

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR  
IN THE FEDERAL TERRITORY OF KUALA LUMPUR  
SUIT NO. WA-22NCvC-410-07/2020**

**BETWEEN**

1. **DATO' VIJAY KUMAR NATARAJAN**  
2. **DATIN CHUA LAY KIM** **... PLAINTIFFS**

**AND**

**MALAYSIA AIRLINES BERHAD** **... DEFENDANT**

**GROUND OF DECISION**

**Introduction**

1. The Defendant (“**D**”) is the national carrier of Malaysia and operates our national airline. The 1<sup>st</sup> Plaintiff (“**P1**”) and 2<sup>nd</sup> Plaintiff (collectively “**Plaintiffs**”) are purchasers of airline tickets issued by D.

2. D filed an application vide Enclosure 8 (“**Encl 8**”) to strike out the Plaintiff’s (“**P**”) Writ of Summons and Statement of Claim (“**SOC**”). Encl 8 was made under Order 18 rule 19(1)(b), (c) and (d) (“**O.18 r.19**”) of the Rules of Court 2012 (“**ROC**”). I allowed Encl 8. These are the grounds of my decision.

**Background**

3. On 19.8.2019, Plaintiffs purchased flight tickets (“**Flight Tickets**”) for a total price of RM2,812 (“**Ticket Price**”) from D’s website for a journey from Kuala Lumpur to Manila return (“**Flight**”). The Flight was scheduled for departure on 26.3.2020 (“**Initial Date**”), but was cancelled due to the implementation of the Movement Control Order (“**MCO**”) on 18.3.2020.

The MCO was put in place by the Government as a containment measure against the Covid-19 coronavirus outbreak (“**Covid-19 pandemic**”) which affected not just Malaysia but countries worldwide.

4. D offered Plaintiffs an option to reschedule the Flight and Plaintiffs agreed to reschedule the Flight to 8.7.2020 (“**Rescheduled Date**”). Due to an extension of the MCO, the Flight was rescheduled yet again to 17.7.2020. At this point, Plaintiffs no longer wished to embark on the Flight and requested for a full refund of the Ticket Price (“**Refund**”). The reason for them flying to Manila was no longer applicable. The meeting which P1 was to attend in Manila had been cancelled.

5. D refused to Refund as the Flight Tickets were non-refundable. Instead D offered a change of travel date or a travel voucher, both of which were rejected by Plaintiffs. Plaintiffs then filed the instant suit on 24.7.2020.

6. The SOC prayed for the following reliefs:

- (a) a declaration that the Malaysian Aviation Consumer Protection Code 2016 (“**Code**”) is a protective legislation and any contractual clause contrary to the provision thereof are null and void;
- (b) a declaration that Plaintiffs are entitled to a full refund of the Ticket Price pursuant to paragraph 12 of the Code;
- (c) a declaration that there has been total failure of consideration of the contract of carriage between Plaintiffs and D;

(d) full refund of the Ticket Price as damages, plus interest and costs.

7. After this suit was filed and the cause papers served on 10.8.2020, D on 4.9.2020 refunded the Ticket Price to Plaintiffs on a “without prejudice” and “without admission of liability” basis. The Refund was effected via a reversal of the charge for payment of the Ticket Price into P1’s credit card account that was used to purchase the Flight Tickets. Plaintiffs however pressed on with their action.

8. At the start of the hearing of Encl 8, I asked Plaintiffs why this action was not tried in the Subordinate Courts in light of the low amount of the Ticket Price. The Ticket Price was RM1,406 in respect of each Plaintiff (total RM2,812). It consist of RM1,294 base fare and RM112 taxes per ticket. Clearly the amount in dispute or the value of the subject-matter of the claim falls within the jurisdiction of the Subordinate Courts, which is up to RM1 million.

9. In response, P1 (who appeared in person) said it was uncertain whether the Subordinate Courts have the power to grant the declarations sought in this action. This is notwithstanding section 65(5) of the Subordinate Courts Act 1948 which provides that a Sessions Court may grant a declaration. It states:

*“A Sessions Court may, in respect of any action or suit within the jurisdiction of the Sessions Court, in any proceedings before it-*  
(a) *grant an injunction; and*  
(b) **make a declaration,**  
*whether or not any other relief, redress or remedy is or could be claimed.”*

10. More telling however is P1's next response that he intends to bring this matter on appeal all the way to the apex court. So as not to delay the matter, I proceeded to deal with Encl 8.

