Neutral Citation Number: [2017] EWCA Civ 11

Case No: B3/2015/0927

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM COUNTY COURT
HHJ WORSTER
3YJ60681

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2017

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE MCFARLANE
and
LORD JUSTICE BURNETT

- -

Between:

DENNIS WOOD **MARGARET WOOD**	**Respondent**
- and -	
TUI Travel PLC T/A First Choice	**Appellant**

- -
- -

Grahame Aldous QC and Philip Jones (instructed by **Mackrell Turner & Garrett**) for the **Appellant**
Robert Weir QC and Andrew Young (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing date: 22nd November 2016

- -

Approved Judgment

Lord Justice Burnett:

1. The issue in this appeal is whether Mr and Mrs Wood can recover damages, pursuant to the implied condition in section 4(2) of the Supply of Goods and Services Act 1982 ("the 1982 Act"), for acute gastroenteritis suffered whilst staying at the Gran Bahia Principe Hotel in the Dominican Republic in 2011 on an all-inclusive holiday contracted with TUI Travel Plc trading as First Choice ("First Choice"). The implied condition provides that where property in goods is transferred pursuant to a contract in the course of business, the goods must be of "satisfactory quality". His Honour Judge Worster concluded that the supply of food and drink to Mr and Mrs Wood constituted the supply of goods for the purpose of the 1982 Act. He decided that their illness was caused by contaminated food or drink that they were given in the hotel. It was not of "satisfactory quality" for the purposes of section 4(2) because it was contaminated. Mr Wood was awarded damages which included £16,500 for pain, suffering and loss of amenity and Mrs Wood £7,500. It is unnecessary to expand upon the detail of the medical problems they suffered as a result of the gastroenteritis but the levels of damages (which are not the subject of challenge) are sufficient to show that the consequences were serious and not transitory.

2. First Choice appeal against the finding of liability under the 1982 Act on the basis that the contract did not contemplate that property in the food and drink would be transferred to Mr and Mrs Wood. They suggest that the consumption of food and drink provided at the hotel involved no transfer of property in that food or drink.

The 1982 Act

3. The 1982 Act, as its title suggests, is concerned with contracts for the supply of goods and also with contracts for the supply of services. Part I of the Act applies to "Supply of Goods" and Part II to "Supply of Services". At the relevant time, Section 1 provided:

> "1 The contracts concerned
>
> (1) In this Act … a "contract for the transfer of goods" means a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract.
>
> (2) For the purposes of this section an excepted contract means any of the following:-
>
> (a) a contract for the sale of goods; ...
>
> (3) For the purposes of this Act … a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above)

whatever the nature of the consideration for the transfer or agreement to transfer."

Section 4 provided:

> "4 Implied terms about quality or fitness
>
> (1) Except as provided by this section and section 5 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods.
>
> (2) Where under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.
>
> …"

The implied condition that the goods be of satisfactory quality is the same as is implied by section 14(2) of the Sale of Goods Act 1979 ("the 1979 Act").

4. The parallel provisions in the 1982 Act relating to the supply of services are sections 12 and 13. As material they provided:

> "12 The contracts concerned
>
> (1) In this Act a "contract for the supply of services" means, subject to subsection (2) below, a contract under which a person ("the supplier") agrees to carry out a service.
>
> (2) For the purposes of this Act, a contract of service or apprenticeship is not a contract for the supply of a service.
>
> (3) Subject to subsection (2) above a contract is a contract for the supply of a service for the purposes of this Act whether not goods are also –
>
> (a) transferred or to be transferred, or
>
> (b) bailed or to be bailed by way of hire,
>
> under the contract and whatever the nature of the consideration for which the service is to be carried out.
>
> 13 Implied term about care and skill
>
> In a contact for the supply of a service, where the supplier is acting in the course of a business, there is an implied term that

> the supplier will carry out the service with reasonable care and skill."

There is no dispute that food is capable of being "goods" for the purposes of the 1982 Act, a term with a wide definition in section 18.

The Facts

5. First Choice is a substantial package holiday provider. Mr and Mrs Wood booked a two week holiday, to celebrate their fortieth wedding anniversary, departing from Gatwick Airport on 30 March 2011 and returning a fortnight later. The price was paid in advance. First Choice agreed to provide or arrange return flights to the Dominican Republic, transfers to the hotel, accommodation together with the board element described as "all inclusive". That meant that all food and drink would be provided by the hotel without Mr and Mrs Wood being responsible for paying anything for it locally. Unsurprisingly, there were no terms or conditions in the contract which concerned themselves with the question of property in the food and drink provided, and when (or whether) it passed to the customers, any more than there are in the terms or conditions upon which customers purchase a meal in a restaurant or bed and breakfast in an hotel.

6. The judge accepted that Mr and Mrs Wood consumed only food and drink provided by the hotel. Prior to suffering gastroenteritis they ate consistently from the buffet save for one meal which they ordered from a menu. Mr Wood developed symptoms on the evening of 2 April 2011. He was admitted to hospital three days later and discharged on 9 April. He had suffered a bacterial infection of some sort. Mrs Wood became ill on 11 April 2011. The judge concluded that both suffered the illness as a result of eating or drinking contaminated fare at the hotel.

