

*Business Order in Cyberspace* (1998) <http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf>

<sup>18</sup> European Commission: Directorate-General for Employment, Industrial Relations

and Social Affairs, *Building the European Information Society for Us All*, April 1997

[http://ec.europa.eu/employment\\_social/knowledge\\_society/docs/buildingen.pdf](http://ec.europa.eu/employment_social/knowledge_society/docs/buildingen.pdf)

<sup>19</sup> See discussion on these at Caslon Analytics, *taxation guide* <http://www.caslon.com.au/taxationguide2.htm>

<<http://www.caslon.com.au/taxationguide.htm>>

<sup>20</sup> See Nellen A, *Overview to E-Commerce Taxation — Guide to Understanding the Current Discussions and Debates* July 2003 <[http://www.cob.sjsu.edu/facstaff/nellen\\_a/ECOMM.pdf](http://www.cob.sjsu.edu/facstaff/nellen_a/ECOMM.pdf)>

<sup>21</sup> See Nellen A, *Overview to E-Commerce Taxation Issues* September 2001 <[http://www.cob.sjsu.edu/facstaff/nellen\\_a/ECTaxUpdate9-01.doc](http://www.cob.sjsu.edu/facstaff/nellen_a/ECTaxUpdate9-01.doc)>

<sup>22</sup> See Organisation for Economic Co-operation and Development: Committee on Fiscal Affairs, *ELECTRONIC COMMERCE: TAXATION FRAMEWORK CONDITIONS* (1998) <<http://www.oecd.org/dataoecd/46/3/1923256.pdf>> at 3

---

## Scalping Protection Misleading and Deceptive – eBay International AG v Creative Festival Entertainment Pty Limited [2006] FCA 1768 (18 December 2006)

Ryan Grant

---

Ryan recently completed a LLB(Grad) at the University of NSW after graduating from a Bachelor of Information Technology at Bond University and working as a software developer. He is currently a Graduate-at-Law in the IT & Communications Group at Baker & McKenzie.

---

### Introduction

In a demonstration of the potentially broad scope of an action under section 52 of the *Trade Practices Act 1974* (Cth) (*TPA*) to protect a company's interests, online auction proprietor eBay brought an action against a concert organiser for misleading and deceptive conduct in relation to ticket conditions designed to prevent ticket scalping.

### Facts

Creative Festival Entertainment (*Creative*) are the organisers of the annual music festival The Big Day Out (*BDO*). In an effort to prevent ticket scalping, Creative cancelled a number of tickets that were sold on eBay's online auction site at an inflated price. The reason given to the ticket holders was that they were in breach of a condition that was printed on the back of the tickets, namely:

*Condition 6: 'Should this ticket be re-sold for profit it will be cancelled and the holder will be refused entry. This condition specifically prohibits ticket re-*

*sale through online market or auction sites.'*

The tickets were originally sold in the following four different ways:

1. on the BDO website;
2. on Ticketmaster's website;
3. at Ticketmaster box-offices; and
4. at other retailers' stores.

Tickets that were sold on the BDO website before 8 November 2006 drew the customer's attention to a previous iteration of condition 6 (*old condition 6*), that stated that a ticket holder *may* be denied entry if the ticket was re-sold for profit. After 8 November 2006, the updated condition 6 (*new condition 6*), set out above, appeared on the website.

Ticketmaster's online terms and conditions of sale included a condition that all sales were subject to the promoter's conditions of sale. The sales personnel in the retail stores did not refer to Creative's conditions at the time of sale. Regardless of where a customer bought a ticket from, new condition 6 was printed on the back of the ticket.

### Arguments

eBay brought the action claiming that, because new condition 6 did not form part of any of the contracts for the sale of the tickets, it was misleading for Creative to represent in the conditions on the back of the tickets that it was entitled to enforce new condition 6. With respect to condition 6 itself, eBay argued that the representation that all tickets sold for profit would be detected and cancelled was misleading because there was no way for Creative to know what tickets were re-sold for profit.