## Decision

11. I am guided by the Court of Appeal case of *Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* (2013) 3 MLJ 511 at 517 which said:

*"[10] In short, the words 'frivolous or vexatious' under r19(1)(b) refer to cases which are **obviously unsustainable** or wrong. The words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of bona fide; they also include proceedings where a party is not acting bona fide and merely wishes to **annoy or embarrass his opponent**, or when it is **not calculated to lead to any practical result** ...*

*[11] The phrase 'abuse of process' under r19(1)(d) signifies that the process of the court must be used bona fide and properly and must not be abused. It includes **consideration of public policy** and **interest of justice**. The court will prevent any **improper use of its machinery**. It will prevent the judicial process from being used as a **means of vexation and oppression** in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. If an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court ..."*

12. I find the instant suit to be scandalous, frivolous or vexatious. My view is that this action is wholly unnecessary and irrelevant. I am of the opinion that Plaintiffs' claim is obviously unsustainable and is bound to fail if it was to proceed to trial. I think Plaintiffs merely wished to annoy or embarrass D. To my mind, this action will not lead to any practical result. It is also my finding that the present suit is an abuse of the process of the Court. I will not allow Plaintiffs to use the judicial process as a means of vexation and oppression against D. My reasons are as follows.

## **Defendant is not contractually obligated to refund the Ticket Price**

13. It is not in dispute that a contract for commercial transactions can be formed electronically and this includes any sale that is performed online. (See section 7 of the Electronic Commerce Act 2006). The terms of the contract of carriage between Plaintiffs and D in relation to the Flight Tickets were presented online via D's website. Plaintiffs had agreed to them by clicking on an '*I understand and accept the Terms and Conditions of Carriage and Fare Conditions*' button to indicate their acceptance when completing the purchase of the Flight Ticket.

14. Plaintiffs purchased the Flight Tickets from D's website subject to the terms and conditions stated therein. The Flight Tickets are non-refundable tickets which were purchased at a promotional price. This was clearly stated in the Fare Conditions on D's website during Plaintiffs' purchase of the Flight Tickets. The Fare Conditions states:

*"Ticket is **non-refundable** in case of cancel/refund."*

15. Plaintiffs are bound by the terms and conditions in D's General Conditions of Carriage ("**General Conditions**"). The General Conditions are contained in D's website and Plaintiffs had agreed to be bound by it when booking the Flight Tickets.

16. Plaintiffs complain that certain conditions were not brought to their proper notice at the time of booking. However, the onus is on Plaintiffs as customers/passengers to read the Fare Conditions and the General Conditions. Failure to read the said conditions does not release Plaintiffs

from being bound by them. It must be assumed that Plaintiffs have understood and agreed to the said terms. In this regard, I follow the Court of Appeal case of *United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin & Anor* [2016] 4 CLJ 871 at 880 which said:

*“[26] The plaintiffs are **assumed to have understood and agreed to all the terms in the hire contract** ... It is untenable to conclude that despite having signed the contract in its entirety, the plaintiffs can now contend that the specific clauses are not enforceable.*

...

*[31] Clauses 13 (and 14 on limitation of liability) are expressly set out in the 2002 agreement. The plaintiffs signed the 2002 agreement in its entirety, meaning that they are bound by cls. 13 and 14. The **fact that they chose not to read the contract in its entirety does not mean that they are not bound** by the terms of the contract ...”*

17. The salient terms are contained in Article 10.2.3 of the General Conditions.

*“Article 10 Schedules, Delays and Cancellation of Flights*

...

*10.2 Change in Flight Status*

...

