DLS/ FMA. Let's finalize 3/7/24

THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

2022/CCPT/011/CON

IN THE MATTER OF : SECTION 49(5) OF THE COMPETITION AND CONSUMER PROTECTION ACT No. 24 OF 2010

IN THE MATTER OF : SECTION 51(1) OF THE COMPETITION AND CONSUMER PROTECTION ACT No. 24 OF 2010

BETWEEN

ETHIOPIAN AIRLINES — APPELLANT

AND

COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

CORAM: Mr. J.N. Sianyabo - Chairperson
Mrs. M.B. Muzumbwe-Katongo - Vice Chairperson
Mrs. B. Chaila - Sichizya - Member
Mr. D. Mulima - Member
Mr. B. Tembo - Member

For the Appellant: Mr. Kasongo Kamfwa from Messrs Wilson and Cornhill Advocates

For the Respondent: Ms. M. Mtonga-Manager-Legal and Corporate Affairs, Competition and Consumer Protection Commission

JUDGMENT

Legislation referred to:

1. The Competition and Consumer Protection Act No. 24 of 2010
2. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
3. The Air Services Act, Chapter 444 of the Laws of Zambia,
4. The Civil Aviation Act No. 5 of 2016
5. The Zambia Air Services Regulations, Statutory Instrument No. 50 of 1982

Cases referred to:

1. Radian Stores Retail Limited v. the Competition and Consumer Protection Commission 2021/CCPT/037/CON
2. Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696
3. Paradine v. Jane (1647) Aleyn 26
4. Pioneer Shipping Limited Vs. BTP Dioxide Ltd (1981) 3 W.L.R, 292
5. National Carriers Limited v Panalpina (Northern) Limited [1981] AC 675
6. W J Tatem Ltd v Gamboa [1939] 1 KB 132
7. Spar Zambia Limited v. Danny Kaluba and Competition and Consumer Protection Commission 2016 /CCPT/009/CON

Other work referred to

1. China's Travel Restrictions due to COVID-19: An Explainer, By Zoey Zhang, available at https://www.china-briefing.com/news/chinas-travel-restrictions-due-to-covid-19-an-explainer/#International%20Travel%20Restrictions
2. International Civil Aviation Organization Core Principles of Consumer Protection, available at https://www.icao.int/sustainability/SiteAssets/pages/eap_ep_consumerinterests/ICAO_CorePrinciples.pdf
3. International Air Transport Association Core Principles on Consumer Protection, available at https://www.iata.org/contentassets/2e46aace261040b9a47fb7b9da18efc9/consumer_protection_principles.pdf

4. Catharine MacMillan (2021) Covid-19 and the Problem of Frustrated Contracts, King's Law Journal, 32:1, 60-70, DOI: 10.1080/09615768.2021.1885328 Available at https://doi.org/10.1080/09615768.2021.1885328 Visited on 19/04/2024 at 22:50hours

5. Spencer Wright, Frustration of Contracts: What causes a contract to break? Available at https://gibbswrightlawyers.com.au/publications/frustration-contractlaw/#:~:text=a%20party%20faces%20loss%2C%20inconvenience%20or%20hardship%3B%20the,event%20%28such%20as%20in%20a%20force%20majeure%20clause%29%3B

SIANYABO, J.N, Chairperson delivered the Judgment of the Tribunal.

BACKGROUND

1. This is an appeal against a decision of the Board of the Competition and Consumer Protection Commission (hereinafter **"the Board"**), against Ethiopian Airlines (hereinafter **"the Appellant"**) made on 9th June, 2022, that the Appellant engaged in unfair trading practices, hence violated section 49(5) and 51 of the Act. The Board directed that the Appellant be fined -
    i. 0.5% of its annual turnover for breach of section 49(5) of the Act and the Competition and Consumer Protection Guidelines for Issuance of Fines, 2019; and
    ii. 0.5% of its annual turnover for breach of section 51(1) of the Act and the Competition and Consumer Protection Guidelines for Issuance of Fines, 2019.
2. The Board further directed that the Appellant submits its latest books of accounts so that the Competition and Consumer Protection Commission (hereinafter **"the Respondent"**) determines how much the Appellant would be liable to pay for breach of section 49(5) and 51(1) of the Act, in accordance with section 5(d) of the Act.

Brief facts of the Case

3. On 26th November, 2021, the Respondent received a complaint from Mr. Frank L. Fang (hereinafter **"the Complainant"**) pertaining to Dianelink Travel and Tours (hereinafter referred to as **"Dianelink"**) and the Appellant. The Complainant alleged that in June, 2021, he purchased three (3) economy class tickets to Shanghai, China for USD4,860 (Four Thousand Eight Hundred and Sixty United States Dollars) from Dianelink. The flight was scheduled for 10th January, 2022. The Complainant stated that on 23rd November, 2021, Dianelink notified him that he had to make an additional payment of USD4,349 (Four Thousand Three Hundred and Forty-Nine United States Dollars) for the tickets to remain valid, or else the booking would be cancelled. The Complainant alleged that he engaged the Appellant who gave him the same response as Dianelink. In view of this, the Complainant found the conduct of both Dianelink and the Appellant unfair and reported the matter to the Respondent.
4. In the opinion of the Respondent, the alleged conduct appeared to be in contravention of sections 49(5) and 51(1) of the Competition and Consumer Protection Act (hereinafter **"the Act"**), which provide as follows, respectively:

> *49.(1)...*
>
> ...
>
> *(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.;* and
>
> *51. (1) A person or an enterprise shall not charge a consumer more than the price indicated or displayed on a product or service.*

5. Sections 49(6) and 51(2) of the Act set out the penalty for the contravention of both sections as a fine not exceeding ten percent of that person's or enterprise's annual turnover.

6. With regard to sections 49(5) and 51(1) of the Act, the Respondent conducted an assessment test as to whether-
    i. Dianelink and the Appellant supplied a particular service to the Complainant with reasonable care and skill within a reasonable time, or if a specific time was agreed, within a reasonable period around the agreed time; and
    ii. Whether Dianelink and the Appellant had charged the Complainant more than the price indicated or displayed on a product or service.
7. The Respondent served Notices of Investigation ("NOI") on both Dianelink and the Appellant on 7th December, 2021, and 30th December, 2021, respectively.[1] Receipt of the NOI was acknowledged by the Dianelink on 8th December, 2021, and by the Appellant on 4th January, 2022.
8. Dianelink responded to the NOI stating, *inter alia,* that it was a mere agent of the Appellant, and that the Appellant determined the terms and conditions of the tickets sold by Dianelink. The Appellant did not respond to the NOI.
9. The Respondent found the Complainant to be a consumer in terms of section 2 of the Act as he had purchased three (3) air tickets to be used on 10th December, 2022, from Dianelink. Section 2 of the Act provides as follows:

    "Consumer means-

    (a) ...

