood on paper  
16 headed "John Jefferson Jr. M.L.A.". They are dated respectively 4th June and 10th

17 July 1994 -

18  
19 4th June 1994

20  
21 "RE: Termination of Agency Agreement

22 I Refer to your letter of 3rd June, 1994 advising of the Decision to  
23 Terminate the Agreement of me Acting as the local Agent of Islena  
24 Airline. Our Records indicate that all revenue from ticket sales and  
25 excess baggage has been accounted for and reported, with the  
26 exception of three weeks in May and the one flight in June, 1994.  
27 While serving as your Agent we have accomplished the following on  
28 behalf of Islena Airline  
29

- 30 1. Improved the Service and reputation of the Airline locally among  
31 passengers; and
- 32 2. Have gotten a monopoly for the Airline on the La Ceiba to Grand  
33 Cayman route;

34  
35 Our Plan of Action was to give adequate notice and Resign as Agent  
36 with effect from the 31st August, 1994, because we have not made any  
37 money as Agents, and I Refuse to work with unprofessionals like  
38 yourself. I have witnesses that have over heard you make remarks  
39 accusing my sister Norma Jean Bennett and myself of stealing from  
40 you, when there is no Evidence to indicate that this is true.  
41 We both have Good Reputations Locally and I am not prepared to let  
42

1 you or anybody else Tarnish our Reputation by Irresponsible and  
 2 Careless Remarks.

3 As you are aware our Agency Agreement called for Notice with respect  
 4 to Termination by either Party. I am prepared to Accept an Early  
 5 Termination of Our Agreement under the following Conditions;

- 6 1. We are given US\$30,000.00 in Cash or Credit against Funds Owed  
 7 to Islena Airline;
- 8 2. US\$50,000.00 and a Written Letter of Apology concerning remarks  
 9 made by Yourself with Respect to the honesty/Reputation of my  
 10 Sister Norma Jean Bennett and Myself;
- 11 3. We are allowed to retain all assets acquired for Office purposes  
 12 since September, 1990 when we took over as your Agents.  
 13 If you continue to Insist on the Early Termination of Our Agreement  
 14 and Fail to Agree to the Conditions as set out above, then I will have  
 15 no alternative but to Write to the Airport Transport Licencing  
 16 Authority requesting Termination of the Licence granted to Islena  
 17 Airline which permits the Airline to fly into the Cayman Islands, on  
 18 the Grounds of yourself as an Undesirable Person for Doing Business  
 19 in these Islands. I will also bring a Case against you before the Courts  
 20 on Slander Charges with respect to your recent remarks concerning the  
 21 Honesty, Integrity and Reputation of My Sister Norma Jean Bennett  
 22 and Myself. Please advise me as soon as possible of Your Decision on  
 23 these matters.  
 24  
 25

26 "10th July 1994

27 Re: Termination of Agency Agreement  
 28  
 29

30 Further to my letter of 3rd June, 1994, in which was mentioned certain  
 31 Penalties if our Agency Agreement was Terminated without the  
 32 Required Notice. There was also a Claim with regard to Slander  
 33 concerning my Reputation and that of my Sister, Norma Jean Bennett.  
 34 As the conditions have not been complied with within the time frame  
 35 given I hereby provide you with a Final Accounting as of 10th July,  
 36 1994:

37		US \$21,510.50
38	Ticket Sales	
39	Excess Baggage Revenue	3,527.50
40	Letter Revenue	1,775.00
41	Photocopier/AC	4,751.47
42	Difference on Manifest 7/5/94	1,998.80
43	Balance Due on Manifest 27/5/94	6,914.05
44		
45	Total Revenue Due US \$	<u>40,477.32</u>
46	Less: Rent (June, July, Aug.)	(1,250.01)
47		

1 “ 10% Commission (3,372.69)  
 2 “ Fax/Telephone ( 523.57)

3 Net Revenue Due Islena Airline \$35,331.05

4  
5  
6 Final Position

7  
8 Personal Severance Fees 30,000.00  
 9 Slander Claim for Comments made  
 10 with respect to the Honesty of myself  
 11 and my sister, Mrs. Norma Jean Bennett 50,000.00

