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THE HIGH COURT

1981 No. 8671P

BETWEEN:

BLANFORD AND HOUDRET LTD.

Plaintiffs

and

BRAY TRAVEL (HOLDINGS) LTD.  
AND ADRIAN J. HOPKINS

Defendants



JUDGMENT of Gannon, J. delivered the 11th day of November 1983

This is a claim to recover a sum of £45,896.00 of which the sum of £32,000.00 is the balance of an allegedly agreed sum of £56,000.00 sterling, and the sum of £13,896.00 is an agreed calculation in sterling of interest accrued since the 7th October 1980. The claim is founded upon a letter dated the 12th December 1980 addressed to the then managing director of the plaintiff company written upon headed notepaper of the first defendant and signed by the second defendant over the description managing director. The plaintiffs

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claim that this letter, which sets out what is described as a payment schedule in respect of the sum of £56,000.00 sterling payable by Bray Travel Ltd. to the plaintiffs, is a contract of guarantee by the defendants. The plaintiffs claim that upon the admitted default of Bray Travel Ltd. to make any payment after the first payment provided for in the schedule of payments the balance of the amounts is recoverable from the defendants. The claim has been contested almost exclusively on the grounds that there was a total failure of consideration for the contract through the acts of the plaintiffs amounting to repudiation and that as a consequence the defendants were entitled to treat the contract as discharged and so is unenforceable and the money not recoverable from the defendants. Other matters of defence pleaded, such as fraudulent misrepresentation, breach of exchange control regulations, illegality, and irregularity of form, were not relied upon.

In the absence of any express term in the letter specifying any consideration for what appears to be a past debt the circumstances affecting the execution of the document have to be investigated to ascertain what inference should be drawn as to the existence of a

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consideration to support the alleged agreement as an enforceable contract. The letter is as follows:

"BRAY TRAVEL (HOLDINGS) LTD.  
St. Helen's  
Killarney Road  
Bray

E.C. Tribe, Esq.,  
Blanford and Houdret Ltd.  
6 Wheler Street  
London E1

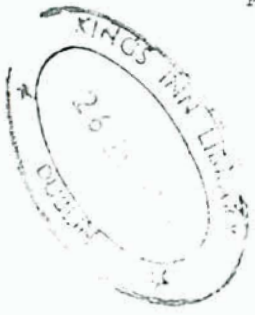
London 12th December 1980

Dear Eddie,

This is to certify that Bray Travel owe the sum of £56,000.00 sterling to Blanford and Houdret Ltd. The following payment schedule has been agreed by both parties

- 1) £IR 16,000.00 today 12th December 1980
- 2) £IR 5,000.00 Wednesday 17th December 1980
- 3) £IR 9,000.00 Friday 19th December 1980
- 4) £IR 7,500.00 Friday 9th January 1981
- 5) £IR 15,000.00 Friday 16th January 1981
- 6) £IR 15,000.00 Friday 23rd January 1981

All these payments will be by means of Bank Certified cheques delivered to Blanford and Houdret Ltd. offices on the due date. Bray Travel Ltd. agrees to pay interest to Blanford and Houdret Ltd. on the sums outstanding at the rate of 4% above LIBOR. It is agreed that interest shall be payable with effect from 7th October 1980. In the event



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"that Bray Travel Ltd. do not meet the schedule I undertake to guarantee all of the outstanding amount due under this agreement.

Yours sincerely,

ADRIAN J. HOPKINS  
MANAGING DIRECTOR"

The letter is in the handwriting, save for the second defendant's signature, of Heath Tyrrell who was financial controller of Bray Travel Ltd. and of a group of associated companies including Bray Travel (Holdings) Ltd. The document was written in the Tara Hotel in London at or about 7 o'clock p.m. on this sheet of headed notepaper which had been brought by special messenger from Dublin on the afternoon of the 12th December 1980. This had been done upon the instructions of the second defendant for the purpose of affording evidence to the satisfaction of the plaintiffs that the first defendant was the effective guarantor. The second defendant and his wife are the only shareholders and directors of the first defendant, and the acts of the second defendant in so binding the first defendant were approved and adopted by the wife of the second defendant. Because of the insistence on the part of the plaintiffs that a substantial immediate cash payment be made the sum of £16,000.00 mentioned in the

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letter was brought to London by the same messenger on the 12th December 1980 and was handed over with the letter to Mr. Shiman for the plaintiffs at the Tara Hotel, London. The form and terms of the letter had previously been composed and approved in draft by Mr. Tribe the plaintiffs' managing director to whom it is addressed at the offices in London of the plaintiffs earlier the same day.