*10.2.2 If we cancel or delay a flight, are unable to provide previously confirmed space, fail to stop at your Stopover or destination point, or cause you to miss a connecting flight on which you hold a reservation (whether or not due to our route cessation or flight rescheduling), except as otherwise provided by the Convention or the Code, we may elect to offer you either one or more of the following options with due consideration to your reasonable interests and applicable circumstances:*

- (a) carry you on another of our scheduled services on which space is available;*
- (b) within a reasonable period of time, re-route you to the destination indicated on your Ticket or applicable portion of your Ticket by our own scheduled services or the scheduled services of another Carrier, or by means of surface transportation. If the sum of the fare, excess Baggage charge and any applicable service charge for the revised routing is higher than the refund value of the Ticket, or applicable portion of the Ticket, we will collect no additional fare or charge from you, and will refund the difference if the fare and charges for the revised routing are lower;*

- (c) *make a refund in accordance with the provisions of Article 11.3; or*
- (d) *reasonable assistance and care/compensation such as meals, refreshments, limited telephone calls, internet access, hotel accommodation and/or airport transfer.*

*10.2.3 In the event:*

- (a) ***your flight is cancelled or delayed due to causes beyond our control such as, but not limited to, Force Majeure, war, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcoming or strikes; or***
- (b) *the route cessation or planned flight rescheduling is caused by an air traffic management decision in relation to a particular aircraft on a particular day which gives rise to a long delay, an overnight delay or the cancellation of one or more flights despite us taking all reasonable measures to avoid the delay or cancellation,*

***we will not be liable to you and shall be under no immediate obligation to comply with Article 10.2.2 although we shall make reasonable efforts to assist you as best as we can in the prevailing circumstances.***

18. D avers that the cancellation of the Flight was in compliance with the MCO. The closure of international borders due to the Covid-19 pandemic caused D to be unable to operate the Flight. This is beyond D's control and therefore, Plaintiffs do not have legal rights to demand the Refund. Since the Flight was cancelled due to causes beyond its control, D avers that it is not contractually obliged to compensate Plaintiffs by virtue of Article 10.2.3 of the General Conditions.

19. I agree. Pursuant to Article 10.2.3 of the General Conditions, D is not liable to Plaintiffs in respect of the cancellation of the Flight if it was due to causes beyond D's control. Such causes include but is not limited to force majeure, security risks or unexpected flight safety shortcoming. It is not disputed that the Flight was cancelled due to the MCO and the Covid-19

pandemic. Clearly this is beyond D's control. D is therefore entitled to invoke Article 10.2.3 of the General Conditions.

20. Even though the Flight Tickets are non-refundable, on a goodwill basis, D offered an option to Plaintiffs to reschedule when the Flight on the Initial Date was cancelled. Plaintiffs agreed to reschedule the Flight from the Initial Date to the Rescheduled Date. However, due to an extension of the MCO, the Flight on the Rescheduled Date had to be rescheduled as well. At this point, Plaintiffs no longer wished to embark on the Flight (as their purpose of the Flight was no longer served) and requested for the Refund.

21. Plaintiffs aver that two other airline companies (i.e. AirAsia and Philippine Airlines) had offered a full refund of their cancelled flights even though their tickets were also non-refundable. However, that is a commercial decision to be made by the airline company in question. Such commercial decision by another airline company is not binding on D. It is D's prerogative to insist on strict adherence to the Fare Conditions and the General Conditions.

### **Plaintiffs are not entitled to Refund pursuant to the Code**

22. The Code was introduced by the nation's economic aviation regulator, the Malaysian Aviation Commission ("**MAVCOM**"), to protect consumer interests in air travel. The Code is applicable to all aviation service providers, including foreign airlines, operating into and out of Malaysia.



23. Paragraph 2 of the Code defines “cancellation” to mean “*the non-operation of a flight which was previously planned and on which at least one place was reserved*”. Pursuant to paragraph 12(1) of the Code, in the event that a flight is cancelled, the operating airline must offer compensation to its passengers. It states:

*“12. Compensation for flight delay and cancellation*

*(1) Where an operating airline reasonably expects a flight to be delayed for at least two hours in its scheduled time of departure or in the case where a **flight is cancelled**, the operating airline shall **offer passengers the compensation and care as specified in the First Schedule.**”*

24. The requisite compensation is laid down in the First Schedule of the Code. It states:

*“First Schedule  
[Paragraphs 9, 11, 12, 12A and 14]  
Compensation and Care*

*5. Paragraph 12, Flight cancellation*

*(1) Passengers shall be offered the choice between –*

- (a) **reimbursement** within thirty days, of the **full cost of the ticket at the price at which it was bought**, including taxes and fees, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, without right to board; or*
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity or at a later date at the passenger’s convenience, subject to availability of seats, at no extra charge.”*

25. As specified in the First Schedule of the Code, passengers shall be offered a choice of compensation between the following 2 options:- (i)

Reimbursement of the full cost of the ticket at the price at which it was bought; or (ii) Re-routing to the passenger's final destination.

