



## **TRAVEL LAW BULLETIN**

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**W**elcome to the latest 'Travel Law' bulletin from 3 Hare Court. Our travel law practice group continues to flourish and Chambers is once again rated in leading guides for expertise in this field, as are several individual members of this group. A full list of the members of the group can be found on the back page of the bulletin, together with Chambers' contact details.

We have extensive experience in dealing with travel claims, providing advocacy and advice at all levels from the County Court to the Court of Justice of the European Union. Members of Chambers have been involved in claims ranging from minor bouts of food poisoning to extensive group actions, road accidents and air crashes, swimming pool accidents, accidents at sea, violent incidents, and employer's liability for accidents in danger zones, to touch on just a few examples. We act for and against tour operators, foreign insurers, travel agents, ship owners, cruise lines, airlines and hoteliers. Claims frequently involve issues of jurisdiction and conflicts of laws, and we have a great deal of experience in these areas.

Members of chambers lecture and publish on travel law, and in December 2011 Katherine Deal is speaking at two seminars on different aspects of litigation arising out of overseas litigation, details of which are available on the website and from the clerking team.

Several members of chambers have fluency in the main European languages and are able to accept instructions in these languages.

As ever, please do not hesitate to contact Mika Thom (marketing manager), James Donovan (our senior clerk) or any member of the clerking team if you would like further information on any aspect of the work undertaken by Chambers.

We hope that you find this bulletin both interesting and informative.

**Katherine Deal**  
**Editor**

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\*Article will or have appeared in 2011 in the Personal Injury Brief Update Law Journal, an online law journal available on subscription. These Chambers contribute a monthly article, edited by Katherine Deal.



## EXOTIC HOLIDAYS: TALES OF THE UNEXPECTED



### ANDREW YOUNG

Travel law practitioners are now familiar with the need to have regard to local standards in determining the prospects of success of a holiday claim brought under the Package Travel (Etc) Regulations 1992, but how does this apply to the increasing popular choice of adventure holidays, either those involving extreme sports or those involving travel to exotic destinations or both?

Exotic holidays also give rise to interesting questions of breach of duty and foreseeability which require the English courts to apply familiar principles to unusual factual situations.

In [Jones v. Sunworld Ltd](#) [2003] EWHC 591, the claimant brought a claim against a tour operator arising out of the accidental death of her husband from drowning while the two of them were staying on their honeymoon at the tragically misnamed Fun Island. It was an unusual feature of the hotel, which was on a very small island that was part of the Maldives, that it had no swimming pool but was surrounded by a lagoon with a coral reef on its outer perimeter. The accident happened when the couple walked into the lagoon on the day after their arrival and encountered a significant change in the depth of the water, which caused the husband to panic and drown.

The claim was brought, not on the basis that the tour operator should have ensured that this natural feature was safe (which would have been a bold and no doubt doomed submission) but rather that the husband should have been warned about the presence of the areas of deeper water and the consequent risk of drowning. Because the lagoon was leased to the hotel and the hotel had no swimming pool, the trial judge accepted that it was part of the package holiday (it was virtually inconceivable after all that anyone would visit the hotel and not make use of the lagoon), but he rejected the submission that this meant that the safety of the lagoon had to be assessed in the same way as the hotel itself.

The court held that the tour operator was under no duty to warn about the hazards of the lagoon: adult holiday makers must be taken to know that the seabed is not even and may spring surprises. As one witness observed and the judge accepted, in relation to natural phenomena, one should expect the unexpected. However, this approach should not be taken too far and it cannot absolve a tour operator from taking reasonable care to prevent foreseeable incidents caused by other humans and not by the natural terrain. In an unreported case in which the author was involved which ended in settlement, the claimants brought proceedings against a tour operator after they were attacked by machete wielding locals while staying under canvas on a safari trip in Kenya which formed part of their package holiday. The claim was defended on the basis that the attackers were outside the tour operator's control, but there was evidence that such attacks were relatively commonplace and that security precautions at the overnight stop were inadequate and that better arrangements might have deterred the attackers, so the tour operator offered a settlement that conceded a major percentage of liability.