It is agreed that this claim should be determined in accordance with Irish law. It is agreed that no payments other than the £16,000.00 on the 12th December 1980 were made by or on behalf of Bray Travel Ltd. or by the defendants to the plaintiffs. It is further agreed that as against the amount claimed a credit of £8,000.00 is due to Bray Travel Ltd. and should be set off pro tanto against the balance after deducting the sum of £16,000.00 paid on the 12th December 1980. The rate for interest described in the letter as "4% above LIBOR" refers to London Interbank ordinary rates, and it is agreed that upon applying such rates the amount of interest accrued on the £32,000.00 sterling since 7th October 1980 is £13,896 sterling.

The plaintiff company has its registered office in London and is engaged as the commercial and sales agent in Great Britain and Ireland of Aviaco the Spanish airline. Bray Travel Ltd. was a travel agency which had engaged Aviaco planes for a programme of winter season flights to and from Dublin between October 1980 and mid-April 1981. The booking of such flights and payments for them were made through the agency of the plaintiffs. Bray Travel Ltd. and the first defendant together with three or four other companies, using the words "Bray Travel" in their names, constituted a group who shared flight bookings and whose accounts were under the control of Heath Tyrrell. In December 1980 the first defendant was the only one of this group of companies which could have been shown to have a trading profit and some capital assets of value free of charge.

The visit to London on the 12th December 1980 of the second-named defendant and Mr. Tyrrell the financial controller of the Bray Travel group of companies was a step in the course of negotiations which had commenced in Madrid at the offices of Aviaco, the plaintiffs' principals. The meeting in Madrid between Mr. Hopkins and

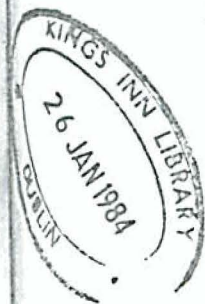
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Mr. Tyrrell with Señor Callejon and Señor Capaldo of Aviaco took place following discussions between the defendant Mr. Hopkins and Mr. Tribe of the plaintiff company in London on the 10th December 1980. The purpose of these meetings and negotiations, which were sought by Bray Travel Ltd. and Mr. Hopkins, was to revise for a temporary period the terms of payments that had been prescribed in the charter agreement dated the 24th June 1980 by which Aviaco planes were to transport traffic for Bray Travel Ltd. between the 1st November 1980 and the 19th April 1981. Included in this programme were flights on the 14th December 1980, the 21st December 1980 and two flights in January, two flights in February and two flights in March 1981. For each of these the charter price per flight was £10,863.00 and it was a term of the agreement that payment on the part of Bray Travel should be as follows:

"By means of a bank cheque issued to Aviacion y Comercio, S.A. Madrid, to be sent to our S.S.A. Messrs Blanford and Houdret Ltd. in London a minimum of 21 days prior to each flight."

The same terms applied to other flights in the programme at a frequency averaging three per week between the 1st November 1980 and 18th April 1981 for which the total charter price per week



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averaged £38,585.00. The evidence, which was not precise on this matter, indicates that for a number of reasons, some of which were beyond the control of Bray Travel Ltd., that company was unable to maintain the rate of income within the necessary time to provide the advance payments in accordance with the terms of the charter agreement. The plaintiffs had no authority to make or vary on behalf of their principals in Madrid a charter agreement with Bray Travel Ltd., and when Mr. Hopkins and Mr. Tyrrell presented proposals for that purpose at London on 10th December 1980 they were referred to Madrid. Prior to going to London on the 10th December Mr. Hopkins had requested from the Irish Intercontinental Bank in Dublin a bank guaranteed credit to the amount of £60,000.00 and offered in support of this request evidence of the creditworthiness of a company described as Bray Travel (U.K.) Ltd. With the assurance of the bank that such a guarantee could be arranged Mr. Hopkins and Mr. Tyrrell went to Madrid and there met Señor Callejon and Señor Lopes Capaldo. The immediate purpose of that meeting for Mr. Hopkins and Bray Travel Ltd. was to ensure that flights engaged for the next following weekend 13th and 14th December would not be