    (b) for the purposes of the other Parts of this Act, other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration..."
10. Following a search conducted on the Patents and Companies Registration Agency (PACRA) website, it was discovered that Dianelink and the Appellant were

[1] CCPC Record of Proceedings, pp.8 and 13.

registered as companies, and were thus found to fall within the purview of "enterprise" as defined in section 2 of the Act which provides as follows:

> *"enterprise" means a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them..."*

11. The Respondent also considered the contents of emails addressed to the Complainant by the Appellant's Ethel Mwenda who stated in part that the fare paid on the original ticket was no longer valid in the system thus additional payment (fare difference of current ticket prices) was to be collected, and apologised for the inconvenience.
12. Another email from the Appellant informed Dianelink that "*...the below tickets to PVG on DEC, JAN & FEB are issued with lesser amount than the base fare amount. Hence, this is to kindly advise you to reissue the tickets with the current Y class OW fare. The booking with lesser amount is subject to cancellation if not adjusted as by Friday 26th November, 2021.*"
13. The Respondent consulted other industry players and established, from them, that once a ticket is booked, paid for and issued, they did not adjust the price on that already issued ticket; and that if an agent erred by issuing a ticket with a lower amount, that agent was charged by the principal and that that cost was not passed to the customer. In particular, the Respondent consulted Proflight Zambia, Kenya Airways and RwandAir.[2]
14. The Respondent compiled its preliminary report, which was approved on 17th March, 2022, and sent to both Dianelink and the Appellant on 22nd March, 2022, and to the Complainant on 29th April, 2022. The Appellant did not make any submissions on the Report, despite being invited to do so by way of a letter dated

[2] CCPC Record of Proceedings, p.41

17th March, 2022, under the hand of Chilufya Sampa, the Executive Director of the Respondent.[3]

15. The Respondent established that the Appellant did not exercise reasonable care and skill by issuing the Complainant with tickets for a lesser amount than the base fare that was verified in its system; and that the Appellant, being the principal who issued instructions to cancel the booking, violated section 49(5) of the Act as it did not exercise reasonable care and skill by issuing the Complainant air tickets on amounts that were not verified in the Appellants system.
16. The Respondent further established that Dianelink and the Appellant had issued the Complainant with tickets, implying that the Complainant had paid for them. Additionally, the Respondent found that the Appellant's demand for an extra fare on already issued tickets, four (4) months after their issuance, was unfair as the Complainant paid an amount communicated to him by the Appellant through its agent, Dianelink, and that this was in violation of section 51(1) of the Act.
17. In view of the foregoing, the Board found that the Appellant engaged in unfair trading practices in violation of sections 49(5) and 51(1) of the Act, and gave directives as set out in paragraph 1 herein, against which the Appellant has appealed.

GROUNDS OF APPEAL

18. The Appellant received the Board Decision on 13th July, 2022[4], and filed its Notice of Appeal and Grounds of Appeal before this Tribunal on 26th July, 2022. Its grounds of appeal are as follows:

Ground One

The Respondent erred in law and fact when it established that the Appellant violated sections 49(5) and 51(1) of the Act as it did not exercise

[3] CCPC Record of Proceedings, p.30
[4] Ibid., p.41

reasonable care and skill by issuing the Complainant air tickets on amounts that were not verified in its system.

Ground Two

The Respondent erred in law and fact when it established that the Appellant's conduct of demanding an extra charge on already issued tickets 4 months after the date of purchase was unfair and in violation of section 51(1) of the Act in total disregard of Dianelink's submission that the reason for the adjusted fare price was due to the Chinese government ban on scheduled flights due to the Covid-19 pandemic.

RESPONDENT'S REPLY TO THE GROUNDS OF APPEAL

19. The Respondent filed its Notice of Grounds in Opposition to Appeal before this Tribunal on 9th September, 2022, and opposed the whole appeal on the following grounds:

    i. That the Board was on firm ground when it found that the Appellant had violated sections 49(5) and 51(1) of the Act, as it did not exercise reasonable care and skill by issuing tickets to the complainant on amounts that were not verified in the system; and

    ii. That the Board did not err in law and in fact when it established that the Appellant's conduct of demanding an extra charge on already issued tickets four (4) months after the date of purchase was unfair and in violation of section 51(1) of the Act, as the record will show, that the ban by the Chinese government on scheduled flights was not the reason for the extra charge imposed on the Complainant.

APPELLANT'S SUBMISSIONS

20. The Appellant began its submission by stating that at the time of the sale of the tickets to the Complainant in June, 2022, the Appellant had normal scheduled flights to the People's Republic of China. The Appellant further stated that subsequently, China closed its airspace due to the increase in Covid - 19 cases

and cancelled flights into China. Following the closure of the airspace and cancellation of flights, the Appellant stated that it became impossible for the Airline to fly into China as scheduled on 10th January, 2022. The Appellant further stated that it negotiated with the Chinese authorities to allow it operate a special flight once a week, and that tickets for this flight were three (3) times more costly than the cancelled normal scheduled flights.

21. The Appellant then argued its grounds of appeal as follows:

Ground One

In ground one, the Appellant argued that the Complainant could not travel to China on 10th January, 2022 because the Chinese government imposed travel restrictions, due to the rise in Covid-19 cases. [5] The Appellant further argued that the fare upgrade was explained by Dianelink as arising following the global restriction on flights by the Chinese government, which necessitated the making of special arrangements under which the Appellant was granted special permission to operate flights into China. Under this special permission, the Appellant submitted that travellers were required to spend two nights in Addis Ababa[6]. The Appellant further submitted that it did its best to negotiate special flights into China just to assist its clients including the Complainant.

Ground Two

Under ground two, the Appellant stated that at the time the Appellant's agent sold the ticket to the Complainant, the expectation of the Parties was that there would be a scheduled flight to China on 10th January, 2022. The Appellant further submitted that the continued flight ban amounted to frustration of the contract between the Complainant and the Appellant. The Appellant cited, in this regard, the case of ***Tatem Limited Vs. Gamboa***[7], in which the effect of frustration of contract was explained.