Reverting to local standards, the author is currently concerned with a claim brought by an English teacher who took part in a charity



trip to The Gambia that included a 7 day work experience in a tribal village living as part of the village community. Food was provided by the hosts and involved slaughtering village chickens and other livestock in the village street. Not surprisingly, food preparation and cooking standards were very different from those to which the claimant was accustomed at home. Food was unrefrigerated and there was no access to a mains drinking water supply. At the end of the holiday, the claimant became very ill as a result of a gastrointestinal infection.

The likely source of infection is either contaminated food or drink. However, it is difficult to assert that the food provided was supplied in breach of local standards, because the villagers were no doubt following the established customs of their tribe in this regard.

The position might be different as far as drinking water is concerned, because it could be argued that the tour operator itself had a duty to provide a supply of bottled water to all those taking part in the trip, as it should have foreseen that water in the village might be unsafe to drink particularly to those from Western countries not accustomed to the same. But even that might be a counsel of perfection, if the bulk of the water required made it very difficult to transport over long distances with only primitive means of transport available. In such a situation, a court might conclude, given that a tour operator only has a duty to exercise reasonable care, that part of the attraction of an exotic package holiday was that it took the holiday-maker away from normal civilisation and that part of the price to be paid for that was the acceptance of more rudimentary safety standards on the part of those supplying services to the holidaymaker.

Obviously, each case will turn on its own facts, but a person taking a package holiday that involves staying in primitive surroundings in an undeveloped country will probably not be entitled to expect the hygiene standards of an expensive Swiss sanatorium!

## ARE YOU SITTING COMFORTABLY...?



**HOWARD STEVENS**

In the recent case of [Hook v British Airways PLC](#) (25 February 2011) Mr Hook, a disabled person who suffers from mobility and learning difficulties, sued BA for its alleged failure to make reasonable efforts to meet his seating needs on flights to and from Cyprus, contrary to Article 10 and Schedule II of Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (“the EC Regulation”). His claim for damages was struck out and his appeal dismissed.

The claim was brought pursuant to Regulation 9 of the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007 SI 2007/2895. Regulation 9 is headed “Compensation claims by disabled persons etc” and provides:

- “9(1) A claim by a disabled person or a person with reduced mobility for an infringement of any of his rights under the EC Regulation may be made the subject of civil proceedings in the same way as any other claim in tort or (in Scotland) in reparation for breach of statutory duty.
- (2) For the avoidance of doubt, any damages awarded in respect of any infringement of the EC Regulation may include compensation for injury to feelings whether or not they include compensation under any other head.”



Having regard to the terms of regulation 9 one might have thought that Mr Hook had a potentially good claim in damages, subject to proof of breach. The judge, HHJ Knight QC (sitting at the Central London County Court), however, struck out the claim for damages, holding inter alia that the Montreal Convention (“the Convention”) was “exclusive” – i.e. where it did not provide a remedy, it was not possible to circumvent it by relying on a non-Convention cause of action; that Mr Hook’s claim for damages did not fall into any of the types of claim for which there was potential liability under the Convention; and that the claim was, therefore, barred by the Convention, in particular Article 29, as interpreted by the House of Lords in Sidhu v British Airways [1997] AC 430.

Mr Hook appealed the judge’s decision to the High Court. On appeal, Supperstone J ([2011] EWCH 379), identified the issue as whether Regulation 9 created an exception to the regime laid down in the Convention so as to provide Mr Hook with a remedy in damages for injury to his feelings as a result of the alleged failure to make reasonable efforts to meet his needs.

Among other things, the Appellant invoked the principle that an international treaty cannot overrule fundamental Union law rights. Neither party, however, pointed to any authority suggesting that claims for damages based on fundamental or constitutional rights were an exception to the exclusivity principle identified in Sidhu. Supperstone J, therefore, rejected the suggestion that Sidhu (and the decision of the US Supreme Court in El Al Israel Airlines Ltd v Tsui Yuan Tseng 525 US 155 (1999)) were not applicable. Moreover, as the judge noted, the nature and scope of the exclusivity principle was firmly established before the EU ratified the Convention and, as the Court of Justice had held in Wallentin-Herman v Alitalia [2009] 2 CMLR9, the Convention formed an integral part of the Community Legal Order and agreements concluded by the Community have primacy

over secondary legislation.

