Package Travel Operator - Legal Obligations when Holidaymaker attacked by Hotel Employee

Holidaymaker succeeds in appeal to Supreme Court for compensation against her UK package travel organiser following 'broad view' approach that hotel employee's guiding actions were ancillary services and not within the exemptions under applicable Package Travel regulations

Package travel organisers will be reviewing their booking terms and conditions to clarify the holiday arrangements that they have agreed to provide, following the Supreme Court judgment in ***X v Kuoni Travel Limited [2021] UK SC 34***. The 30 July 2021 judgment can be found **here**. However, it was accepted that Package Travel Regulations statutory liability could not be excluded by any contractual term in the Booking Conditions.

Background

In 2010, the Claimant ("Mrs X"), and her husband bought a package holiday to Sri Lanka from Kuoni Travel Ltd ("Kuoni") that included flights and accommodation at a four star all-inclusive hotel. In the early morning of 17 July 2010, when Mrs X was on her way to the reception, a hotel electrician employee, who was on duty and wearing uniform, ("N") offered to show her a shortcut. However, instead of taking Mrs X to the reception, he lured her into an engineering room where he raped and assaulted her.

Mrs X sued Kuoni for compensation for breach of contract and/or breach of obligations under the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) ("the 1992 Regulations") that applied in the UK at the time. The purpose of the 1992 Regulations was to implement Directive 90/314/EEC in the UK by ensuring domestic legislation that package travel organisers were contractually liable to consumers for failure to perform or improper performance, except for a small number of defences.

The Booking Conditions (which mirrored the 1992 Regulations) stated that Kuoni would accept responsibility if *"any part of [the] holiday arrangements"* was not of a *"reasonable standard"*. However, Kuoni sought to exclude responsibility for failure of holiday arrangements, or death or injury that was not caused by the fault of either Kuoni, its agents or suppliers; that was caused by the consumer, or was due to unforeseen circumstances which *"even with all due care, {Kuoni} or {their} agents or suppliers could not have anticipated or avoided"* (Booking Conditions, clause 5.10(b)).

Firstly, Kuoni sought to rely on that contract exclusion.

Secondly, Kuoni sought to rely on a statutory defence to liability for failure to perform, or improper performance of, the contract, asserting that it was an event that they *"even with all due care, could not foresee or forestall"* (Regulation 15(2)(c)(ii) of the 1992 Regulations).

This included considering what was the 'holiday arrangement' and whether N was a 'supplier' of services. If N was a supplier then he could foresee or forestall his own deliberate criminal act.

Mrs X's case did not involve alleging, say, negligent supervision or selection of N by the hotel or negligence by Kuoni, and it was recognised that N alone caused the attack.

High Court and Court of Appeal Judgments

Initially, Mrs X's claim did not succeed because both the High Court and the majority of the Court of Appeal decided that the phrase 'holiday arrangements' (in the Booking Conditions) did not include a member of the hotel's maintenance team conducting a hotel guest to the hotel's reception. This, the Court of Appeal decided, was no part of the functions for which N was employed.

The majority of the Court of Appeal also made side comments that N was not a 'supplier' in the context of the Booking Conditions or the 1992 Regulations.

Supreme Court Judgment

When Mrs X appealed to the Supreme Court, there were two main issues:

- Did the rape and assault constitute improper performance of the obligations of Kuoni under the package travel contract?

- If so, is any liability of Kuoni in respect of N's conduct excluded by the Booking Conditions clause 5.10(b) and/or Regulation 15(2)(c) of the 1992 Regulations?

Due to the ramifications for the travel industry, ABTA were allowed to intervene and make submissions before the Supreme Court. In July 2019, the Supreme Court referred two points to the Court of Justice of the European Union ("CJEU"); when doing so, the Supreme Court asked the CJEU to assume that guidance by hotel staff to the reception was within the 'holiday arrangements' which Kuoni had contracted to provide and secondly, that the rape and assault constituted improper performance.

The CJEU was asked questions relevant to the scope of the Regulation 15(2)(c)(ii) defence including whether an employee of an hotel is himself considered a 'supplier of services' for the purposes of that statutory defence. The CJEU's judgment of 18 March 2021 can be found here and did not favour an employee of a supplier of services performing that package travel contract being a supplier himself.

Supreme Court comments on liability:

The Supreme Court accepted that there should be a broad interpretation of the holiday services contracted for, stating in respect of this all-inclusive four-star holiday that *"in the case of any*

contract for a package holiday the provider of the holiday necessarily undertakes to provide not merely transport, accommodation and meals but also to provide other services ancillary thereto … it is only in this way that an enjoyable holiday of the reasonable standard contracted for can be provided … The precise content of the ancillary services may vary from one contract to another".

The Supreme Court agreed with the Court of Appeal's dissenting Judge's comments that *"for such a holiday to be a reasonable standard, hotel staff must be helpful to guests when asked for assistance; all the more must a member of staff, who actually offers assistance, assist the guest in a reasonable way. On no view did N assist Mrs X in a reasonable way when he guided her to the engineering room."*

Finding in Mrs X's favour, the Supreme Court unanimously decided that the service of guiding a guest in the hotel was a service for which Kuoni had accepted liability. The scope of services which Kuoni had undertaken to provide as part of the 'holiday arrangements' was governed by the contract between Mrs X and Kuoni, and not by the contract between the hotel and its employee.

