CASE COMMENTS

The Significance of the High Court Decision in *Baltic Shipping Company v Dillon*

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Australian commercial lawyers are living in dramatic yet challenging times. The legislatures, both Commonwealth and State, have been uncommonly busy in enacting such far-reaching consumer protection measures as the *Trade Practices* Act 1974 (Cth), and the State and Territory *Fair Trading Acts*. In addition, the High Court has been very active with creative contributions in areas such as estoppel,[1] privity,[2] unjust enrichment[3] and damages.[4] Now, in one of its latest decisions, the Full High Court has taken the opportunity to clarify a number of other areas of contract law much in need of such treatment. The occasion was the Court's decision in *Baltic Shipping Company* v *Dillon* (hereafter *Dillon*).[5] The areas under review covered:

1. Restitution of money paid in advance of a breach of contract, in particular, the exact meaning of a total failure of consideration;
2. The relationship between restitution and damages; and
3. Damages for disappointment and distress.

These issues arose from a particularly dramatic example of a 'spoiled holiday' case, the facts of which are set out below.

The facts and issues

The plaintiff, Mrs Dillon, made a contract with the defendant, Baltic Shipping, to take a fourteen day Sydney to Sydney South Pacific cruise on the defendant's vessel, the 'Mikhail Lermontov', for a fare of $2205, the cruise to commence on 7 February 1986. As is common practice in the case of such a cruise, the plaintiff paid the fare in advance of the holiday. The contract was governed by the law of New South Wales. The ship left Sydney on the appointed day. All went well until, on the ninth day, the ship struck a rock and sank off the New Zealand coast. The plaintiff was one of many passengers[6] who suffered loss owing to the collision, including in her case personal injuries and property damage as well as mental distress. The collision was caused by the defendant's admitted negligence in breach of the cruise contract.[7]

1 *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387.
2 *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107.
3 *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221.
4 See eg, *The Commonwealth* v *Amann Aviation Pty Ltd* (1991) 174 CLR 64.
5 (1993) 176 CLR 344.
6 The plaintiff was one of 123 passengers who commenced actions against the defendant. All proceedings were consolidated in a single action in the plaintiff's name.
7 Such a contract contains an implied term to the effect that reasonable care will be exercised by the shipowner in navigation of their vessel.

The issues for determination by the High Court were:

(i) was the plaintiff entitled to restitution of the prepaid fare for a total failure of consideration? If so, the extent to which that had to be taken into account in any award of damages for breach; and

(ii) was the plaintiff entitled to general damages for disappointment caused by her so catastrophically truncated holiday (the injured feelings issue)?

The defendant appealed against the decision of Carruthers J at first instance,[8] confirmed by the New South Wales Court of Appeal,[9] that the plaintiff was entitled to full restitution of the fare for a total failure of consideration and damages, not only for her personal injuries but also for her injured feelings. In brief, the High Court reversed the restitution order on grounds that, there having been a partial performance of the cruise, there had not been a total failure of consideration but upheld the damages awarded for injured feelings. We now turn to more fully analyse these issues and the significance of the High Court's decision.

Restitution and total failure of consideration

An action for restitution of money paid is in modern Australian common law based on unjust enrichment of the payee.[10] In the context of contract law such an action may be brought to recover money paid in advance of a breach which leads to a premature termination of the contract or paid in advance of such a termination caused by a frustrating event. In either case the plaintiff payer must show a total failure of consideration, ie that he or she has received no part of the consideration for which the sum was paid and that consequently the defendant payee would be unjustly enriched by being allowed to retain it.

Before *Dillon* there was in Australian common law some uncertainty, though of diminishing extent, as to what, particularly in the frustration context, was meant by a total failure of consideration.[11] There were two views. On the one hand, and a highly theoretical hand it was, the consideration for the money prepaid was seen as being the payee's contractual *promise* to perform his or her side of the contract as well as the actual performance itself. Thus, and because termination for breach or frustration has a prospective rather than retrospective effect, until any such termination the payer has had the benefit of the payee's binding promise to perform. This was the view taken by the English Court of Appeal in *Chandler* v *Webster*,[12] a frustration decision. There, the plaintiff failed in an action for restitution of a sum paid in advance as part payment for the hire of rooms to view King Edward VII's Coronation procession when the contract was frustrated by the procession's cancellation owing to the King's sudden illness. Indeed, to add insult to injury, the plaintiff was held liable to pay the balance of the contract price. It had fallen due before the frustrating event and therefore remained payable under the general rule that, in frustration cases, the loss lies where it falls. On this interpretation of the meaning of a total failure of consideration a restitution claim, in the absence of agreement or statute to the contrary, would inevitably fail in every case where a payee has contractually promised to perform (thus in all bilateral contracts).