Supperstone J accordingly held that:

- Regulation (EC) 2027/97 on air carrier liability in the event of accidents (as amended by Regulation (EC) 889/2002) – in which the provisions of the Convention relating to the liability of air carriers were incorporated – expressly provided that the liability of Community air carriers in respect of passengers was to be governed by the Convention;
- there was no liability for injury to feelings under the Convention;
- the EC Regulation did not expressly authorise Member States to allow individuals to bring claims for damages against air carriers and certainly did not do so in circumstances where such claims were barred by the Convention;
- the fact that Recital 18 of the EC Regulation recognised that the penalties imposed might include “the payment of compensation to the persons concerned” did not suggest that Member States were authorised to create a private law cause of action sounding in damages;
- compensation payments might be an aspect of the administrative regime implemented by the enforcement body in a Member State (provisions for enforcement being central to the purpose of the EC Regulation);
- there was no breach of the principle of equivalence since, if the exclusivity principle applied, all discrimination claims (whether in respect of sex, race, gender or age) arising out of, or in the course of, carriage by air were “pre-empted” by the Convention.

Thus, Supperstone J held that Mr Hook could invoke the administrative enforcement regime operated (in the case of the UK) by the Civil Aviation Authority, and was entitled to seek a declaration and also injunctive relief, but that he could not seek damages pursuant to regulation 9. The judge found no basis for a reference to the Court of Justice since the proper interpretation of the material parts of the EC and UK Regulations was in his view clear.



The decision *Hook v BA* is interesting on a number of levels. On one, it is a stark example of legislation (in the form of regulation 9) not serving its evident purpose. On another, it is a potent reminder of the exclusivity of the Convention regime and of the importance of *Sidhu*. The decision is also thought provoking in its consideration both of the inter-relationship between the Convention (as part of the Community legal order) and other Community legislation and between EC and UK regulations. On a more practical level, it would appear to rule out claims for damages of the type brought by Mr Hook, subject of course to any appeal.

## WHEN IN ROME (II)...



### KATHERINE DEAL

The uncertainty in England and Wales regarding the temporal scope of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, 'Rome II', seems to be drawing to a close...

### Background

For claims governed by the previous regime in this jurisdiction, namely the Private International Law (Miscellaneous Provisions) Act 1995, 'the 1995 Act', the applicable law governs issues of substance in the claim such as availability of heads of loss. However, since quantification of loss is traditionally regarded under English law

as a matter of procedure, the assessment of such heads of loss as are recoverable takes place on English principles since procedural issues would be governed by English law as the law of the forum, see *Harding v Wealands* [2007] 1 AC 1. In many cases, English levels of damages will be higher (in some case dramatically so) than those available under the law of the foreign country.

But in those cases to which Rome II applies, the applicable law will govern, *inter alia*, the existence, the nature and the assessment of damage or the remedy claimed. In other words, if the applicable law is Spanish law, the English claimant can broadly expect the English Judge to seek to apply Spanish law regarding the quantification of his damages.

Probably because the difference between English levels of damages and those available in other Member States can be striking, attention has focused in this jurisdiction on how to determine whether a claim is governed by Rome II or not. One might have thought this would be a simple task, but not so!

### Dispute

The problem is that Article 31 of Rome II ('Application in Time') provides that, 'This Regulation shall apply to events giving rise to damage which occurs after its entry into force.' And Article 32 ('Date of application') provides that, 'This Regulation shall apply from 11 January 2009....' So which claims are caught?

The battle lines in this jurisdiction tend to be drawn as follows:

- (a) Rome II only applies where the accident post-dates 11 January 2009;
- (b) Rome II does not apply to claims arising out of accidents on or after 20 August 2007 unless those claims were issued after 11 January 2009.
- (c) Or Rome II applies to those claims where the accident happened on or after 20 August 2007 and the applicable law is determined after 11 January 2009.