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[5] *Record of Proceedings pp.21 and 8).*
[6] Ibid., p.21
[7] *(1938) 3 All ER 135*

22. The Appellant submitted that *in casu*, the initial contract between the Complainant and itself was frustrated by the Chinese government's ban on scheduled flights. The Appellant further submitted that it was a serious error or misdirection on the part of the Respondent to expect the Appellant to discharge its obligations under a contract which was no longer capable of performance. In view of this, the Appellant argued that any ticket issued to the Complainant to fly after 10th January was a new contract with its own terms, including fares.

RESPONDENT'S SUBMISSIONS

23. The Respondent argued both grounds together, and in this regard, submitted that the Board was on firm ground when it found that the Appellant had violated sections 49(5) and 51(1) of the Act.
24. In relation to section 49(5), the Respondent argued that the provision of a service to a consumer with reasonable care and skill was couched in mandatory terms, by use of the word "shall", hence the provision of a strict liability. Counsel referred to the definition of "reasonable care" from ***Black's Law Dictionary*** which defines it as a test of liability for negligence, the degree of care that a prudent and competent person engaged in the same line of business or endeavour would exercise under similar circumstances.
25. The Respondent referred to the definition of "skill" from ***Black's Law Dictionary*** which defines it as special ability and proficiency; especially the practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them appropriately, with readiness and dexterity. Or skill is generally considered as more than mere competence. It is a special competence that is not part of the reasonable person's ordinary equipment, but that results from aptitude cultivated through special training and experience.
26. The Respondent stated, *inter alia*, that according to pages 2 to 4 of the Record of Proceedings, which pages contained an email between the Complainant, the Appellant and Dianelink, the reason advanced for the additional payment to be made by the Complainant for the tickets he had purchased was that the tickets

were no longer valid, as the fare that the Complainant had initially paid for the tickets was no longer valid in its system. The Respondent further submitted that the correspondence clearly showed that the fare adjustment upwards had nothing to do with the Covid-19 Pandemic as alleged by the Appellant in its Heads of Argument, and by Dianelink in its submissions to the preliminary report at pages 33 to 34 of the Record of Proceedings.

27. Counsel for the Respondent also submitted that the Appellant, through Dianelink, was expected to conduct its business with the utmost reasonable care and skill as set by standards - this being to issue tickets to customers based on valid and correct prices that are provided for in its system. The Respondent argued that the issuance by the Appellant of three (3) tickets at a lower fare was an act of negligence not expected of enterprises in this line of business, and that the Respondent had obtained third party information from other airlines.[8] The Respondent stated that it was unequivocal from the submissions of those Airlines that once a ticket is issued to a customer, prices are not adjusted. Counsel for the Respondent further submitted that the Appellant, accordingly, did not provide a service to the Complainant with reasonable care and skill, as the Appellant proceeded to adjust the price of the already issued tickets and threatened that if the Complainant did not pay the additional amount on the tickets, the tickets would become invalid.

28. As regards section 51(1), the provision was equally couched in mandatory terms, prohibiting the charging of a consumer, a price that exceeds that displayed. The Respondent stated, further, that the initial price of the issued tickets was USD4,860.00 (Four Thousand Eight Hundred Sixty United States Dollars), and that four (4) months after the purchase of the tickets. In addition, the Appellant notified the Complainant that the Appellant was now charging an additional USD4,340.00 (Four Thousand Three Hundred and Forty United States Dollars) for the tickets, bringing the total purchase price to USD9,200. 00 (Nine Thousand

[8] Record of Proceedings p. 22

Two Hundred United States Dollars), and that on this basis, the Appellant violated section 51(1) of the Act.

29. Counsel averred that the grounds of appeal had no merit as neither Covid-19, nor the ban of entry into China had anything to do with the additional fare imposed by the Appellant. Counsel further averred that even if the flight ban formed the basis for the increase in the fare, the price adjustment should not have applied to the issued tickets, as they were already paid for, and that the conduct of the Appellant was purely negligent and unfair on the part of the Complainant.

30. Counsel prayed that the Appeal be dismissed.

CONSIDERATION OF THE APPEAL

31. On the 17th of July, 2023, this Tribunal heard the Parties. Learned Counsel for the Appellant, Mr. Kamfwa, submitted that the Appellant would rely, entirely, on its Heads of Arguments filed on 24th of May, 2023. In a similar vein, Learned Counsel for the Appellant, Ms. Mtonga, elected to rely entirely on the Respondent's Heads of Arguments filed on 5th June, 2023. The Tribunal wishes to thank Counsel for the Heads of Argument filed before it, which shall, as and when necessary, be referred to by it.

Ground One

The Respondent erred in law and fact when it established that the Appellant violated Sections 49(5) and 51(1) of the Act as they did not exercise reasonable care and skill by issuing the complainant air tickets on amounts that were not verified in the system.

32. The Appellant argued that on account of travel restrictions imposed by the Chinese government, *the Complainant could not travel to China on 10th January 2022, and that the said travel restrictions* necessitated the making of special arrangements under which the Appellant was granted special permission to operate flights into China. The Appellant submitted that the flight schedule

under this special permission involved two nights stay in Addis Ababa[9], and that it did its best to negotiate special flights into China just to assist its clients, including the Complainant. The Appellant further submitted that the fare upgrade was explained by Dianelink as arising following the travel restrictions.

33. The gist of the Respondent's argument regarding Ground One pertained to the strict liability imposed by section 49(5) of the Act, which section was couched in mandatory terms. According to the Respondent, pages 2 to 4 of the ROP, which contained an email between the Complainant, the Appellant and Dianelink, showed that the additional payment to be made by the Complainant for the tickets he had purchased was the invalidity of the tickets which arose on account of the invalidity of the fare in the Appellant's system. The Respondent further submitted that the correspondence did not advance Covid-19 as the reason for the increase in the fare.

34. On perusal of the Record of Proceedings, the Tribunal notes an email from the Complainant, to Ethel, which contains the following excerpt of a message forwarded from Dianelink:

Dear Diane

Greetings!

As you know, our published OW fare from LUN to PVG is USD5000+ for Economy and USD7000+ for business class. However, the below tickets to PVG on DEC, JAN & FEB are issued with lesser amount than base fare amount. Hence this is to advise you to reissue the tickets with the current Y class OW fare... [10]

35. Ethel Mwenda responded to this email on even date at 16:42 hours[11], stating, *inter alia*, that-

[9] Record of Proceedings Page 21
[10] Ibid., p4
[11] Ibid., p3.