In English law *Chandler* v *Webster* was overruled by the well known decision of the

8 *Dillon* v *Baltic Shipping Co* (1989) 21 NSWLR 614.

9 *Baltic Shipping Co* v *Dillon* (1991) 22 NSWLR 1.

10 *Pavey & Matthews Pty Ltd* v *Paul* (1987) 162 CLR 221.

11 Compare eg, *In re Continental C & G Rubber Co Pty Ltd* (1919) 27 CLR 194 (frustration) and *Shaw* v *Ball* (1962) 63 SR (NSW) 910 (breach). See also, *David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 175 CLR 353, 381-383 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

12 [1904] 1 KB 493.

House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (hereafter *Fibrosa*).[13] It was in *Fibrosa* that the other, more practical, view of total failure of consideration prevailed. It is that in the usual case the consideration, or *quid pro quo*, for the money prepaid is the payee's *performance* of his or her contractual promise. Therefore, in the majority of cases one must ask whether there has been a total failure of performance of what was promised by the payee to ascertain whether restitution must be made. More pertinently, a court must pose the question: Did the payer receive from the payee any part of that for which the payment was made? If not, there has been a total failure of consideration and, as a matter of construction, it will rarely be the case in a restitution context that the payment will be found to have been made in return for the payee's promise.

The High Court in *Dillon* came down decidedly in favour of this view. By so doing, it removes any remaining scintilla of doubt that might have previously existed in Australian law. Any uncertainty that there might have been lay only in which view applied in the case of a contract prematurely terminated under the doctrine of frustration. The second view has long been applied in the case of termination for breach.[14] In the case of frustration, the possible uncertainty arose only from a probable misinterpretation of the basis for the High Court's decision in *In re Continental Rubber Co Pty Ltd*[15] which came after *Chandler* v *Webster* but before *Fibrosa*. In *Dillon*, the High Court regarded the application of the *Fibrosa* approach in modern Australian law as being beyond any reasonable doubt. Indeed, the only hint of any previous doubt is contained in the following statement of Mason CJ in a footnote to his judgment: 'To the extent that it is necessary to say so, [the *Fibrosa* decision] correctly reflects the law in Australia and, to the extent that it is inconsistent, should be preferred to the decision of this court in *In re Continental C & G Rubber Co Pty Ltd* ...'[16] On the facts of *Dillon* the High Court, reversing the courts below, found that there had been no total failure of consideration because the plaintiff had received the benefit of eight days of the promised cruise before the ship's collision. Therefore, she was not entitled to restitution of the prepaid fare.

Why was it that the courts below reached a different conclusion on this issue? It was not because the *Chandler* v *Webster* interpretation of the meaning of total failure of consideration was preferred. Rather, it arose from their interpretation of the cruise contract as being entire rather than divisible. The majority in the New South Wales Court of Appeal confirmed the decision of the trial judge, Carruthers J, that the contract was entire as a contract of carriage for the provision of a relaxing fourteen day cruise. Since the defendant's breach had prevented its full performance, in other words, had led to a failure to fulfil an entire obligation of an essentially all or nothing nature, there had been a total failure of consideration. Any actual benefits obtained by the plaintiff in the form of the eight pre-sinking days of cruising were 'entirely negated' by that event.[17] It was akin to the example given by Jessel MR in *Re Hall and Barker*[18] that '[i]f a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe and ask you to pay one half of the price'. In principle, this approach is persuasive. Under the rule in *Cutter* v *Powell*[19] a contracting party who has not completed performance of an entire contractual obligation cannot sue

13 [1943] AC 32.