withdrawn notwithstanding the absence of advance payments. The further purpose of the meeting involved providing acceptable security for payments in respect of the remaining December and following January flights in lieu of advance payments as required by the charter agreement. The purpose of the visit to Madrid was achieved in the sense only that the Aviaco representatives gave verbal assurances that advance payment would be waived and the flights not withdrawn if there was adequate security shown for the payments. Aviaco were agreeable to accept a bank guarantee to an amount of £60,000.00 on the lines of the specimen furnished by Irish Intercontinental Bank which was "to be in our hands early in the following week" as stated by Señor Callejon in evidence. The terms of the specimen bank guarantee were sent by telex to the plaintiffs and discussed on the phone with them by Señor Capaldo on the 11th December 1980, the day of the meeting in Madrid.

Mr. Hopkins and Mr. Tyrrell were informed that the bank guarantee would have to be executed and delivered in Dublin with an Aviaco representative who would go to Dublin when informed that the bank guarantee was available for execution and delivery. In respect of the more immediate flights booked for the intervening period the

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Aviaco representatives accepted that the amounts of a deposit previously paid by Bray Travel Ltd. and of currency rebates and other credits derived from previous and pending flights would probably exceed in value the flight charges for the two flights due at the weekend 13th and 14th December 1980. Mr. Hopkins and Mr. Tyrrell were not able to give precise details of these calculations, and Aviaco were dependent on the plaintiffs for information upon such details. However, agreement was reached in Madrid that in respect of the weekend flights (for which the bank guarantee would be too late) advance payments would be waived and the flights would not be withdrawn if the accounts showing the credits claimed should be clarified with the London agents, the plaintiffs herein. It was further verbally agreed that payments for the later flights up to mid-January should be secured by a second bank guarantee up to £70,000.00 in value to be obtained several days after the first guarantee for £60,000.00. Señor Callejon said in his evidence:

"We mentioned £60,000.00 for first guarantee and then several days later another for £70,000.00 to carry on to mid-January and then continue as before. This was a temporary arrangement. When I say clarify accounts I mean to clear up for me what was due to us he paying

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"our agents for us and getting credits."

In cross-examination the evidence of Señor Callejon was:

"He mentioned something about £10,000.00 for each flight. There were eight flights to mid-January. Both guarantees would cover these. I was not clear that we owed £49,000.00. Our London agents would clear up the whole accounts. We had agreement in principle on two things - the bank guarantees and to clarify accounts. We did not know what credits were due to Hopkins nor what was due to us from Hopkins per Blanford and Houdret."

During the meeting in Madrid Señor Callejon telephoned Mr. Tribe the plaintiffs' managing director and got confirmation that there were credits due to Bray Travel Ltd. of amounts approximating those claimed but there were also debits to be calculated because five cheques for some previous flights had not been met but the amounts had been passed on by Blanford and Houdret to Aviaco before it was found that payment was not being made. In relation to the agreement in principle reached in Madrid there were two matters of importance upon which it was not possible to reach a satisfactory degree of precision. In the first place it was not possible to agree how much precisely was the value of the credits

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in favour of Bray Travel Ltd. which were accepted as security for payments for the flights of the week ending 13th and 14th December.

In the second place it was not possible to agree a date on which the first bank guarantee would be executed and available. Because a second bank guarantee had not been anticipated before the 11th December further negotiations with the bank became necessary. As to the first matter it was agreed in Madrid that Mr. Hopkins would satisfy Blanford and Houdret and the latter, as agents for Aviaco, had the duty to be satisfied on this matter. As to the second matter it does not appear from the evidence that any function was given by Aviaco to Blanford and Houdret other than to inform the principals when a representative would be required in Dublin, Mr. Hopkins having agreed in Madrid to arrange this through Blanford and Houdret.