*"...The **fare paid on the ticket is no longer valid in the system** thus additional payment (fare difference of current ticket price) is to be collected. My apologies for the inconvenience.*

Regards,

Ethel

[Emphasis ours]

36. The Tribunal established that a base fare is the price of an airline ticket before fees, taxes, and any surcharges are added. In most cases, a traveler's base fare will be lower than the final ticket price. Some fares, such as ones to international destinations, may increase significantly from the base fare when additional taxes are added.[12]
37. The Tribunal also considered the nature of the duty of care owed, to prospective travellers, by persons involved in air travel and the sale, by those persons, of air tickets. In this regard, the Tribunal considered the International Civil Aviation Organization ("ICAO") Core Principles of Consumer Protection[13] ("ICAO's Principles") which provide that-

> *Passengers should have clear, transparent access to all pertinent information regarding the characteristics of the air transport product that is being sought, prior to purchasing the ticket, including the following:*
>
> - *total price, including the particular air fare, taxes, charges, surcharges and fees;*
> - *general conditions applying to the fare;...*

It suffices to note that both Zambia and Ethiopia are parties to ICAO.

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[12] What is an Airline Base Fare? (tripsavvy.com)
Visited on 27/03 at 16:30 hours

[13] Available at https://www.icao.int/sustainability/SiteAssets/pages/eap_ep_consumerinterests/ICAO_CorePrinciples.pdf Visited on 27/03/2024 at 17:32 hours.

38. The Tribunal further considered the International Air Transport Association ("IATA") Core Principles on Consumer Protection[14] which provide as follows:

> *Passengers should have clear, transparent access to the following information:- fare information, including taxes and charges, prior to purchasing a ticket;...*

It is important to note that Ethiopian Airlines is a member of IATA.

39. The foregoing provisions illumine the duty of the Appellant, and other members of ICAO and IATA, to provide a prospective air traveller, prior to that air traveller's purchase of a ticket, with information pertaining to the total price of the ticket, including the particular air fare, taxes, charges, surcharges and fees. The ICAO Core Principles go further by providing that general conditions applying to the fare must be availed to a customer. *In casu*, therefore, if the fare was subject to increment, this information should have been provided to the Complainant, before he purchased the tickets, together with an elaboration of the reasons that were likely to cause an increment.

40. Did the Appellant perform this duty, i.e. did they conduct themselves in a manner that is compliant with the foregoing Principles - in a manner that reasonable persons engaged in the business of air transport should? Unfortunately, the answer to this question is in the negative. This is evident from the email referred to in paragraph 35 above in which it is stated, *inter alia*, that the Appellant's *"...published OW fare from LUN to PVG is USD 5000+ for Economy and USD7000+ for business class. However, the below tickets to PVG on DEC, JAN & FEB are issued with lesser amount than base fare amount. Hence this is to advise you to reissue the tickets with the current Y class OW fare..."* [15]

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[14] Available at https://www.iata.org/contentassets/2e46aace261040b9a47fb7b9da18efc9/consumer_protection_principles.pdf Visited on 27/03/2024 at 17:44 hours.

[15] Record of Proceedings, p.3.

41. The foregoing excerpt suggests that the Appellant, through its agent, failed to provide the Complainant with the correct information pertaining to the total price of the tickets, including the particular air fare, taxes, charges, surcharges and fees. The Appellant, therefore, failed to provide air tickets to the Complainant with reasonable care and skill. The Tribunal notes that not only did the Appellant fail in its duty, but the Appellant even went a step further and sold tickets to the Complainant based on the wrong price, and sought extra payment from the Complainant to redress this failure, hence the upward airfare adjustments. The Tribunal further notes that the Complainant paid this extra fare.

42. The Tribunal also notes that the Appellant puts forth another reason for adjusting the airfare upwards, namely that the fare paid by the Complainant, which was valid in the system at the time of purchase, was no longer valid thus, additional payment (fare difference of current ticket price) was to be collected.[16] In the view of the Tribunal, the presumption of validity of the price paid by the Complainant derives from the use, by Ethel Mwenda, of the words "fare paid on the ticket **is no longer valid** in the system" - with the words "no longer valid", suggesting the cessation of validity of a price. [Emphasis ours].

43. In view of the foregoing emails, the Tribunal then sought to answer the question whether the travel ban caused the increment in the airfare as argued by the Appellant. The Tribunal is constrained to answer this question in the positive. In the view of the Tribunal, had the travel ban been the real reason behind the fare increment, this reason would have been advanced by the Appellant and Dianelink at the earliest possible opportunity they were accorded. Unfortunately, in November, 2021, the reasons provided by Dianelink and the Appellant to the Complainant spoke to the need "*...to reissue the tickets with the current Y class OW fare, as they* were *issued with lesser amount than base fare amount,...*" and to collect fare difference of current ticket price "...as *the fare paid on the ticket is no longer valid in the system...*" The matter of the ban

[16] Record of Proceedings p3.

was only raised, by Dianelink, the following year (ie.2022) on the 24th of March, in response to a letter from the Respondent pertaining to allegations of unfair trading practices being practised *by Dianelink.*[17] This begs the question, "If the travel ban by the Chinese government was, indeed, the real reason behind the increase in the airfare, why did the Appellant wait four (4) months to advance the reason?"

44. In the view of the Tribunal, the reason is simple - the travel ban was an afterthought whose intent was to pervert the cause of justice. The Tribunal's view is fortified by the fact that at the time of the sale of the tickets to the Complainant, travel restrictions were already in place in China. In fact, the said restrictions commenced in March, 2020. This is evidenced by the following online article entitled *"China's Travel Restrictions due to COVID-19: An Explainer"*[18].

45. The Article provides, in part, as follows:

> *According to a statement released by the Ministry of Foreign Affairs and the National Immigration Administration on Wednesday, foreign nationals holding valid Chinese residence permits for work, personal matters, and reunion can enter China without applying for new visas - **effective from 0 am, September 28, 2020.** If these 3 categories of residence permits as held by foreign nationals have expired (in the time since the travel ban **was imposed on March 28, 2020**) - the holders may apply for relevant visas by presenting the expired residence permits and relevant material to the Chinese embassies or consulates on the condition that the purpose of the holder's visit to China remains unchanged [Emphasis ours];*

and

> ***International travel restrictions***

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[17] Ibid p33.