12  
13  
14 US\$80,000.00

15 Less: Amount due Islena Airline 35,331.05

16  
17 Amount due to John D. Jefferson - US\$44,668.95

18  
19 I have made separate arrangements with Cayman Airways to repay  
 20 what is owed to them by Jefferson Travel Services Ltd for handling  
 21 Charges. You have until the 24th July, 1994 to have the Funds due  
 22 myself Paid otherwise I will proceed with Legal Proceedings against  
 23 you in Court on Slander Charges and also submit a recommendation to  
 24 the Airport Transport Licencing Board to have the Charter for Islena  
 25 Airline to fly to Grand Cayman Cancelled. I look forward to receiving  
 26 your check in Settlement in due course.”  
 27  
 28

29 These letters speak for themselves. It suffices for present purposes to say that Mr.

30 Wood was not intimidated. His response dated 15th July enclosed documentation on

31 the basis of which he claimed \$59,897.78. Proceedings were issued on 19th  
 32 September, 1994.  
 33

34 Before going to the issues pleaded I now refer to the evidence of Mr. Jefferson.

35  
 36 His evidence about the financial arrangement which he had made with CAL accords  
 37 with that of Mr. Wood about what Mr. Jefferson told him. He had opened an account

38 with CAL on behalf of Jefferson Travel for handling fees incurred, with a credit limit

1 of \$5,000. That, Mr. Jefferson said, was so that the fees could be paid when the  
2 statement of what was owing was received by CAL which might be up to six weeks  
3 after the transaction concerned. He asserted that this arrangement was made with  
4 CAL, and the money owed, by Jefferson Travel Services Ltd to CAL and not by  
5 Islena, and he did not know why CAL would go to Islena. I shall refer to the way in  
6 which that was pleaded later.

7  
8 Mr. Jefferson also testified that the arrangement with Islena was with Jefferson Travel  
9 Services Ltd., not him personally. Having reviewed the correspondence and the  
10 course of dealing between the parties I accept that.

11  
12 Aspects of the arrangements which Mr. Jefferson explained included the practice of  
13 accepting fares and refunding cash to customers; the receipting of amounts paid for  
14 transporting letters and their inclusion on the manifest; the agent's responsibility for  
15 renewal of Islena's annual licence; He said that he had released to the plaintiff's  
16 attorneys all documents for which they asked and acknowledged that he had given a  
17 draft for US\$10,000 dated 3rd June 1994 to Mr. Wood on the following day and that  
18 if his counterclaim were not taken into account there would then still have been  
19 money owing to Islena.

20  
21 Everything, he said, was properly accounted for. He was taken through the  
22 documents to which I have referred, and others, and did not dispute their authenticity.  
23 Cross-examined, he acknowledged the correctness of the figures pleaded by the  
24 plaintiff and sought to justify his credit arrangements with CAL and the increase of

1 the indebtedness of Jefferson Travel above the agreed limit, saying that if he took care  
2 of the liability it was no business of Islena and in no way affected their operation. I  
3 do not accept that. If the money deducted from revenue had been properly paid over  
4 there would have been no excess debit balance. He acknowledged that certain  
5 business expenses had been paid out of revenue received and asserted that these  
6 related to commission to which the agent was entitled. He did not however "audit"  
7 the amounts weekly or monthly or, as he put it "penny by penny."  
8

9 There was evidence from Mr. Jefferson that after Mr. Wood and his colleague had  
10 collected the documentation on termination of the agreement an envelope of tickets  
11 representing a substantial amount of money which had not been reported was  
12 discovered. On 3rd June 1994 he and Jefferson Travel had the ability to pay in full  
13 but he refused to do so because of the way in which the agreement was terminated.  
14 He insisted that a three month notice period had been agreed. He acknowledged that  
15 he was Chairman and President of Jefferson Travel Service Ltd and personally kept  
16 the account with Islena; that if (which he denied) he had paid out funds in excess of  
17 his 10% commission otherwise than in accordance with the agreement, they would be  
18 Islena funds and that would be improper; and that on 3rd June 1994 money was owed  
19 to Islena and to CAL and that both the CIS and US\$ accounts of Jefferson Travel  
20 Services Ltd were overdrawn.  
21