14 See eg, *Shaw* v *Ball* (1962) 63 SR (NSW) 910.

15 (1919) 27 CLR 194. It is by no means clear that the High Court in this decision applied the *Chandler* v *Webster* approach. The decision is ambiguous and, on one interpretation, may be reconciled with *Fibrosa*. There is no reason in principle for applying any different approach to cases of termination for frustration and termination for breach. Either case involves the same restitution action in the form of an action for money had and received.

16 (1993) 176 CLR 344, 355, note 55.

17 (1989) 21 NSWLR 614, 668 per Carruthers J.

18 (1878) 9 Ch D 538, 545.

19 (1795) 6 TR 320; 101 ER 573.

for any promised but unpaid contract price, unless a partial performance has been freely accepted by the other party, and subject to the doctrine of substantial performance.[20] For example, an airline which has promised to carry a passenger to a certain destination as an entire obligation cannot recover, prima facie, an unpaid fare unless it completes, or substantially completes, its promised performance. Therefore, in the converse situation where the fare or other price has been prepaid should not the payer be entitled to its restitution where there has only been a partial performance by the payee?

The High Court disagreed. A cruise contract such as that in *Dillon* is more than a simple contract of carriage from place A to place B. There is, as it were, a bundle of benefits to which a passenger is entitled as part of the overall cruise, benefits such as on-board accommodation, food and entertainment and off-board port visits. In the words of Mason CJ: 'The return of the respondent to Sydney at the end of the voyage, though an important element in the performance of an appellant's obligation, was but one of many elements'.[21] Before the catastrophic accident, the plaintiff had enjoyed some of the benefits promised by the defendant during the eight days of the cruise. These features led to the conclusion that, as a matter of construction, the contract was not one where the payee's right to retain the prepaid fare was conditional upon full or substantial performance of its contractual obligations.

This approach might suggest that the High Court treated the cruise contract as being divisible or severable rather than entire. Gaudron J did indeed favour that conclusion when, having defined[22] an entire contract as one 'involving an obligation which cannot be and, thus, is not performed at all unless it is fully or completely performed', she stated[23] that there was 'no basis for treating the [cruise contract] as an entire contract with the premature termination of the cruise constituting a total failure of consideration'. The other judges were more cautious. All agreed that there had not been a total failure of consideration and therefore no restitution of the fare. They did so, however, on the basis that whether the contract was properly described as entire or divisible was not the relevant question. An action to recover a prepaid fare is different from one to enforce payment of an unpaid fare. Instead of asking whether there has been a complete performance by the payee in a restitution claim, one must ascertain the 'reason or basis for the payment'.[24] According to McHugh J: 'As a general rule, ... a payment, made otherwise than to obtain title to land or goods, should be regarded as having been made unconditionally, or no longer the subject of a condition, if the payee has performed work or services or incurred expense prior to the completion of the contract'.[25] That is because in such a case the payment will have been made, at least in part, in respect of (or consideration for) any work or services performed or expenses incurred by the payee. There would therefore only be a total failure of consideration if the payee had not begun such performance by the time of termination of the contract for breach or frustration. Any such general rule, however, might well have to give way in the face of an aborted attempted performance which puts the parties back to square one or in other ways proves useless to the payer. Two examples illustrate the point. The first is the hypothetical example given by Deane and Dawson JJ in *Dillon*[26] of a contract of air carriage by which an airline as consideration for a passenger's fare is to transport the passenger from Sydney to London. That consideration would, according to their Honours, 'at least prima facie, wholly fail if, after dinner and

20 See eg, *Hoenig* v *Isaacs* [1952] 2 All ER 176 and, generally, Glanville Williams, 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373.
21 (1993) 176 CLR 344, 353.
22 *Id* 384.
23 *Id* 386.
24 *Id* 393 per McHugh J.
25 *Id* 391.
26 *Id* 378.

the inflight film, the aircraft were forced to turn back due to negligent maintenance on the part of the carrier and if the passenger were disembarked at the starting-point in Sydney and informed that no alternative transportation would be provided'. The second is provided by the decision of the English Court of Appeal in *Heywood* v *Wellers (A Firm)*.[27] There, the client of a solicitor was held entitled to recover a fee paid to the solicitor for a total failure of consideration when the work done by the latter proved to be 'useless' in that it 'did nothing to forward the object which the client had in view'[28] (the solicitor had negligently failed to obtain a court order to protect the client against molestation by a former male friend).