[18] China's Travel Restrictions due to COVID-19: An Explainer, By Zoey Zhang, available at https://www.china-briefing.com/news/chinas-travel-restrictions-due-to-covid-19-an-explainer/#International%20Travel%20Restrictions Visited on 28/03/2024 at 02:33 hours

***From midnight (0 a.m.) of March 28, 2020**, China suspended the entry of most foreign nationals, citing the temporary measure as a response to the rapid spread of COVID-19 across the world. The announcement was made by China's Ministry of Foreign Affairs on March 26, two days ahead of schedule.*

46. Further, even if the Appellant could argue out the travel ban, the Tribunal holds the firm view that this would not be in keeping with the Zambia Air Services Regulations, Statutory Instrument No. 50 of 1982. The said Regulations were promulgated under the repealed Air Services Act, Chapter 444 of the Laws of Zambia, which law was replaced by the Civil Aviation Act No. 5 of 2016. The Tribunal notes that notwithstanding the repeal of the Air Services Act, and the replacement thereof by the Civil Aviation Act, 2016, the regulations made under the repealed Act remain in force to the extent that they are not repugnant to the Civil Aviation Act, 2016, until they are revoked. Section 15 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia provides in this respect-

> *15. Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder.*

47. There being no revocation of the said statutory instrument, the Tribunal refers to the Second Schedule to the Regulations, and in particular, to Article III, which provides, in paragraph 1(a), as follows:

> *Ticket Prima Facie Evidence of Contract*
>
> *1. (a) The ticket constitutes prima facie evidence of the contract of carriage between Carrier and the passenger. The conditions of*

contract contained in the ticket are a summary of some of the provisions of these Conditions of Carriage.

48. Article III(2)(b) of the same Regulations provides, in part-

Extension of Validity

(b) If a passenger is prevented from travelling within the period of validity of his ticket because Carrier-

*(i) **cancels the flight on which the passenger holds a reservation**; or*

(ii) ...; or

*(iii) **fails to operate a flight reasonably according to schedule**; or*

(iv) ...; or

(v) ...; or

(vi) ...;

***the validity of such passenger's ticket will be extended until Carrier's first flight on which space is available in the class of service for which the fare has been paid**.* [Emphasis ours]

49. The Tribunal finds that the ticket being *prima facie* evidence of the contract between the Carrier and the passenger, the consideration payable, and paid, for the tickets was that presented by the Appellant, to the Complainant as $4, 860. Further, the Tribunal holds the view that if indeed, the travel ban resulted in the Appellant failing to fly according to its schedule, and in the Appellant having to reschedule its flights, resulting in more expensive flights, the foregoing provisions suggest that the Appellant, having contracted with the Complainant to provide his air carriage to China, should, at the very least, have engaged the Complainant for the extension of his ticket until the first flight on which space was available, or offered him a refund if the other options were not acceptable.

The Tribunal finds that the Appellant failed to reschedule the Complainant's flight at no cost to the Complainant or failed to refund the Complainant, but instead increased the air fare.

50. Further, the Tribunal agrees with learned Counsel for the Respondent regarding the strict liability imposed on the Appellant by section 49(5) of the Act. In the case of ***Radian Stores Retail Limited v. the Competition and Consumer Protection Commission***[19] *(the* ***"Radian Stores Case"****)*, this Tribunal considered the statutory duty of reasonable care and skill set out in section 49(5) of the Act. Finding that that duty was one of strict liability, this Tribunal stated, *inter alia-*

> *103. This statutory duty of reasonable care and skill on the part of a supplier (i.e. the Appellant in this case) is mandatory, entailing strict or absolute liability. In some statutory offences, such as careless driving, for instance, no harm may occur and hence there may be no tort, yet the conduct may still be condemned as careless.*[20] *The rationale for mandatory observance and strict liability in statutory offences is founded on public policy considerations as reflected in the objectives of the Act, i.e. protection of consumers (those who buy or offer to buy) from exploitation or abuse by suppliers of a service.*
>
> *104. Other considerations include the enforcement of the statutory provision being rendered impracticable by defences such as absence of intention (mens rea) or negligence. In the case of* ***Caswell v. Powell Duffryn Associated Collieries Limited (1940) A.C. 152 at 177****, Lord Wright stated that an action for breach of a statutory duty is not for negligence in the strict or ordinary sense.*[21] *Discussing strict liability in relation to the offence of giving a misleading*

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[19] 2021/CCPT/037/CON

[20] See Clerk and Lindsell on Torts, Seventeenth Edition (London, Sweet & Maxwell, 1995), paragraph 7-124.

[21] See also discussion by Clerk and Lindsell, ibid. paragraph 11-25.

indication as to the price at which any goods, services, accommodation or facilities are or may be available under section 11 of the (English) Consumer Protection Act of 1987 and alternative relief (compensation), the authors of Clerk and Lindsay on Tort, state that it is a strict liability offence and the court that convicts a person of the offence has discretion to make a compensation order in respect of any personal injury, loss or damage arising from the offence.[22]

105. ...

106. ...

107. ...

108. ...

109. ...reasonable care and skill are measured on an objective test. That it means "omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done." Blyth v. Birmingham Waterworks Company (1856) 11 Exch 78, earlier cited by counsel for the Respondent.

110. We agree with this common law standard of care being applicable to the statutory duty of reasonable care and skill required by section 49 (5) of the Act...

111. The nature of the breach of the statutory duty of reasonable care and skill would, ..., apply with modifications as follows: "omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human

[22] Ibid, paragraph 14-50.

affairs would do, or doing something which a prudent and reasonable man would not do. The defendant (Appellant) would be liable if, regardless of whether unintentionally and /or without negligence, it omitted to do that which a reasonable person would have done, or did that which a reasonable person would not have done.

51. Considering the foregoing, and on the basis of *stare decisis*, this Tribunal reiterates that the duty set out in section 49(5) is one of strict liability.

Ground Two

52. The Appellant submitted that the Respondent erred in law and fact when it established that the Appellant's conduct of demanding an extra charge on already issued tickets 4 months after the date of purchase was unfair and in violation of Section 51(1) of the Act. The Appellant averred that the Respondent totally disregarded Dianelink's submission that the reason for the adjusted fare price was due to the Chinese government's ban on scheduled flights due to the Covid-19 pandemic.
53. The Appellant argued that at the time Dianelink sold the ticket to the Complainant, the expectation of the Parties was that there would be a scheduled flight to China on 10th January, 2022, but unfortunately, that was not to be as the flight ban was still in place.
54. The Tribunal takes judicial notice of the fact that the Coronavirus first appeared on a small scale in 2019, with the first large cluster appearing in Wuhan in December, 2019[23]. By the time the Appellant sold the tickets to the Complainant in June, 2021, the Coronavirus had been in existence for seventeen (17) months, and the travel ban for fifteen (15) months (having commenced in March, 2020).
55. The Tribunal, further, considered the Appellant's argument that it expected that there would be a scheduled flight on 10th January, 2022, and has asked itself, "Was this a reasonable probability in the circumstances or was this a fantastic

[23]What is the history of Coronavirus? Available at Coronavirus History: How Did Coronavirus Start? (webmd.com) Visited on 17/03/2024 at 17:18hours.

possibility? The Tribunal has also asked itself, "Considering that at the time of the sale of the tickets the Coronavirus had been in existence for seventeen (17) months, should it not have been foreseeable by the Appellant that there was a likelihood that the travel ban would not be lifted in the next seven (7) months (i.e. in the period from June, 2021, to January, 2022)? Should the Appellant not have exercised greater caution and have been alive to the operational risk posed by Covid-19?"