Although Kuoni's case was that it regarded N as pursuing a criminal enterprise and not providing a service within the package travel contract, the Supreme Court disagreed stating that *"the correct focus should be on provision of the service of guiding a guest. This fell within the 'holiday arrangement' which Kuoni undertook would be provided. N was able to assault Mrs X only as a result of purporting to act as her guide."*

Supreme Court comments on exemptions from liability:

Having established liability, the second issue for the Supreme Court was whether the exclusion of liability or statutory defence applied. It was common ground that the Booking Conditions mirrored the wording of the 1992 Regulations, which, in turn, implemented Article 5 of Directive 90/314/EEC.

The parties had agreed that the Booking Conditions could not exclude liability under Regulation 15 of the 1992 Regulations, due to Regulation 15(5).

The Directive did not define the concept of 'supplier of services'. The CJEU stated in its ruling of March 2021 (which was binding on the Supreme Court) that it did not regard the employee himself as being classified as a 'supplier of services' for the purposes of the EU Directive. This was because an employee has a relationship of subordination and therefore is under the employer's control, but a supplier of services does not have a relationship of subordination.

Secondly, the CJEU acknowledged that the 'supplier of services' (in this scenario, the hotel) may act through their employees, who are under the hotel's control.

Thirdly, in view of the objective of ensuring a high level of consumer protection, the CJEU ruled that defences from liability must be interpreted strictly. The provision regarding events which cannot be foreseen or forestalled (i.e. Regulation 15(2)(c)(ii) in UK legislation at that time) was observed to be distinct from the separate exemption for force majeure; the provision gave an exemption regardless of whether or not the event was unusual and it concerned matters within the organiser's or supplier's sphere of control. An employee's performance of his employer's obligations is within the employer's control.

Therefore, overall the Supreme Court decided that Kuoni was responsible under the Booking Conditions and could not rely upon contract exclusions or the statutory defence.

Finally, the Supreme Court highlighted that it had not been necessary to address issues relating to vicarious liability (i.e. by an employer of its employee's actions). Vicarious liability was not relevant to the outcome, as liability arose due to the Booking Conditions and the applicable 1992 Regulations. The earlier case judgments had mentioned that under Sri Lankan law the hotel would not have been vicariously liable for the rape and assault carried out by N.

CPB Comment

It is clear that package travel organisers are liable for their suppliers of services (including those suppliers' employees' deliberate acts of a criminal nature), regardless of whether or not the hotel (as the supplier of services) in the specific jurisdiction would be vicariously liable for those employees' acts, as vicarious liability by an employer of its employee is not relevant.

This means it should be much more straightforward for claimants who have been assaulted by hotel staff to make a claim against the package travel organiser. They will not require advice on local legal standards relating to the assault.

The judgment also makes it clear that a package travel organiser cannot dismiss a claim on the basis that it relates to a service that is not explicitly mentioned in the contract. If it is a service that would be expected, for that particular holiday, in order to have an enjoyable holiday, it will be a service included in the contract.

The nature and level of services which the organiser will be liable for may vary, depending on the nature of the trip, the standard of the hotel, etc.

This judgment considers the wording of the 1992 Regulations, which applied at the time. For Package Travel contracts entered into from 1 July 2018 the Package Travel and Linked Travel Arrangements Regulations (SI 2018/634) ("the 2018 Regulations") apply.

In terms of exemptions from liability, these were listed in Regulations 15(2)(a) – (c) of the 1992 Regulations and now Regulations 16(4)(a) – (c) of the 2018 Regulations.

The wording of the provision establishing the organiser's liability, Regulation 15 of the 2018 Regulations, has similarities to the provision within the 1992 Regulations, but exemption 15(2)(c) of the 1992 Regulations has been replaced by Regulation 16(4)(c) of the 2018 Regulations which is considerably shorter and simplified. Regulation 16(4)(c) states:

> *"..the traveller is not entitled to compensation for damages under paragraph (3) if the organiser proves that the lack of conformity is….(c) due to unavoidable and extraordinary circumstances".*

The phrase 'unavoidable and extraordinary circumstances' is defined in the 2018 Regulations as *"a situation beyond the control of the party who seeks to rely {on it} and the consequences of which could not have been avoided even if all reasonable measures had been taken"*. That phrase is also used elsewhere in the 2018 Regulations, including in the context of termination of a trip by the organiser.

In April 2021, the Scottish Courts considered a school trip refund dispute arising from the COVID-19 pandemic in which the organiser unsuccessfully asserted that the contract refund requirement for unavoidable and extraordinary circumstances would only trigger if the holidaymaker was in a position to proceed and it was only the organiser who was not. The contract referred to the situation being beyond 'our' control, the consequences of which could not have been avoided even if all reasonable measures had been taken. As the package travel organiser lost on that express contract point, they were required to refund the school and it was not necessary in ***Dumfries & Galloway Council v NST Travel Group [2021] 4 WLUK 156*** to consider the balance of the school's case, which related to whether there was an implied term due to the 2018 Regulations.

In relation to travel insurance coverage, some travel policies require a package travel claim to go through the arbitration process or complaints procedure of the package travel organiser. Many package travel organisers refer to the ABTA arbitration scheme, but this scheme has eligibility criteria including maximum claim values, so some scenarios will not come within it, in which case a claim for overseas legal expenses under the travel policy may in principle (and subject to other terms and conditions of the travel insurance) come within the overseas legal expenses cover.

To summarise, by clarifying the meaning of 'supplier of services' in the context of deliberate actions of a hotel's employee in a package travel arrangement, the ***Kuoni*** Supreme Court decision will hopefully lead to acceptance of liability by the package travel organiser more quickly and easily and furthermore where legal expenses cover applies, the sum assured limit is less likely to be utilised debating these points through the Courts.

Any questions

If you have any questions regarding the insurance-related issues highlighted in this article, please get in touch with Helen.

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