Overall, the tenor of the judgments in the High Court in *Dillon* is that the proper test for determining the restitution issue is whether or not any prepayment is construed as having been made conditionally upon complete performance by the payee. However, it is suggested that, although the majority considered it not crucial, whether or not the contract is entire is not an altogether irrelevant factor in applying that test in that, if entire, that will more readily indicate that payment is conditional upon full performance. In the aborted flight illustration given by Deane and Dawson JJ, for example, any prepaid fare will have normally been made for the purpose of being carried to one's destination rather than, as in a cruise contract, partly for any inflight entertainment, food, window sightseeing or other such incidental matter which might be provided by the carrier. Fulfilment of that entire obligation by the carrier would thus more readily be construed as a condition upon which the fare was paid.

Of course, and as also exemplified by *Dillon*, a restitution claim for prepaid monies is only part of the story. Where, as on the facts, termination of the contract is caused by the payee's breach one must also consider the payer's action for damages. In this context *Dillon* provides valuable guidance on two matters, namely, (i) the relationship between any restitution of prepaid money and damages, and (ii) a matter on which there was comparatively little previous Australian authority, the circumstances in which damages may be awarded for disappointed feelings. It is to these matters that we now turn.

Restitution and damages for breach

This matter arose in *Dillon* because the courts below awarded the plaintiff restitution of the cruise fare in addition to damages for disappointed feelings and physical injuries caused by the ship's sinking. The High Court considered that this was to overcompensate the plaintiff. More particularly, a generous award of general damages (twice the cruise fare) for disappointment had been combined with restitution of the fare to produce an aggregate award which was too high. It was too high under the well known *Robinson* v *Harman*[29] principle which defines the overall parameters of an award of damages for breach of contract. Under that principle, the purpose of an award is to compensate the plaintiff by putting him or her in the position he or she would have been in had the contract been duly performed by the defendant (or had there been no breach), not a cent more nor a cent less. Posing the question: What would the plaintiff's position have been had the cruise proceeded without the breach?, the answer would no doubt be, a feeling of well-being arising from fourteen days enjoyment of the promised holiday benefits. However, in order to obtain that enjoyment the plaintiff would have paid the contract price, the fare. If, therefore, full restitution of the price is ordered by the court, under *Robinson* v *Harman* that has to be taken into account in assessment of the damages for disappointed feelings. The latter must be discounted to take account of the former. Hence, as stressed by

27 [1976] QB 446.
28 *Id* 458 per Lord Denning MR.
29 (1848) 1 Ex 850; 154 ER 363.

the High Court, the plaintiff in such a case is not entitled to 'full damages and complete restitution ... for the same breach of contract'.[30] That was where the High Court considered that the courts below were in error. By combining full restitution with generous general damages the plaintiff had been permitted to 'recover more than once for the same loss'[31] contrary to basic principle. Had the restitution order not been overturned one is left in little doubt that the High Court would have reduced the general damages awarded for disappointed feelings.

The Court was, however, not stating that a plaintiff cannot be awarded restitution plus damages for the same breach - they are not alternative remedies between which a plaintiff must choose to the exclusion of the other - merely that the two heads must not be combined so as to overcompensate. A plaintiff is entitled to a single, not a double, indemnity as compensation for a defendant's breach. The statements made in the High Court on this matter serve, therefore, as a useful reminder of the paramountcy of the *Robinson* v *Harman* principle in the award of contract damages.