56. In the view of the Tribunal, the Appellant ought, in the circumstances, to have foreseen that there was a high probability that the Coronavirus that had been in existence for seventeen (17) months as at June, 2021, was not going to end within seven (7) months of the sale of the tickets to the Complainant (i.e. by January, 2022), and that the ban would not be lifted.

57. The assumption by the Appellant is even more fantastic if one considers that from the time that the ban was effected in March, 2020, to June, 2021, when the tickets were sold to the Complainant, in China, the number of Covid-19 confirmed infections and deaths had risen from eighty two thousand one hundred (82, 100) cases and three thousand three hundred and four (3, 304) deaths to one hundred and three thousand one hundred (103, 100) cases and four thousand eight hundred and forty six (4, 846) deaths[24]. The Tribunal, therefore, disagrees with the submission made by the Appellant regarding its reasonable expectation that the ban would be lifted, and that as a consequence, a flight would be available for the Complainant. In the view of the Tribunal, no reasonable person in the aviation industry could have had such an expectation, considering the increase in the number of confirmed cases of infection, and the number of deaths, in China, from the Coronavirus.

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[24] Number of novel coronavirus COVID-19 cumulative confirmed and death cases in China from January 20, 2020 to June 6, 2022, available at https://www.statista.com/statistics/1092918/china-wuhan-coronavirus-2019ncov-confirmed-and-deceased-number/
Visited on 23/03/2024

58. In order considering Ground Two, the Tribunal has also asked itself the pertinent question - "Does the evidence show that the upward adjustment of the airfare was attributable to the ban on travel imposed by the Chinese Government?"
59. In responding to this question, the Tribunal took judicial notice of the fact that the travel ban aforementioned had been, and was already, in place at the time that the ticket was sold by the Appellant to the Complainant, in June, 2021. The ban was still subsisting in November, 2021, when the Appellant increased the airfare. Arguably, therefore, there was no change in circumstances between June, 2021, when the tickets were sold, to November, 2021, when the Appellant increased the airfare. The Tribunal finds it difficult, on account of this fact, to agree with the Appellant that a ban existing at the time of sale of the tickets in June, 2021, caused an increase in the price of the tickets in November, 2021. This brings us to the matter of Frustration of Contract also argued by the Appellant.
60. The Appellant submitted that legally speaking, the continued flight ban amounted to frustration of the contract between the Complainant and the Appellant. The Appellant submitted that *in casu*, the initial contract between the Complainant and the Appellant was frustrated by the Chinese government's ban on scheduled flights and that it was, accordingly, a serious error or misdirection on the part of The Respondent to expect the Appellant to discharge obligations on a contract which was no longer capable of performance; and that any ticket issued to the Complainant to fly after 10th January amounted to a new contract with its own terms including fares.
61. The question to be determined by the Tribunal is, "Was the contract frustrated?" This question is addressed below.

What is frustration of Contract?

62. The law on frustration of contract stems from the theory of absolute obligation, whereunder a person is absolutely bound to perform any obligation which that person has undertaken ("*Pacta sunt servanda*" or "Agreements must be kept").

It was explained by the Court in the well-known case of ***Paradine v. Jane (1647)***[25], *"When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."*

63. Lord Radcliffe in the ***Davis Contractors Ltd v Fareham Urban District Council [1956]***[26] ("the Davis Contractors Case") stated-

> *"The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, ex facie binding, are no longer enforceable against the parties."*

That is to say, frustration of contract allows parties to a contract to be relieved of their obligations under the contract.

64. The doctrine only applies to contracts which have become impossible (not more expensive) to perform. Where frustration operates, it does so to automatically, as a matter of law, end the contract and discharge the parties from further liability under it. As Bingham LJ observed, the drastic nature of this result is such that "the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended". [27]

65. The test for a frustrated contract was defined by Lord Radcliffe in the Davis Contractors Case (*supra*). He stated-

> *"... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was*

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[25] ***Aleyn 26 at 27***

[26] AC 696

[27] J. Lauritzen A.S. v Wijsmuller B.V. (The "Super Servant Two") [1990] 1 Lloyd's Rep 1

undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do." [28]

66. Under the Doctrine, therefore, there must be a supervening event or an unexpected event that occurs, which significantly changes the circumstances under which the contract is to be performed, that the parties no longer need to perform the contract. The supervening event, therefore, should not have been in existence at the time of entry into the Contract, i.e. it must be a new and unforeseen event.

67. In the case of *W J Tatem Ltd v Gamboa [1939] 1 KB 132*, Lord Goddard, J., provided a different dimension to the foreseeability of the supervening event, by stating that even where an event is foreseen by the parties to a contract, the event can be a frustrating event, "the only thing that is essential is that the parties should have made no provision for it in their contract". He stated-

> *Sir Robert Aske meets this point by saying there cannot be frustration where the circumstances must have been contemplated by the parties. By "circumstances" I mean circumstances which are afterwards relied on as frustrating the contract. It is true that in many of the cases there is found the expression "unforeseen circumstances," and it is argued that "unforeseen circumstances" must mean circumstances which could not have been foreseen. But it seems to me, with respect, that, if the true doctrine be that laid down by Lord Haldane, frustration depends on the absolute disappearance of the contract; or, if the true basis be, as Lord Finlay put it, "the continued existence of a certain state of facts," it makes very little difference whether the circumstances are foreseen or not. If the foundation of the contract goes, it goes whether or not the parties have made a provision for it. The parties may make provision about what is to happen in the event of this destruction taking place, but if the true foundation of the doctrine is that once the subject-matter of the contract is destroyed, or*

[28] At p.729

the existence of a certain state of facts has come to an end, the contract is at an end, that result follows whether or not the event causing it was contemplated by the parties. It seems to me, therefore, that when one uses the expression "unforeseen circumstances" in relation to the frustration of the performance of a contract one is really dealing with circumstances which are unprovided for, circumstances for which (and in the case of a written contract one only has to look at the document) the contract makes no provision...