## High Court

The High Court of England and Wales had cause to consider the issue of the temporal scope on two occasions.

In [Homawoo v GMF Assurances](#) [2010] EWHC 1941 (QB) (a case in which this writer appeared as junior counsel for the claimant led by James Dingemans QC of these chambers) Slade J considered the three possibilities. On a preliminary basis she preferred option (a) on the basis that it gave legal certainty. In the end Slade J considered that the input of the ECJ was necessary to enable a decision to be made on the preliminary issue, and she referred the following two questions to the ECJ:

1. Are Articles 31 and 32 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in conjunction with Article 297 of the Treaty on the Functioning of the European Union, to be interpreted to require a national court to apply Rome II, and in particular Article 15 thereof, in a case where the event giving rise to the damage occurred [in that case on 29 August 2007]?
2. Is the answer to question 1 affected by either of the following facts:
  - (i) that the proceedings seeking compensation for damage were commenced on [in that case 8 January 2009];
  - (ii) that the national court had not made any determination of the applicable law before 11 January 2009?

Shortly after the hearing in [Homawoo](#) the matter was considered again by Tomlinson J (as he then was) in [Bacon v Nacional Suiza Cia Seguros y Reseguros SA](#) [2010] EWHC 2017 (QB). He noted that [Homawoo](#) had been referred. He considered that option (a) was unsustainable given the travaux préparatoires and preferred

option (c), which he felt produced a ‘clear, if arbitrary, result’. In the event, he found against the claimant and so his consideration of the matter was obiter.

[Homawoo](#) (Case 412/10) proceeded to an oral hearing before the ECJ on 14 July 2011. On 6 September 2011 Advocate General Mengozzi delivered his opinion, which is available on the ECJ’s website at [www.curia.europa.eu](http://www.curia.europa.eu). He considered that the Commission essentially overlooked the ramifications of a different date for entry into force and date of application (a difference, moreover, not repeated in all of the language versions of Rome II). Accordingly one could not rely on the travaux préparatoires on their own and reference had to be had to the objectives and structure of Rome II. He concluded after considering the precise wording of Articles 31 and 32 of Rome II, and the general structure or the objectives thereof, that, ‘[I]t is abundantly clear that that regulation must be interpreted as being applicable to events giving rise to damage occurring on or after 11 January 2009’, i.e. option (a), as the claimant submitted.

He therefore proposed answering the 1st question referred, ‘[A]s meaning that a national court must not apply that regulation, and in particular Article 15(c) thereof, in a case in which the event giving rise to the damage occurred on 29 August 2007. Regulation No 864/2007 applies only to events giving rise to damage which occurred on, or after, 11 January 2009’, and did not need to consider the 2nd question.

There is no guarantee that the Court will follow AG Mengozzi’s lead, and as yet there is no date for judgment. However it is surely more likely than not that it will adopt the same approach. Watch this space!



## SUING THE LOCAL SUPPLIER



**SARAH CROWTHER**

The premise of the Package Travel etc Regulations is in part that it is easier for a tour operator to seek redress from a local supplier than it would for a consumer to pursue his claim directly. However, one of the recurring challenges for tour operator and retailer defendants in package travel claims is securing the co-operation of the local suppliers whose goods or services are alleged by the claimant to have fallen below the required standard. Very often foreign suppliers are unfamiliar with adversarial litigation and fail to appreciate the need to secure proper evidence in response to allegations and simply fail to participate, at least until it is effectively too late. Others are actively contemptuous of English tourists and respond to what they perceive to be outlandish and unjustified criticisms with startling counter-accusations such as fraud, drunkenness and malingering.

For the tour operator which finds itself 'piggy in the middle' between a customer's claim and a recalcitrant or militant supplier, one of the weapons in its armoury is to bring a third party claim (latterly known as additional claims in CPR Part 20). But are such claims worth the costs or the hassle? What are the practical and legal difficulties which need to be faced?