22 I seek to summarise the plaintiff's pleaded claims as follows. They relate to moneys  
23 which it says were deducted from remittances to it and shown as having been paid on  
24 sales returns when they were not so paid; and failure to properly account for and pay

1 monies due to the plaintiff for the period 8th April 1994 to 3rd June 1994 at all.  
2 Particulars of these were set out in the statement of claim and were analysed and  
3 described as schedules A,B and C in a report prepared for the plaintiff by an  
4 accountant, Mr. Julian Campbell who at the material time worked for the firm Moore  
5 Stephens. It was conceded that the figures contained in these particulars were  
6 accurate or at any rate substantially so.

7  
8 It is denied in the amended defence and counterclaim that the first defendant, Mr.  
9 Jefferson, was a party to the agreement at all; that there was any trust in relation to  
10 moneys received or obligation to hold them in a separate account; that the plaintiff's  
11 termination of the contract was lawful; that sums were fraudulently retained; and that  
12 moneys owed by the plaintiff to CAL for handling charges were wrongfully retained.

13  
14 The defendants deny that anything is owed to the plaintiff and the second defendant  
15 counterclaims for loss it alleges that it incurred by reason of the alleged wrongful  
16 termination of the agreement without notice. That is particularised as 10% of the  
17 plaintiff's ticket, express letter and excess baggage sales from 5th June 1994 to 4th  
18 September 1994. There is a claim for an accounting for this period and an alternative  
19 claim for damages for wrongful determination of the agreement. Finally, set-off is  
20 claimed.

21  
22 The case therefore turns upon the resolution of a number of questions of law. They  
23 are these -

24

1 1. With what party or parties did the plaintiff conclude its agreement - John  
2 Jefferson Jr or Jefferson travel Services Ltd or both?

3  
4 2. What was the period of notice of termination applicable to the agreement?  
5

6 3. Was the plaintiff entitled in any event to terminate the agreement without  
7 notice by reason of breach?  
8

9 4. Did the agreement give rise to a trust or merely a debtor/creditor  
10 relationship?  
11

12 5. What will be the appropriate orders in relation to any sums found to be  
13 owing?  
14

15 With regard to the first issue, I have already expressed my finding that the agreement  
16 was concluded with Jefferson Travel Services Ltd and not with Mr. Jefferson  
17 personally.  
18

19 With regard to the second and third issues I find that the period of notice applicable to  
20 the contract, whether by express agreement or by implication of a reasonable period  
21 was three months. However, the breaches of the agreement revealed by the evidence  
22 were of such a serious nature that the plaintiff was justified in terminating it without  
23 notice.  
24

1 With regard to the fourth issue, it is common ground that the existence or otherwise of  
2 a trust depends on the terms of the agreement. Each party relied on a number of the  
3 same authorities but drew very different conclusions from them.

4  
5 It is, I think, well established that the duties of an agent include the following -  
6

7 “It is the duty of an agent  
8

- 9 (a) to keep the money and property of his principal separate  
10 from his own and from that of other persons;  
11 (b) to preserve and be constantly ready with correct accounts  
12 of all his dealings and transactions in the course of his agency;  
13 (c) to produce to the principal, or to a proper person appointed  
14 by the principal, all books and documents in his hands relating  
15 to the principal’s affairs.”  
16

17 Boston Deep Sea Fishing v. Ansell (1888) 34 Ch D 339 was cited by the plaintiff for  
18 the proposition, which is conceded, that where a principal dismisses an agent - even if  
19 he does not know of all the agents derelictions at the time he can rely on what he  
20 discovers after. With regard to other aspects of that case, I shall simply say that I  
21 shall not be making orders for refunds of commissions under paragraphs 5 and 6 of  
22 the statement of claim.