Creative contended that the new condition 6 was in effect no different to the old condition 6, which was brought to the customer's attention on the BDO website before 8 November 2006. It was argued that new condition 6, as read by a reasonable person, would mean that the ticket would only be cancelled if Creative became aware that it was re-sold for profit. Creative also contended that the conditions were sufficiently brought to the attention of the customer on Ticketmaster's website. Additionally, Creative argued that

---

## Scalping Protection Misleading and Deceptive – eBay International AG v Creative Festival Entertainment Pty Limited

---

with respect to over the counter ticket sales, customers were able to read the conditions on the ticket and seek a refund if they did not agree to be bound by them.

### Reasoning

Rares J first determined the legal status of new condition 6 in each of the sales situations. With respect to sales on the BDO website before 8 November 2006, he found that the old condition 6 was the one that was presented to the customer at the time of sale and included in the contract for sale. He found that the Ticketmaster website sales process did not sufficiently bring Creative's conditions of sale to the attention of the customer at the time of contract formation. Creative's argument that the customers at the retail outlets could read the tickets and then seek a refund was rejected, since the same set of conditions on the back of the ticket expressly denied customers any refund. There was no material in the retail outlets concerning, and the sales personnel did not bring to the customer's attention, the special conditions. The judge found that the transaction was completed before the conditions found only on the back of the ticket were brought to the customer's attention.

This reasoning meant that the new condition 6, as printed on the ticket, did not form part of the contracts for sale<sup>1</sup> and was thus unenforceable in contract. Following on from this, the judge decided that Creative's statement to the customer that he or she was bound by the conditions on the back of the ticket was false because the conditions on the ticket contradicted those that formed the

contract for the sale of the ticket. Since the representation was clearly made in the course of trade or commerce, the elements of section 52 of the TPA were made out.

Rares J then examined the wording of new condition 6. Creative contended that the contractual construction of new condition 6 was such that it should be read so cancellation of the ticket was conditional on Creative knowing the ticket was re-sold for profit. The judge stated that while Creative's construction of new condition 6 may be valid, the condition was open to other interpretations and he found that the ordinary reasonable person would find the representation to mean that that all re-sold tickets would be detected and cancelled. This, in reality, was not possible and Rares J found that Creative had no reasonable grounds on which to make such a representation. The elements of section 52 of the TPA were made out, as it was clear this representation was made in the course of trade or commerce.

### Outcome

Rares J granted a declaration that Creative contravened section 52 of the TPA. He also declared that new condition 6 did not form part of the respective contracts for the sale of the tickets, save those made on the BDO website after 8 November 2006. Additionally, the judge granted an injunction preventing Creative from engaging in any further contraventions of section 52.

Rares J did not order Creative to publish any corrective advertising as he felt that the outcome was

'unfortunate' for consumers who want to attend music festivals.

### Broader Implications

Online sales proprietors should take the outcome of this case as a reminder of the lesser-known implications of failing to draw customers' attentions to sales terms and conditions. Additionally, proprietors should take care when drafting terms and conditions with respect to any representations they may make, as cases such as this demonstrate how businesses may use section 52 of the TPA as a tool to further their commercial interests rather than just as a consumer protection measure.

There are also specific implications for ticket vendors. If Creative's conditions were consistently and precisely drafted, the outcome may well have been different. There is clear scope for the use of contractual conditions to prevent scalping, but they should be used in combination with other means. Other festival organisers have sought to rely on measures such as printing the purchaser's name on the ticket and offering unconditional refunds for purchasers up to 21 days before the event. Despite this, it should be noted that Victoria<sup>2</sup> and Queensland<sup>3</sup> have specific legislation targeting scalping.

---

<sup>1</sup> Apart from those tickets sold on the BDO website after 8 November 2006.

<sup>2</sup> *Sports Event Ticketing (Fair Access) Act 2002* (VIC).

<sup>3</sup> Section 30C *Major Sports Facilities Act 2001* (QLD).