Where the local supplier is domiciled in a Member State of the EU (except Denmark),

then, assuming that the main proceedings are not merely a device to remove him from his own jurisdiction, a tour operator can bring third party proceedings pursuant to Article 6(2) of the Judgments Regulation (Council Regulation 44/2001). Where the contract stipulates that the courts of England and Wales have jurisdiction, then even where the local supplier does not have EU Member State domicile, jurisdiction can be established via Article 23 of the Judgments Regulation. In cases where the contract does not stipulate England and Wales or where the only cause of action is the Civil Liability (Contribution Act) 1978, then alternative routes to service out of the jurisdiction through CPR 6 Part IV will have to be found and permission to serve out of the jurisdiction obtained.

In many third party proceedings, the applicable law will not be the law of England and Wales. There are instances where a commercially powerful tour operator has negotiated English law to apply to its contracts with small scale local hoteliers or excursion providers, however, in these circumstances it is rarely necessary to resort to third party proceedings. More often proceedings are considered by smaller, specialist or niche tour operators which lack this bargaining power, particularly when faced with large local suppliers, for example, an international chain of ski equipment rental shops. In many of these cases a foreign law will apply. The Foreign Limitation Periods Act 1984 provides the general rule that foreign applicable law to govern limitation (section 1). It is important to obtain early advice regarding what procedural steps are generally required by the foreign law to stop time running, because these can be relevant (see for example [Barros Mattos v McDaniels](#) [2005] EWHC 1323 (Ch)).

Despite the common law presumption that foreign law is identical to English law absent evidence proving the contrary, in practice appropriate foreign expert law evidence is essential before third party proceedings can be pleaded and served. Obtaining relevant and



cogent foreign expert law evidence is a skill in itself. The tour operator will need to establish the principles of the applicable law which govern the existence of a cause of action and recovery of loss and damage. The temptation to either apply the facts of the claim to the relevant legal principles or to opine on the ultimate issue seems for many foreign lawyers to be overwhelming, and this can fatally undermine the credibility of the expert if not carefully handled from the outset.

In practical procedural terms, it is important not to fall at the first hurdle: service. The service of proceedings abroad remains a complicated and technical exercise, fraught with the risk of set aside in the event of error (see CPR 6.41 to 6.44). The costs associated with the translation of proceedings (see CPR 6.45) for service regularly run into several thousands of pounds. It is imperative to endorse the claim form appropriately where proceedings are being served out of the jurisdiction without permission (CPR 6.34).

The special characteristics of claims with a foreign element require consideration during case management by the Court, but also during preparation by the parties. In cases where there is a language barrier, the provisions of CPR 32 PD 23.2 regarding witness statements in a foreign language need to be borne in mind. Where video (or 'live') link evidence is contemplated, detailed guidance as to the arrangements and management of such evidence, including the need to ensure there are no diplomatic objections, in CPR 32 PD 33. In practice, one of the commonest challenges is transporting the bundles of documents to the live linked witness. It is also for the calling party to make appropriate arrangements for a suitably qualified interpreter to be available.

In view of the attendant costs, complexity and likely delay, it might be suggested that third party proceedings would only be justified in moderate or high value claims. However, this attitude

overlooks the commercial realities of defending package travel claims without any meaningful evidence regarding the allegations of fault or underlying facts raised by a claimant.

The only alternative for the tour operator faced with a non co-operative local supplier very often is to settle the claimant's claim and costs on best possible terms, which may not be the message which the tour operator wishes to send to other potential claimants or the wider general public. With careful and considered handling, third party proceedings not only improve the prospects of successfully defending a claim, but enable the tour operator to hold the local supplier accountable.

## DEVELOPING THE DUTY OF CARE OWED BY A TOUR OPERATOR



**CLARA JOHNSON**

It has hitherto been beyond doubt that should a holidaymaker sustain injuries during the course of a package holiday caused by a breach of duty by the tour operator or local supplier, he or she only has a cause of action pursuant to the Package Travel Regulations – which in essence, is a statutory claim for breach of contract. The holidaymaker does not have a separate and additional cause of action in tort. However, in two recent cases there appears to have been a slight shift in this analysis such that the ground may be opening up for holidaymakers to bring



claims against a travel agent or tour operator in tort.