Damages for disappointed feelings

In the normal case, damages for breach of contract are awarded to compensate for a plaintiff's financial loss or physical injury caused by a defendant's breach. Indeed, there has long been in English law a general rule which precludes recovery of damages in a breach of contract action for injured feelings in the form of disappointment or mental distress. With a few exceptions, such matters were seen as being potentially too subjectively uncertain in an essentially commercial contract context. The general rule, which can be traced back to at least 1856 in *Hamlin* v *Great Northern Rly Co*,[32] was confirmed in 1909 by the House of Lords in *Addis* v *Gramophone Co Ltd.*[33] There, a wrongfully dismissed employee was unable to obtain damages to compensate for his injured feelings caused by the humiliating manner of his dismissal. In an action for breach of contract he could be compensated for loss of salary in respect of the period of notice to which he was entitled, for loss of commission, as a business manager, which could have been reasonably anticipated during that period and for the time which might reasonably elapse before he might find suitable new employment. However, those damages arising from tangible losses could be neither aggravated or diminished by reference to feelings aroused by the manner in which the dismissal occurred. The very few exceptions to this general rule mentioned in the House of Lords[34] were not readily to be augmented for fear of 'uncertainty and confusion in commercial affairs'.[35] In the circumstances of *Addis*, only if the plaintiff's injured feelings had resulted from some tort (eg defamation or trespass to the person) accompanying his dismissal could he have successfully claimed compensation and then by dint of a separate tort claim.

However, despite the fears expressed in *Addis*, courts in England[36] and elsewhere[37] have in later years qualified the general rule by awarding damages for injured feelings in a wider range of cases. So much so that it seemed that the general rule was perhaps being

30 (1993) 176 CLR 344, 359 per Mason CJ adopting the view expressed in *Corbin on Contracts* (St Paul, Minnesota: West Publishing, 1952), para 1221.
31 The phraseology of G H Treitel, *Law of Contract* (8th ed., London: Sweet & Maxwell, 1991), 834.
32 (1856) 1 H & N 408; 156 ER 1261.
33 [1909] AC 488.
34 [1909] AC 488.
35 [1909] AC 488, 495.
36 See eg, *Jarvis* v *Swan Tours Ltd* [1973] QB 233; *Heywood* v *Wellers (A Firm)* [1976] QB 446; *Cox* v *Philips Industries Ltd* [1976] 1 WLR 638.
37 See eg, *Vorvis* v *Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 (Canada); *Rowlands* v *Collow* [1992] 1 NZLR 178 (New Zealand).

displaced by treating such consequence as falling within the principles of remoteness of damage established by the two branches of the rule in *Hadley* v *Baxendale*.[38] In other words, its recovery would depend on whether it fell within a defendant's reasonable contemplation as a probable consequence of the breach excluding, as being simply too subjective a factor, only that everyday sense of disappointment which is a natural reaction to loss of one's contractual expectations. Otherwise, injured feelings would be in no separate category of its own.

Given that there was little Australian authority directly in point,[39] the High Court in *Dillon* could have perhaps rejected the *Addis* principle for Australian law. Instead, the general restrictive rule was confirmed. However, the Court also confirmed and rationalised the important qualifications to that rule contained particularly in the post-*Addis* English case law. The effect of those qualifications is that, for most practical purposes, it may be said that the general rule has lost much of its previous significance. What are these qualifications? The High Court grouped them in three categories of recoverable mental distress:

1. Distress caused by breach of a contract the object, or an object, of which is to provide enjoyment, pleasure or relaxation.
2. Distress caused by breach of a contract to prevent molestation or vexation.
3. Distress consequent upon physical injury or inconvenience caused by a breach.

In all three any claim would have to fall within the rule in *Hadley* v *Baxendale* governing remoteness of damage. The first two categories, which may be termed cases of directly caused distress, should cause few problems in this context. There would seem little doubt that distressed feelings or disappointment would be a consequence falling within the reasonable contemplation of a defendant who fails to provide promised good feelings in the form, for example, of a holiday or other entertainment. Equally that should be the case where there has been breach of a promise that molestation, vexation or distress will cease or not be caused to the plaintiff as, for example, in *Heywood* v *Wellers (A Firm)*[40] where a solicitor, in breach of contract, failed to take steps to obtain a court order to protect a client against molestation by a former male friend or, hypothetically, breach of a contractual promise to provide a neighbour with peace of mind by ceasing or limiting bagpipe lessons. In the case of the third category, which might be termed derivative or parasitical distress, the physical injury or inconvenience from which it derives should also, of course, fall within the defendant's reasonable contemplation as, for example, in the English decision in *Hobbs* v *London & South Western Railway Co*[41] where a railway company in breach of contract caused inconvenience to the plaintiff passengers by depositing them at the wrong destination thereby obliging them to walk five miles home late at night.