23 I turn therefore to three modern cases next. All involved arrangements between  
24 airlines and travel agents. They are -

25 Stephens Travel Services Int. Pty Ltd v. Qantas Airways Ltd. (1988) 13

26 NSWLR 331 (Court of Appeal);

27 Canadian Pacific Airlines v. CIBC (1987) 42 DLR 375 ;

28 Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming (1995) 3 WLR 64

1 It is convenient to deal with these cases in the order in which I have referred to them.

2

3 In Stephens Travel Services Int Pty Ltd v. Qantas Airways Ltd, Qantas as a member  
4 of the International Air Transport Association (IATA) was party to a travel agency  
5 contract, the terms of which provided, inter alia, that airline tickets and transportation  
6 orders owned by Qantas could be sold and issued by the travel agent for Qantas. The  
7 contract specifically provided that unless already accounted for “all moneys collected  
8 by the agent for transportation and ancillary services sold under this agreement, “...  
9 shall be the property of the carrier and shall be held by the agent in trust for the carrier  
10 or on behalf of the carrier until satisfactorily accounted for to the carrier and  
11 settlement made ....”. Incorporated into the contract by the adoption of Sales Agency  
12 Rules were machinery provisions for the payment by the agent of moneys received by  
13 it for tickets issued by it, at fortnightly intervals, to a clearing bank and to be paid by  
14 that bank to Qantas. The agent paid moneys received by it for airline tickets and  
15 transportation orders into an overdraft account with its bank; each fortnight it drew on  
16 this account for payment to Qantas. The bank refused to pay on one such cheque,  
17 closed the account, appointed receivers and used what moneys were in the account in  
18 reduction of its overdraft. Moneys received for tickets and transportation orders after  
19 the appointment of receivers were paid into a trust account in the joint names of the  
20 receivers and the administrator appointed under the Travel Agents Act 1973. Qantas  
21 sought to recover all moneys received by the agent and the receivers for airline tickets  
22 and transportation orders not accounted for.

23 It was held that where parties have agreed that legal and equitable rights and remedies  
24 should co-exist in the one transaction, the court will give effect to that agreement, and

1 that having regard to the terms of the travel agency contract the moneys received by  
2 the travel agent in respect of tickets issued by Qantas (in respect of which or to the  
3 extent to which Qantas had not been paid) were to be held on trust by the travel agent.  
4

5 In Canadian Pacific Airlines v. CIBC, the arrangements between the parties were  
6 substantially similar. As noted by Maloney J, the case reduced to two primary issues  
7 which he described as follows -

8 “The plaintiff’s position is that the relationship is one of  
9 principal and agent, with an express trust created by the  
10 agreement, requiring proceeds of ticket sales to be held in  
11 trust for CP. The financial statements of the agents (which  
12 were seen by the bank) do not show ticket sales as income.  
13 The only income recorded thereon is commission income.  
14 Also, the agreement provides that the blank ticket stock  
15 remains the property of CP until sold.  
16 The defendant CIBC argues that the relationship is not  
17 fiduciary but rather debtor-creditor, the three certainties  
18 of a trust relationship not being present. The agreement  
19 provides, in subpara. 16(a), that the agent must remit to  
20 the airline the price of all tickets sold, regardless of how  
21 much of that price the agent eventually collects. The  
22 defendant argues that this renders the agency a mere debtor  
23 to the airline, responsible only to pay it a specified sum of  
24 money from an unspecified source. In order for a trust  
25 relationship to exist, argues the bank, the source of the trust  
26 must be certain, as otherwise there is no certainty as to the  
27 subject-matter of the trust.”  
28

29 Subparagraph 16(b) of the agreement provided as follows -  
30

31 “All money collected by the Agent for transportation and ancillary services  
32 sold under this agreement, including applicable commissions which the Agent  
33 is entitled to claim thereunder will be the property of the Carrier and shall be  
34 held by the agent in trust for the Carrier or on behalf of the Carrier, until  
35 satisfactorily accounted for to the Carrier, and settlement made.”  
36  
37

38 As Maloney J observed, in order to constitute a trust, an arrangement must have three

1 characteristics, known as the three certainties: certainty of intent, of subject-matter  
2 and of object. He found that the agreement, in subpara. 16(b), was certain in its intent  
3 to create a trust; the subject-matter was to be the funds collected for ticket sales; the  
4 object, or beneficiary, of the trust was also clear; it was to be the airline. The  
5 necessary elements for the creation of a trust relationship were all present and  
6 Maloney J so found.