68. In order to determine whether or not a contract has been frustrated and that the contractual obligations thereunder are no longer binding on the parties, one cannot avoid undertaking an analysis of the facts of the case. In the case of ***Pioneer Shipping Limited Vs. BTP Dioxide Ltd (1981)***[29], Lord Diplock stated that in the ultimate analysis, the assessment of frustration of contract involved the making of "... *a conclusion of law as to whether the frustrating event or series of events has made the performance of the contract a thing radically different from that which was undertaken by the contract*". The "radically different" test is the generally accepted test employed for determining whether or not a contract has been frustrated.

69. In ***National Carriers Limited v Panalpina (Northern) Limited [1981]***[30], the House of Lords restated the test for frustration when it stated-

Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

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[29] ***3 W.L.R, 292***
[30] ***AC 675***

70. The exceptions to discharge of contract by frustration include a party facing loss, inconvenience or hardship, the event in question being reasonably foreseeable, the frustrating event being self-induced, the contract being merely delayed or interrupted, or the frustrating event already being in existence when the parties entered into the contract.[31] As regards the event being reasonably foreseeable, the English courts have stated *obiter dicta* that a foreseen or contemplated event should not be a frustrating one.[32] If the event is sufficiently foreseeable that it should have informed the way in which the parties contracted, specifically as to the allocation of risk, a court will be inclined to consider that the parties have contracted taking this factor into account. If this is so, frustration is unlikely.[33]

71. The Tribunal has considered the event to which the Appellant has referred as having caused the frustration of the Contract i.e. the travel ban by the Chinese government. The Tribunal has, regarding the matter of the travel ban, belaboured the point that the said ban was in existence prior to, during, and after the purchase, by the Complainant, of the tickets. On this basis, the Tribunal finds that the travel ban was not a supervening, new or unforeseeable event as the travel ban was in effect prior to, at, and after, the sale of the tickets to the Complainant. On this basis, the Tribunal is constrained to find that an already existing travel ban made the contract impossible to perform, as the possibility of the failure to perform the contract existed even at the time the Appellant and the Complainant entered into the contract. That is to say, what should have been the supervening event already existed at the time the contract was entered into. In fact, the Appellant itself stated that it expected that the travel ban would, by the scheduled date of

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[31] Spencer Wright, Frustration of Contracts: What causes a contract to break? Available at https://gibbswrightlawyers.com.au/publications/frustration-contract-law/#:~:text=a%20party%20faces%20loss%2C%20inconvenience%20or%20hardship%3B%20the,event%20%28such%20as%20in%20a%20force%20majeure%20clause%29%3B
Visited on 08/04/2024 at 15:42hours.

[32] Catharine MacMillan (2021) Covid-19 and the Problem of Frustrated Contracts, King's Law Journal, 32:1, 60-70, DOI: 10.1080/09615768.2021.1885328, p.65. Available at https://doi.org/10.1080/09615768.2021.1885328 Visited on 19/04/2024 at 22:50hours

[33] *Ibid*

travel, have been lifted. In the view of the Tribunal, the Appellant entered into an imprudent commercial bargain, whereunder it contracted with the Complainant, with the expectation that the travel ban would be lifted. The Appellant did this even though it was practically impossible to determine when the Covid-19 pandemic would end, and the number of Covid-19 cases and deaths was increasing. As such, the Appellant took the risk of that expectation being disappointed, or of the lifting of the travel ban not being realised.

72. The Tribunal, further, notes that frustration of contract was not the subject matter of the investigation undertaken by the Respondent and adjudicated on by the Board of the Respondent. The subject matter, in this respect, pertained to a violation of section 51(1) of the Act namely, that the Appellant *charged the Complainant more for the tickets to China than the price indicated in the System.* This is evident from the fact that the NOI was sent in December, 2021, after the airfare was increased, and not in January, 2022, after the scheduled flight was cancelled.

73. The Tribunal also finds that even if a finding was made that the contract was frustrated, the frustration of the Contract would have occurred on, or around 10th January, 2022, when the Appellant confirmed that it was not able to fulfil its flight obligation to the Complainant on account of a "supervening event, namely "the travel ban". That is to say, the contract would not yet have been frustrated in November, 2021, when the Appellant increased the airfare to China, because (to use the Appellant's words), "*the expectation of the Parties was that there would be a scheduled flight to China on 10th January, 2022*". This expectation suggested that the possibility of performance of the Contract still existed until 10th January, 2022. The Appellant also suggested that frustration only occurred on 10th January, 2022, in its argument that "*Any ticket issued to the Complainant to fly after 10th January was a new contract with its own terms including fares.*" Accordingly, frustration of contract cannot be canvassed as justification for the Appellant's violation of section 51(1) of the Act.

74. *This brings the Tribunal to another pertinent question, Did the Respondent* ***"err in law and fact when it established that the Appellant's conduct of demanding an extra charge on already issued tickets 4 months after the date of purchase was unfair and in violation of section 51(1) of the Act in total disregard of the Appellant's submission that the reason for the adjusted fare price was due to the Chinese government ban on scheduled flights due to the Covid-19 pandemic?"*** This question is considered below.

75. Counsel for the Appellant submitted, albeit regarding Ground One, that the fare upgrade was explained by Dianelink, as arising following the global restriction on flights by the Chinese government, which necessitated the making of special arrangements under which the Appellant was granted special permission to operate flights into China, and that these alternative arrangements were more expensive. The Tribunal notes that the Appellant did not give an indication as to when the special travel arrangements came into effect.

76. Counsel for the Respondent submitted that section 51(1) of the Act was couched in mandatory terms, prohibiting the charging of a consumer, a price that exceeds that displayed. Counsel for the Respondent further submitted that the Appellant's act of increasing the airfare four (4) months post purchase by an additional four thousand three hundred and forty United States Dollars ($4, 340.00) for the tickets, bringing the total purchase price to nine thousand two hundred United States Dollars ($9, 200. 00), was a violation of section 51(1) of the Act.