The first of these cases is Parker v TUJ [2009] EWCA Civ 1261. Mrs Parker sustained injuries in an accident that occurred just after she had completed a toboggan run in Austria. At the time she was on a package holiday supplied by the defendant but had purchased a ticket for the toboggan excursion separately in resort. The defendant's reps had accompanied Mrs Parker and others on the bus which took them to the tobogganing event. The reps had briefed the participants on the bus and at the top of the mountain that at the end of the run there was a flashing red light at which point they must dismount their toboggans and walk the rest of the way down the mountain. The reps spread themselves out among the participants during the event. The accident occurred when Mrs Parker remounted her toboggan at the end of the run and careered into straw bales which were hard and frozen.

Although much of the argument at trial and on appeal centred on whether Mrs Parker had a contract with the defendant or with the local supplier, it was argued that the defendant was nonetheless liable in tort. Mrs Parker argued that the defendant was negligent because amongst other things, it had not provided reps to stand at the end of the toboggan run. If they had been there, they could have helped Mrs Parker down to the bottom of the mountain or at least stopped her from remounting the toboggan.

It was argued by the defendant that the tour operator owed no duty of care to the claimant. This argument was firmly rejected by the Court of Appeal. It found that there was a duty of care, which had been created by the assumption of responsibility on the part of the defendant – specifically, that local reps had accompanied Mrs Parker and others on the run and had given them instructions and directions as to how to complete the run safely. Ultimately, Mrs Parker's appeal failed because the scope of the duty

contended for was too high. There were also insurmountable difficulties with causation.

Nonetheless, Parker is clear authority for the proposition that in certain circumstances, regardless of the contractual nexus between a tour operator and holidaymaker, a tour operator may owe a duty in tort to the holidaymaker. The advantage of this from the holidaymaker's point of view is that if the excursion contract is with the local supplier, he or she has a remedy against the tour operator. Whether there has been an assumption of responsibility depends on the facts of each case. In many excursion cases it is likely that there has been an assumption of responsibility on the part of the tour operator – for example by the carrying out of a risk assessment or giving directions in relation to safety issues. However, there is highly unlikely to be a tortious duty owed in cases where a local rep has simply sold tickets as agent on behalf of a local supplier – save for any narrow duties owed arising from its position as agent.

The second case is Harrison v Jagged Globe Limited, unreported, Central London County Court 14 April 2011. The facts of this case are unusual as it involved Sir Ranulph Fiennes and a 'staged' accident performed during the course of an expedition to Peru. The defendant tour operator specialising in mountaineering expeditions assisted with a planned expedition to Peru. The defendant asked Sir Ranulph whether he wanted to be provided with a leader on the expedition, which he declined. However, he was provided with local guides who were to assist with acclimatisation, altitude training and training in climbing techniques. Sir Ranulph invited the claimant to join him on the expedition. During the expedition, the claimant agreed to take part in a staged fall down a crevasse and subsequent rescue. There were two staged falls – both of which resulted in injuries.

The local guides supplied by the defendant had assisted with the staged falls. The court found that the provision of assistance with the staged



falls did not form part of the package holiday contract since it was not contemplated until well after the contract had been concluded. However, the local guides supplied by the defendant had assumed responsibility for the staged falls in agreeing to assist with them and in so doing had imposed a tortious duty on the defendant to provide this assistance with reasonable skill and care. The court found that the first staged fall had been poorly managed and executed and there was breach of duty in relation to it (albeit there was a reduction for contributory negligence by 40%). However, in relation to the second fall, the claimant had accepted the risk of injury, which would have been obvious from the first fall and the defendant was not liable on account of the principle *volenti non fit injuria*. Essentially, liability was established against the defendant because of the assumption of responsibility of the local guides who had been supplied by the defendant as part of the package holiday contract.