It was necessary to consider in detail the evidence relating to the meeting in Madrid in order to establish the context or circumstances which governed the making of the contract the subject of this claim. At the meeting in London on the 12th December 1980 Mr. Tribe, the plaintiffs' managing director and Mr. Hopkins

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discussed what had been arranged in Madrid, and their evidence does not indicate any difference or misunderstanding between them as to what had taken place, and what had been discussed and verbally agreed in Madrid. But Mr. Hopkins and Mr. Tyrrell had arrived in London directly from Madrid and had no more material with them than they had had in Madrid to clarify accounts. They expected that all the necessary information would be available at the London offices of Blanford and Houdret as agents of Aviaco. The necessary information was not readily available and it was agreed that it would take so much time to "clarify the accounts" that this matter should be deferred to a date to be arranged after Christmas. However, Blanford and Houdret required that Bray Travel Ltd. discharge immediately a debt incurred as a liability for money paid by Blanford and Houdret to Aviaco on behalf of Bray Travel Ltd. which the latter had not paid to the plaintiffs. Blanford and Houdret claimed a sum of £76,000.00, but Mr. Hopkins and Mr. Tyrrell, while admitting money was due by Bray Travel Ltd. to Blanford and Houdret claimed that the balance after credits did not exceed £40,000.00. A contentious discussion on these differences preceded and led up to

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the making of the contract the subject of this claim. The plaintiffs were insistent that the indebtedness of Bray Travel Ltd. to them be discharged at that meeting by immediate payment. I accept the evidence of the second defendant that Mr. Tribe did threaten to withdraw the Aviaco flights for the week ending the 13th and 14th December if the Blanford and Houdret claim was not met. Because the matter of clarification of the Bray Travel Ltd. accounts with Aviaco as arranged in Madrid had not then been done, although deferred by agreement, the plaintiffs could have carried out this threat. Under this pressure Mr. Hopkins and Mr. Tyrrell did negotiate for the discharge of the Bray Travel Ltd. debt to Blanford and Houdret and adopted the sum of £56,000.00 without verification as a compromise amount and the deferred payments as listed in the letter of the 12th December 1980. There was no evidence to imply that legal proceedings for recovery of the money claimed were at any time contemplated.

Although the plaintiffs' managing director telephoned Señor Callejon in Madrid on the 12th December 1980 reporting on the meeting in London he did not inform Señor Callejon that he had not

clarified the Aviaco accounts nor that he had obtained the contract upon which this claim is now brought. The only reference he made to this aspect was that "things were satisfactory" or that "a satisfactory arrangement was made". The statement made by Mr. Tribe to Señor Callejon on the 12th December 1980 that things were satisfactory or that a satisfactory arrangement was made, being made without reference to the negotiations about Blanford and Houdret's own claim against Bray Travel Ltd., must have conveyed to Aviaco that Bray Travel Ltd. had sufficient credit to permit waiver of the requirement of advance payments for the weekend flights of the 13th and 14th December and that these flights should not be withdrawn. The evidence shows that following Mr. Tribe's report to Aviaco on the London meeting of 12th December 1980 the only matter about which Aviaco thereafter was concerned was the time when a representative should travel to Dublin to take delivery of a properly executed bank guarantee for £60,000.00 as security for the subsequent December flights including those of the 20th and 21st December. There is no evidence which indicates or supports any inference that the plaintiffs had any authority from Aviaco on the 12th December 1980

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to cancel any of the flights if they were satisfied on the matter of clarification of the accounts. As agents for Aviaco the plaintiffs undoubtedly had the duty to ascertain and report if and when the first bank guarantee would be available for execution and delivery, but there is no evidence that the defendants had express or implied authority to withdraw on behalf of Aviaco any of the flights which were dependent upon the delivery of that bank guarantee. The only instructions received by the plaintiffs from Aviaco by Friday the 12th December 1980 were that a bank guarantee for £60,000.00 was to be obtained early the following week and no date was specified nor had any been agreed upon in Madrid. No agreement was reached or indeed sought on Friday the 12th December as to when the first bank guarantee would be available. Mr. Tribe agreed in his cross-examination that neither Mr. Hopkins nor Mr. Tyrrell had told the plaintiffs that the bank guarantee would be available on any particular date, and that no one had arranged a "planned meeting" in Dublin on the 16th December. I am satisfied by the oral evidence given by the witnesses for the plaintiffs as well as for the defendants that the statements in the telex