7  
8 The most recent of the cases, and the highest of the authorities, on which the plaintiff  
9 relied was Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming (1995) 3 WLR 64.

10 The facts were that the plaintiff airline appointed as its agent in a particular area for  
11 the sale of passenger and cargo transportation a company of which the defendant was  
12 the managing director and principal shareholder. Under the agreement the company  
13 was to hold in trust for the airline money received from such sale until it was  
14 accounted for by the company to the airline. With the defendant's knowledge and  
15 assistance the company paid the money into its current bank account instead of into a  
16 separate account, and in breach of trust the company used that money for its own  
17 business purposes. The company failed to pay to the airline sums due within the time  
18 specified by the agreement. The airline terminated the agreement and, the company  
19 having become insolvent, commenced proceedings against the defendant to recover  
20 the money owed by the company. The judge held that the defendant was liable as  
21 constructive trustee to pay that amount to the airline. On appeal the Court of Appeal  
22 of Brunei Darussalam reversed that decision, holding that the defendant could not be  
23 so liable because it had not been established that the company was guilty of fraud or  
24 dishonesty in relation to the money held in trust for the airline. On the airline's appeal

1 to the Judicial Committee of the Privy Council it was held, allowing the appeal, that  
2 where a third party dishonestly assisted a trustee to commit a breach of trust or  
3 procured him to do so, the third party would be liable to the beneficiary for the loss  
4 occasioned by the breach of trust, even though the third party had received no trust  
5 property and irrespective of whether the trustee had been dishonest or fraudulent; that  
6 in the context of such accessory liability honesty was to be judged objectively and  
7 acting dishonestly, or with a lack of probity, which was synonymous, meant not  
8 acting as an honest person would act in the circumstances and could usually be  
9 equated with conscious impropriety as distinct from inadvertent or negligent conduct  
10 or carelessness, although a third party might be acting dishonestly if he recklessly  
11 disregarded the rights of others; that the third party's conduct had to be assessed on  
12 the basis of his actual knowledge at the time not what a reasonable person would have  
13 known or appreciated, and regard could be had to his personal attributes including  
14 experience and intelligence and the reason for him acting in that way; and that,  
15 accordingly, since the defendant had caused or permitted the company to commit a  
16 breach of trust by using in the conduct of its business money held in trust for the  
17 airline when he knew that the company was not authorised to so by the terms of the  
18 trust, the defendant had acted dishonestly, and was, therefore, liable to the airline for  
19 the amount owed to it by the company.

20  
21 The judgment of their Lordships was delivered by Lord Nicholls of Birkenhead and  
22 contains this telling passage -  
23

24 "In most cases there is little difficulty in identifying how an honest person  
25 would behave. Honest people do not intentionally deceive others to their  
26 detriment. Honest people do not knowingly take others property. Unless

1 there is a very good and compelling reason, an honest person does not  
2 participate in a transaction if he knows it involves a misapplication of  
3 trust assets to the detriment of the beneficiaries.”  
4

5 In each of the three cases to which I have just referred the establishment of a trust was  
6 an express term of the agreement. In that respect all are distinguishable from the  
7 present case. Nevertheless having reviewed the nature of the arrangements between  
8 the parties against the background of industry practice in different parts of the world  
9 which these cases reveal I find that the three certainties were present and that a trust  
10 existed. The first defendant acted dishonestly in causing or permitting the second  
11 defendant, the company in which he was the controlling mind to commit breaches of  
12 trust and I find both defendants to be liable to the plaintiff.  
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G.E. Harre  
Chief Justice

21 Oral Judgment delivered and Order made on 10th October 1997.  
22 Judgment reduced to writing on 22nd April 1998.  
23  
24