Both decisions reflect an important development in travel law. They open up the potential for claims to be brought against a tour operator in tort for its negligence or that of its local suppliers, whereas previously claims have been almost exclusively contractual in nature. It remains to be seen how far this approach will be extended. Although the courts may readily find there has been an assumption of responsibility and therefore that a duty of care is owed to the claimant by the tour operator, practitioners ought to keep in mind that the courts are unlikely to find there has been a breach of duty where the scope of the duty contended for is too high, as was the case in *Parker*. As Longmore LJ commented in *Parker*, to allow Mrs Parker's appeal would effectively 'encourage potential claimants to believe that whenever an injury occurs someone must be to blame. That is not what the law of negligence is about'.

## AGENCY – NO LONGER A BLANKET DEFENCE



**HELEN PUGH**

Goldtrail. Dream Holidays. Holidays4U. Many holidaymakers have already had to face the harsh reality of being stranded abroad when their tour operator goes bust. Yet the concerns don't end there. Unhappy holidaymakers are increasingly finding that their tour operator is no longer around to compensate them and turning their attention elsewhere. And the lucky recipient of this attention? The travel agent.

Two claims arising from the Package Travel, Package Holidays and Package Tours Regulations 1992 merit particular attention. The first is the statutory claim pursuant to Regulation 4. The second is a contract claim relying upon Regulation 15.

Turning to Reg 4 first, this imposes a type of strict liability on organisers and retailers who 'supply' inaccurate statements contained in 'descriptive matter'. The definition of retailer as "the person who sells or offers for sale the package put together by the organiser" is clearly aimed squarely at travel agents. Unlike Regulation 15, there are no statutory defences. Direct contractual relationship or not, a travel agent will need to compensate the holidaymaker for his contractual loss including any Jackson/Milner award.



A potential escape route for agents depends upon the meaning which courts will give to the word 'supply'. At its broadest, Reg 4 imposes liability on travel agents who make brochures available to customers on shelves even if the customers have no other contact with the travel agent at all. At its narrowest, Reg 4 should only apply to those cases in which the package holiday contract is formed with or via the travel agent.

In reality the answer is likely to be somewhere in the middle with each case depending on its own facts. Keppel-Palmer v Exsus Travel Ltd and another [2003] All ER Digest is a good example. In that case the principal faxed leaflets to the travel agent which in turn faxed the leaflets on to the holidaymaker. Mr Justice Gage indicated (obiter) that this was insufficient to constitute a supply by the travel agent. The agent was merely acting as a conduit.

The more complex but potentially wider claim arises from 'improper performance' of 'the contract' pursuant to Regulation 15. The breach of contract claim is brought against 'the other party to the contract' which can be the organiser, the retailer or both.

If the travel agent is merely the retailer, there is a powerful argument to make that by its nature an agent does not enter into any contract with the holidaymaker. Support for this traditional contract law analysis can be found in the judgment of Goldring J in ABTA v CAA [2006] EWHC 13 (Admin). However, the success of this argument will depend on whether the agency was disclosed to the holidaymaker.

The position is more complicated if the travel agent is the organiser, namely 'the person who, otherwise than occasionally, organises packages and sells or offers them for sale.' This often hinges upon the factually sensitive question - Who pre-arranged the package?

The leading case on whether there is a package, and consequently who pre-arranged the package, is the Court of Appeal decision in ABTA v CAA [2006] EWCA Civ 1356. Lord Justice Chadwick defined the distinction as follows:

"The factual question to be resolved – on a case by case basis – is whether the services are being sold or offered for sale as components of a combination; or whether they are being sold or offered for sale separately, but at the same time." The determination is highly fact sensitive. In cases in which the tour operator pre-arranged the package, the travel agent is likely to be the retailer only. They will only be 'other party to the contract' if the agency was undisclosed. In other cases different tour operators may provide the flights and accommodation. In such cases, if the services are sold as a 'package' it must follow that the travel agent pre-arranged the combination and is the 'other party to the contract.' Anecdotal evidence suggests many county courts have yet to get to grips with this new way of analysing travel agent relationships. As more tour operators go bust, they may soon have to.