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sent by Mr. Tribe at 10.21 on Tuesday the 16th December that a meeting for the 16th December had been arranged and that agreement to have or deliver a bank guarantee on that date are untrue. I am satisfied from the oral evidence that the statement in the telex sent by Mr. Tribe at 18.08 on Tuesday the 16th December that agreement to have a bank guarantee available on Tuesday the 16th was reached in Madrid or reported so to have been on Friday the 12th December is also untrue. I do not believe that Mr. Tribe either informed his principals in Madrid of any supposed time limit for making the bank guarantee available or obtained their authority to extend such time limit prior to 18.08 on the 16th December 1980. I believe the statement in the telex of that time and date implying such authority is also untrue. From the evidence of Señor Callejon, which I accept as truthful, I find as fact that until the morning of Wednesday the 17th December 1980 Aviaco were not aware of any indication being given to Bray Travel Ltd. that the flights booked for the following weekend and later flights would be withdrawn, nor was he aware that any time limit for producing the bank guarantee had been imposed or that there was any reason for so doing. I am

satisfied that on that morning of Wednesday the 17th December 1980 Señor Callejon did authorise the withdrawal of those flights if the bank guarantee was not known to be available by noon on that day, but that he agreed to defer this step until afternoon that day at the suggestion of Mr. Tribe. I believe that Señor Callejon was not informed of the telexes sent by Mr. Tribe on the 16th December and that he authorised the withdrawal of flights on the 17th December only upon the suggestion of Mr. Tribe.

Having regard to the facts and circumstances as known to the parties to this contract made on the 12th December 1980 I believe the consideration given by the plaintiffs for obtaining this contract by Bray Travel Ltd. to discharge its indebtedness and by Bray Travel (Holdings) Ltd. to guarantee these payments was the forbearance (as represented) of Blanford and Houdret to insist upon withdrawing the flights because of the non-clarification of the accounts. That is to say the credits due by Aviaco to Bray Travel Ltd. were being accepted by the plaintiffs as sufficient to satisfy Aviaco conditions for the purpose of waiving the requirements of advance payments for the weekend flights of the 13th and 14th December and so ensuring

that such flights would not be withdrawn. All the witnesses stressed the importance to the passenger traffic, to the airline, and to Bray Travel Ltd. of keeping the flights going and having that as their primary interest. The insistence by the plaintiffs, under threat of stopping the flights, upon getting immediate discharge of the debt then due to them leads to the necessary inference that the implied assurance that the flights would not be withdrawn was the real consideration for the promises to pay and to guarantee contained in the contract made on the 12th December 1980. To me the circumstances as disclosed by the evidence lead to the inference that the agreement for deferred payments for indebtedness incurred in the course of the mutual business relationship was dependent in the contemplation of both parties upon the continuance of that business and the maintenance of the programme of flights as arranged. In these circumstances it seems to me the sending by the plaintiffs of the telex of 10.21 on the 16th December 1980 without the authority or knowledge of Aviaco, their principals, was so inconsistent with the contract made for their own benefit on the 12th December 1980 as to amount to a renunciation of that



contract. It is now known that the telexes sent by the plaintiffs on the 16th December 1980 were untruthful in their content in material respects and were sent in purported exercise of an ostensible authority which the plaintiffs then did not in fact have. All the circumstances as disclosed by the evidence lead to the inevitable and only conclusion that the defendants were entitled to treat as discharged the contract requiring the further payments set out in the letter of 12th December 1980 upon which the plaintiffs claim in this action. It is my conclusion that this contract upon which this claim is founded was discharged on the 16th December 1980 by the wrongful acts of the plaintiffs and I dismiss the claim.

With costs.

S. G.  
7/11/83



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