All seven members of the High Court in *Dillon* seem to have concurred on the above three exceptions to the general rule of no recovery for injured feelings. Also, their Honours regarded the general rule as being one of relatively weak force easily rebutted by a claim falling within any of the three exceptions and even perhaps destined for further contraction in future case law. Thus, Mason CJ considered that, despite the 'obvious' merits of an approach which would put '[d]amages for disappointment and distress ... on precisely the same footing as other heads of damage',[42] on balance it was preferable to

38 (1854) 9 Ex 341; 156 ER 145.
39 One of the few Australian decisions was that of Zelling J in the South Australian decision *Athens - MacDonald Travel Service Pty Ltd* v *Kazis* [1970] SASR 264 (a 'spoiled holiday' case).
40 [1976] QB 446.
41 (1875) LR 10 QB 111.
42 (1993) 176 CLR 334, 365.

continue with the general rule if for no other reason than to emphasise that an innocent party's ordinary disappointment following a failure to perform a contract is 'seldom so significant as to attract an award for damages'. Deane and Dawson JJ considered, in passing, that although it was not necessary to pursue the matter, there was 'something to be said' for treating the exceptions to the general rule as being examples of a more general qualification which might confine it to 'ordinary commercial contracts and contracts involving proprietary rights'.[43] McHugh J, after a careful analysis of the case law, also concluded that the general rule should stand, at least for the time being.[44] This was, however, only because *Dillon* fell clearly within one of the exceptions to it and, therefore, the court had not had the benefit of full argument on its possible rejection. If the matter were free from authority his Honour indicated a preference for bringing damages for injured feelings within the ordinary contract rules of causation and remoteness.

As already indicated *Dillon*, a 'spoiled holiday' case, fell within the first exception to the general rule. The defendants had quite clearly promised, expressly or impliedly, to provide the plaintiff with a cruise which would be an enjoyable and relaxing experience. By their negligent navigation they had caused an event, the shipwreck, which, as put by Brennan J, '[provoked] severe tension of mind and depression of spirit' instead of the promised 'interlude to relax the mind and refresh the spirits'.[45] Or, in the words of Deane and Dawson JJ: 'The direct consequence of Baltic's admitted breach of contractual duty was that Baltic failed to provide the latter part of that promised pleasant holiday. Instead, it provided an extraordinary unpleasant experience'.[46] Also, given that the shipwreck caused the plaintiff personal injury (not to mention physical inconvenience), the facts would also have brought the case within the third exception. Therefore, the plaintiff was entitled to damages for her disappointment. Although there was a feeling in the High Court, and the New South Wales Court of Appeal below, that the amount awarded (about twice the fare) was perhaps over generous, particularly when added to an award for personal injury which included compensation for 'psychological trauma', the High Court refused to interfere with the trial court's assessment. For future guidance, however, it might be significant that some agreement was expressed, particularly by McHugh J,[47] with the suggestion of Kirby P in the Court of Appeal below[48] that, in the absence of exceptional circumstances 'increasing the sting of the failure to provide the enjoyment and pleasure promised', no more than half the sum awarded in *Dillon* should be the norm for a passenger in such a case.

In this context it is interesting to recall that a similarly generous award for disappointment was made in the leading English 'spoiled holiday' case, *Jarvis* v *Swan Tours Ltd*,[49] one of the decisions relied on in *Dillon*. There, the defendants failed to provide the plaintiff (a solicitor) with the promised good time at an Alpine Hotel during a package skiing holiday in Switzerland. The circumstances which caused the plaintiff's understandable disappointment were with customary clarity, and some humour, described by Lord Denning MR.[50] They certainly fell far short of what he had been promised in the holiday brochure. However, he had not suffered any physical or psychiatric injury and had been provided with air travel, accommodation and meals. Despite this, the English Court of Appeal increased the trial court's award of half the holiday price as general damages for disappointment to almost twice that amount (holiday price 63 pounds, damages for loss

43 *Id* 381.
44 *Id* 394-405.
45 *Id* 371.
46 *Id* 382.
47 *Id* 406.
48 (1991) 22 NSWLR 1, 31.
49 [1973] QB 233.
50 *Id* 235-237.

of entertainment and enjoyment 125 pounds). Holiday providers, travel agents and their insurers will no doubt hope that Kirby P's suggested limit finds favour in future 'spoiled holiday' cases.