26. However, paragraph 12(5) of the Code stipulates that the airline shall not be obliged to pay compensation if it can be proved that the flight cancellation was caused by "extraordinary circumstances" which could not have been avoided even if all reasonable measures had been taken. It states:

*"(5) An operating airline shall **not be obliged to pay compensation** if it can **prove that the delay or cancellation**, as the case may be, is **caused by extraordinary circumstances** which could not have been avoided even if all reasonable measures had been taken."*

27. "Extraordinary circumstances" is defined in paragraph 2 of the Code (interpretation section) as follows:

*"extraordinary circumstances" means circumstances that may, in particular, occur in cases of war, meteorological conditions incompatible with the operation of the flight concerned, **security risks, unexpected flight safety shortcomings and strikes that affect the operation** of an operating airline;*

28. MAVCOM has recognised the Covid-19 pandemic as an "extraordinary circumstance" within the purview of paragraph 12(5) of the Code. This is because the Covid-19 pandemic has resulted in national quarantines and travel bans all around the world to which airlines must abide due to security and safety measures. MAVCOM's press statement on 8.4.2020 states:

*"COVID 19 has contributed towards the aviation industry globally undergoing one of the most challenging periods of its history. Passenger travel has plummeted, and airline revenues have therefore significantly decreased, therefore resulting in the airlines facing severe challenges in managing their resources and*

cashflows. These unprecedented and **extraordinary circumstances** are also true in Malaysia.

...

**Under the MACPC, consumers may receive compensation for flight disruptions caused by airlines. However, this regulation does not apply where the flight disruptions is an ‘extraordinary circumstance’, outside of airline’s control.**

Containment measures of the COVID-19 involve national quarantines and travel bans, not only in Malaysia, but countries worldwide. These situations are **deemed as extraordinary circumstances** in which the airlines will have to abide due to security and safety measures.

MAVCOM has prepared an FAQ available on its FlySmart website which consumers may refer to for information on refund requests during this Covid-19 period. ... The Commission also strongly encourages consumers to refer to the website of respective carriers to ascertain the terms of any refund requests. **The airline nevertheless retains a commercial discretion on whether to exceed the prevailing ticket terms in favour of the consumer.”**

29. MAVCOM has also issued an FAQ pertaining to flight disruptions caused by the Covid-19 pandemic. It states that the refund options offered to passengers for cancelled flights is a commercial decision by the airlines.

*“Flight Disruptions – Covid-19 FAQs*

*Q2 As my flight was cancelled, the airline has only offered a travel voucher or a choice to reschedule my flight. I want a full refund to my original mode of payment. Is this possible?*

**The cancellation of flights by airlines is caused by extraordinary circumstances. The refund options offered to passengers is a commercial decision by an airline.”**

30. The regulator has stated unequivocally that the Covid-19 pandemic is an “extraordinary circumstance” within the scope of paragraph 12(5) of the Code. Therefore the refund or compensation required under the Code does not apply. MAVCOM has also stated in no uncertain terms that the

refund offered to passengers is a commercial decision by the airline concerned.

31. Plaintiffs aver that the statutory interpretation of what constitutes “extraordinary circumstances” under the Code is a question reserved for the Court, and not any government agency. My interpretation is no different than what had been declared by the regulator. At the time of writing this judgment, the Covid-19 pandemic rages unabated. The restrictions under the MCO (in March 2020) was later relaxed in the form of a Conditional MCO (in May 2020), followed by a Recovery MCO (in June 2020). But a second MCO, ‘MCO 2.0’ so-called, was reintroduced on 13.1.2021 due to a surge in infections not only in Malaysia but globally.

32. A state of Emergency has also been declared in Malaysia (from 12.1.2021 until 1.8.2021) to curb the Covid-19 pandemic which is threatening to overwhelm the country’s healthcare system to breaking point. The last time a national Emergency was declared was in 1969 in response to deadly racial riots.