77. The Tribunal considered Article VI(2)of the Zambia Air Services Regulations, the relevant portions of which provide that-

> *2. If Carrier ..., **fails to operate reasonably according to schedules**, ..., Carrier, with due consideration to the passenger's reasonable interests, shall-*
>
> *(a) carry the passenger on another of its scheduled passenger services on which space is available; or*

(b) *re-route the passenger to the destination indicated on the ticket or applicable portion* ***thereof by its own scheduled services or the scheduled services of another Carrier****, or by means of surface transportation.* ***If the fare****, excess baggage charges, and any applicable service charge* ***for the revised routing is higher than the refund value of the ticket or applicable portion thereof as determined under Article XI, paragraph 3 (b), Carrier shall require no additional fare or charge from the passenger and shall refund the difference if the fare and charges for the revised routing are lower; or (c) make a refund in accordance with the provisions of Article XI, paragraph 3 (b).*** [Emphasis ours]

78. In the view of the Tribunal, if indeed the travel ban resulted in the Appellant failing to fly according to its schedule, and having to reschedule its flights, resulting in more expensive flights, the foregoing provisions suggest that the Appellant, having contracted with the Complainant to provide his air carriage to China, should, at the very least, have engaged the Complainant - for the re - routing of the Complainant on the next available flight, or on a flight with another carrier (when available), at no extra cost to the Complainant, or offered him a refund if the other options were not acceptable. We also agree with Counsel for the Respondent that even if the flight ban formed the basis for the increase in the fare, the price adjustment should not have applied to the issued tickets, as they had already been paid for. The Appellant failed to offer the Complainant these options, and resorted, instead, to threats to cancel the tickets purchased by the Complainant, if the Complainant did not top up the fare.

79. The Tribunal further, finds that the obligation in section 51(1) is one of *absolute liability. In the case of* ***Spar Zambia Limited v. Danny Kaluba and Competition***

and Consumer Protection Commission [34] (the "Spar Zambia Case), speaking to the nature of the liability set forth in section 51(1) of the Act, this Tribunal stated,

> *... Furthermore, we are of the view that the said public policy and the suppression of the mischief would be defeated if the offence was not one of absolute liability because implementation of the requirement of the law is exclusively a responsibility of the Appellant and the Respondent is not privy to the process by which the Appellant secures adherence to the law. Whether or not the act in issue was committed deliberately by negligence or honest mistake despite all the diligent efforts are matters within the exclusive knowledge of the Appellant.*

80. We further stated in the Spar case that, *"even assuming intention and negligence had been ingredients, the onus would have been on the Appellant, who had the exclusive knowledge of the processes it undertook (if any), to show that it took due care and skill in ... pricing correctly."* We find that the Appellant has not shown that it took due care (reasonable care) and skill in its pricing. Rather, the Appellant sought to justify its actions on a travel ban which was already in existence when the tickets were sold to the Complainant.
81. On the basis of the foregoing, the Tribunal finds that the Board did not err when it found that the Appellant violated section 51(1) of the Act.
82. The Tribunal also thought it prudent to address its mind to the submissions made by Counsel for the Appellant that the Appellant did its best to negotiate special flights into China just to assist its clients including the Complainant, and to those made by Counsel for the Respondent who submitted that the conduct of the Appellant was purely negligent and unfair on the part of the Complainant. In the view of the Tribunal, it matters not, that the Appellant did its best to negotiate special flights into China just to assist its clients including the Complainant, as argued by the Appellant, or that the Appellant was negligent in the conduct of the transaction, as submitted by the Respondent. In the view of the Tribunal,

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[34] ***2016/CCPT/009/CON***

because the efforts undertaken by the Appellant are within the exclusive knowledge of the Appellant, the Appellant would have to show that it exercised reasonable care and skill in its provision of a service to the Complainant. We find that the Appellant failed to do this.

Decision of Tribunal

83. In view of the foregoing, the Tribunal finds the following:

(1) With respect to Ground One of the Appeal-

(a) The Appellant, through its agent, Dianelink, failed to provide the Complainant with the correct information pertaining to the total price of the tickets, contrary to ICAO and IATA Principles of Consumer Protection. The Appellant, therefore, failed to provide air tickets to the Complainant with reasonable care and skill. The Tribunal, further, finds that the duty to provide a service with reasonable care and skill is one of strict liability.

(b) Not only did the Appellant fail in its duty to provide a service with reasonable care and skill, but further sold tickets to the Complainant based on the wrong price;

(c) The travel ban was not the real reason behind the fare increment, and that if it was, it would have been advanced by the Appellant and Dianelink at the earliest possible opportunity they were accorded. The reason initially advanced, to the Complainant, in November, 2021, by Dianelink and the Appellant was the need *"...to reissue the tickets with the current Y class OW fare, as they* were *issued with lesser amount than base fare amount,..."* and to collect the fare difference of the current ticket price "...as *the fare paid on the ticket is no longer valid in the system..."* ;

(d) The travel ban was only raised, by Dianelink, on the 24th of March, 2022, in response to a letter from the Respondent pertaining to

allegations of unfair trading practices being practised *by Dianelink*. The Tribunal finds, therefore, that the travel ban was an afterthought whose intent was to pervert the cause of justice, because at the time of sale of the tickets to the Complainant in June, 2021, travel restrictions were already in place in China from March, 2020;

(e) The ticket constitutes *prima facie* evidence of the contract of carriage between the carrier and the passenger. The price at which the tickets were sold, thus, constituted the full and final consideration for the tickets; and

(f) the Appellant, should, at the very least, have engaged the Complainant for the extension of the tickets until the first flight on which space was available, or offered him a refund if the other option was not acceptable. The Appellant failed to do this.

(2) With respect to Ground Two-

(a) The obligation in section 51(1) of the Act is one of *absolute liability;*

(b) There was no supervening event which made the Contract impossible to perform, as the travel ban by the Chinese Government (cited by the Appellant as the event which frustrated the Contract) was in effect prior to, at, and after, the sale of the tickets to the Complainant. The Tribunal, therefore finds that there was no frustration of contract; and

(c) Even if a finding of frustration could be made, frustration of contract was not the subject matter of the investigation undertaken by the Respondent and adjudicated on by its Board. The subject of adjudication was the contravention of section 51(1) of the Act. Further, frustration if at all, would only have occurred on

10th January, 2022, which was the scheduled date for the flight, and not in November, 2021, when the air fare was increased.

84. On the basis of the foregoing, both grounds of appeal fail, and the Tribunal upholds the decision of the Board. Consequently, the appeal is dismissed with costs.

85. The costs shall be agreed by the Parties, and in default, will be assessed by the Tribunal.

86. A party aggrieved by this judgment may appeal to the Court of Appeal within thirty (30) days of the receipt of the judgment.

Delivered at Lusaka this 23 day of MAY, 2024.

Mr. J.N. Sianyabo
CHAIRPERSON

Mrs. M.B. Muzumbwe-Katongo

Mr. D. Mulima

Mrs. B.S. Chaila-Sichizya

Mr. B. Tembo