## UNDER A CLOUD



**ALEXANDER HALBAN**

On 14 April 2010, the Eyjafjallajökull volcano in Iceland erupted, sending clouds of volcanic ash into the atmosphere. The eruption continued for six days, until much of Europe was covered. Fearing that ash could interfere with aeroplane engines, aviation authorities closed much of European airspace. Travellers suddenly found themselves stranded aboard, with their return flights cancelled. It took weeks for all of them to get back home. What had started as a relatively small eruption led to the largest disruption to air



travel since the Second World War.

Not just an important meteorological event, the ash cloud is now becoming an important legal event. Travellers had spent considerable time, effort and money getting back home and wanted to claim compensation. Potential defendants were not hard to come by: insurance companies, airlines and tour operators.

This article will focus on the latter, tour operators. Most travellers had booked package holidays and claimed under the Package Travel Etc Regulations 1992. The cancellation of a return flight was clearly non-performance of the holiday contract, contrary to regulation 15. It was also a failure to provide a significant proportion of the services after departure, contrary to regulation 14. Not unreasonably, tour operators thought they should not be liable for something as unpredictable and unpreventable as a volcanic eruption. It seemed to fall exactly into definition of force majeure in regulation 15: either unusual or unforeseeable circumstances beyond the tour operator's control, the consequences of which could not have been avoided; or an event which the tour operator could not foresee or forestall, see Regulation 15(2)(c). Force majeure was a specific defence to a claim for non-performance under regulation 15. But what of Regulation 14, which was silent on the subject? Claimants argued that even if the tour operator relied on the force majeure defence to regulation 15, it could not avoid liability under regulation 14, which had no such defence. This followed a literal reading of the Regulations. If the drafters of the Regulations (and the European directive on which they are based) had intended force majeure to be a defence to regulation 14, they would have said so. Some support for this argument is found in regulation 13, which concerns pre-departure changes, where force majeure is specified as a defence.

However, the tour operators argued that this argument ignores the basic facts. If a single event, the eruption, caused a breach of both regulation 14 and 15, how could the tour operator be liable for one but not the other? It would undermine the entire purpose of force majeure if claimants could neatly side-step it and make the tour operator liable by another route.

The relationship between these two regulations was not a new problem and had arisen in previous cases. In Charlson v Mark Warner Ltd [2000] CLY 4043, for instance, bad weather had curtailed the claimants' skiing holiday. It was held that this was force majeure and that all liability was excluded: regulation 14 must be read subject to the force majeure defence in regulation 15.

However, this appeared to be contradicted in Tanner v TUI UK Ltd (10-12 October 2005, Central London County Court, unreported) in which a cruise was altered and partly cancelled due to rough weather. The holiday-makers claimed compensation for breach of regulation 14. The judge decided that regulation 14 applies whether or not the tour operator is in breach of contract. The tour operator had, strangely, conceded the point that regulation 14 could not be read subject to regulation 15. The judge then considered whether it would be 'appropriate' to order compensation under regulation 14. He concluded that it would not, since the reason for the breach of regulation 14 was a force majeure situation. Although the tour operator was liable, it did not have to pay compensation. Tour operators seem to have succeeded in the ash cloud cases, at least on this point. The Charlson argument has been followed in several cases, such as in Lewis v Travelmood Ltd (18 July 2011, Bournemouth CC, DDJ Taylor, in which this author appeared as counsel for the defendant) and, in Scotland, Magill v Royal Caribbean Cruise Lines (23 February 2011, North Strathclyde Sheriff's Court). Both judges read regulation 14 as subject to regulation 15, so neither needed to consider the effect of Tanner. But even if they had, it is hard to see how the claimant's argument could have succeeded.

It is more logical to regard force majeure as a defence to all claims, under either regulation, rather than as a defence to one but only a discretionary bar to compensation under the other. The same volcanic eruption and the same spoiled holiday should produce the same answer however the question is phrased.



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