33. The Covid-19 pandemic has adversely affected not only the aviation industry. It has wrecked the economy and caused upheavals in our lives. It cannot be gainsaid that things will never be the same. In the circumstances, I have no hesitation in making a determination that the Covid-19 pandemic amounts to an “extraordinary circumstance” within the ambit of the Code.

34. In the present case, the cancellation of the Flight was due to the Covid-19 pandemic and is out of D’s control. This qualifies as an “extraordinary circumstance” under the Code, which is in line with the

stance taken by MAVCOM. In the premises, D is not obliged to provide compensation to Plaintiffs by virtue of paragraph 12(5) of the Code.

35. Although not obligated to do so, D had in fact refunded the Ticket Price to Plaintiffs. Plaintiffs complain that D did so on a “without prejudice” and “without admission of liability” basis. I do not see why this matters since D is not under a legal obligation to Refund in the first place. Absent any legal obligation, D is perfectly entitled to give the Refund on a “without prejudice” and “without admission of liability” basis.

36. Plaintiffs also complain that the Refund is an unsolicited payment. I fail to understand why given that the SOC prayed for a refund of the Ticket Price as damages. Paragraph 12(iv) of the SOC prayed for:

*“full refund of monies in the sum of RM2,812.00 paid to the Defendant as damages”.*

37. Plaintiffs further complain that the Refund does not constitute full tender. That the compensation sought in the SOC is different or more than the Ticket Price as it includes interest and costs. Plaintiffs might have obtained interest and costs if judgment was awarded in their favour. But that will not happen in view of my finding that the instant suit is obviously unsustainable and ought to be struck out.

38. Even if Plaintiffs were entitled to compensation, under the First Schedule of the MACPC, such compensation is:- *“reimbursement within thirty days, of the full cost of the ticket at the price at which it is bought”*. In other words, the compensation that Plaintiffs would receive is refund of the Ticket Price only and nothing more.

39. Plaintiffs contend that the General Conditions contravenes the Code. I disagree. Article 10.2.3 of the General Conditions is in conformance with paragraph 12 of the Code. Whereby compensation will not be given for cancellation caused by “extraordinary circumstances” that are beyond D’s control. The compensation provided in Article 10.2.2 of the General Conditions is also in line with the First Schedule of the Code.

40. Plaintiffs referred to a High Court judgment dated 7.10.2020 in Kuala Lumpur High Court Suit No. WA-22NCvC-411-07/2020 (“**HC Judgment**”). In that HC Judgment, Plaintiffs won a sum of RM13,610 against Oman Air, the defendant in that suit. Plaintiffs also obtained declaratory orders similar to the ones sought for in this suit. However, all that needs to be said about the HC Judgment is that it was a default judgment that was obtained because the defendant in that case did not enter appearance.

## **Conclusion**

41. For the reasons above, I am satisfied that this is a plain and obvious case for striking out. The SOC is obviously unsustainable and is bound to fail if it was to proceed to trial. I therefore allowed Encl 8. I ordered Plaintiffs to pay costs of RM5,000 to D.

Dated 14 January 2021

*sgd*  
**Quay Chew Soon**  
Judicial Commissioner  
High Court of Malaya, Kuala Lumpur

## Civil Division NCvC 10

### Counsels

Dato' Vijay Kumar Natarajan (1<sup>st</sup> Plaintiff) in person.

Chee Yun Hsai (*Messrs Kumar Jaspal Quah & Aishah*) for the 2<sup>nd</sup> Plaintiff.

Yasmin Natasha and Jagjit Kaur (*Messrs Sidek Teoh Wong & Dennis*) for the Defendant.

### Cases cited

*Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd* (2013) 3 MLJ 511

*United Overseas Bank (Malaysia) Bhd v Lee Yaw Lin & Anor* [2016] 4 CLJ 871

### Legislation cited

*Order 18 rule 19 of the Rules of Court 2012*

*Section 65(5) of the Subordinate Courts Act 1948*

*Section 7 of the Electronic Commerce Act 2006*

*Paragraphs 2, 12 and the First Schedule of the Malaysian Aviation Consumer Protection Code 2016*