The Proceedings

7. The claim was advanced principally under the Package Travel, Package Holidays and Package Tours Regulations 1992 No. 3288 ("the 1992 Regulations"). Those regulations were introduced to implement Council Directive 90/314/EEC on package travel, package holidays and package tours. They govern the circumstances in which a representation in a brochure is binding on a tour operator and requirements of information that must be provided to a customer. They allow a customer to transfer the benefit of the contract to another, void contractual terms allowing the operator to increase prices after the contract has been entered into save for closely defined reasons and limit the scope for altering significant terms. Regulations 14 and 15 govern liability of the tour operator when things go wrong. Regulation 14 is concerned with the position when a "significant proportion of services are not provided". Regulation 15 is concerned with proper performance of the contract:

(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because-

(a) the failures which occur in the performance of the contract are attributable to the consumer;

(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or

(c) such failures are due to-

(i) unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or

(ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

(3) In the case of damage arising from the non-performance or improper performance of the services involved in the package, the contract may provide for compensation to be limited in accordance with the international conventions which govern such services.

(4) In the case of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the contract may include a term limiting the amount of compensation which will be paid to the consumer, provided that the limitation is not unreasonable.

(5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term.

…"

8. The term "services" is not defined in the 1992 Regulations but has a broad meaning which includes transport, accommodation and ancillary services which would include food and drink provided by an hotel.

9. The 1992 Regulations provide a wide range of protections to the holiday maker. Liability for injury or damage resulting from the improper performance of the contract arises, by virtue of regulation 15(2), when there is fault of some sort on the part of the provider of the obligation in question. The terms of the directive and the 1992 Regulations do not, in my view, assist in deciding the question which arises in this appeal.

10. The judge heard detailed evidence of the systems in place at the hotel and was provided with much contemporary documentation which demonstrated the care taken to comply with high standards of food hygiene. The claimants failed to establish that the hotel was at fault in the manner required by the 1992 Regulations. There is little doubt that food might be contaminated without fault on the part of a restaurant or hotel. That is what the judge concluded was the position in this case.

11. It was in those circumstances that the alternative case advanced by Mr and Mrs Wood fell to be considered. They relied upon the implied condition found in section 4(2) of the 1982 Act on the basis that First Choice agreed to supply them with food and drink and agreed that property in the food and drink would transfer to them before or when it was consumed. Mr Weir QC on their behalf argued in addition that even if the 1982 Act did not apply there was a similar condition implied at common law.

12. Mr Aldous QC on behalf of First Choice has not suggested that food contaminated in the way found by the judge to have been the position in this case could be considered of "satisfactory quality" for the purpose of section 4(2), if it applies. Food contaminated with bacteria such as to cause illness could hardly be described as such. Before the judge, the burden of the argument advanced by First Choice was that the contract they entered into with Mr and Mrs Wood was a contract for the supply of services. It could not be both a contract for the supply of services and a contract for the supply of goods at the same time. Thus, it was submitted, the judge should have concluded that it was a contract for the supply of services (which included the provision of food and drink) and thus all of its provisions were governed by the implied term found in section 13 of the 1982 Act that the services should be provided with reasonable care and skill. The corollary of this submission is that section 4 of the 1982 Act did not apply to the contract. In view of the finding of a lack of fault on the part of the hotel the submission, if correct, would have resulted in the claim being dismissed. On behalf of Mr and Mrs Wood, it was argued before the judge that a contract could be both a contract for the supply of goods and supply of services at the same time. The provision of food and drink was the supply of goods, even though most of what First Choice contracted to provide were services. The judge accepted that argument.

The Appeal

13. The grounds of appeal contend that the judge should have concluded that:

    i) The contract between Mr and Mrs Wood and First Choice was a contract for the supply of services and could not also have been a contract for the transfer of goods;

    ii) No property in goods was transferred by First Choice to Mr and Mrs Wood, in particular they never acquired property in the food or drink they consumed;

    iii) For either or both reasons the implied condition in section 4(2) of the 1982 Act formed no part of the contract, rather the applicable implied term was that found in section 13.

14. Mr Aldous focussed his oral submissions on the second ground. It was no longer suggested on behalf on First Choice that a single contract may not be both a contract for the supply of goods and also a contract for the supply of services. That concession was rightly made. The language of the statute itself in sections 1(3) and 12(3) of the 1982 Act makes clear that the two are not mutually inconsistent. To the extent that a contrary view was expressed at first instance in *Trebor Bassett Holdings Ltd v ADT Fire and Security Plc* [2011] EWHC 1936 (TCC) [2011] BLR 661 at paragraph 219 it was disapproved in the Court of Appeal in the same case by Tomlinson LJ (with whom the Chancellor and Richards LJ agreed) at paragraph 49 of his judgment: [2012] EWCA Civ 1158, [2012] BLR 441. There are many obvious everyday examples of contracts that have both elements. For example, a single contract might involve the purchase and fitting of carpets or kitchen units; or a contract to have a car serviced routinely envisages that new parts might be fitted. These are examples of contracts for work and materials which before the enactment of the 1982 Act were subject to implied terms at common law but these were put on a statutory footing following the recommendation of the Law Commission, Report on Implied Terms in Contracts for the Supply of Goods (Law Com. No. 95) in 1979.

15. The submissions advanced on behalf of First Choice have an elegant simplicity. There was no contract by which First Choice agreed to transfer property in food and drink to Mr and Mrs Wood. All that First Choice did was to provide a licence to its all-inclusive customers to consume food and drink with no question of their ever becoming the owners of what was on their plates or in their glasses. When consumed by customers the food was destroyed. The provision of food was a service and but one component of a contract by which First Choice agreed to supply a variety of services. Mr Aldous placed considerable reliance on the judgment of Lord Mance in the Supreme Court in *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* [2016] AC 1034; [2016] UKSC 23.

16. Mr Weir submitted that both parts of the 1982 Act could apply to a single contract and that the supply of food was within the scope of Part I. He

recognised that reliance upon the 1982 Act by Mr and Mrs Wood required them to show that First Choice agreed to transfer property to them in the food and drink with which they were provided. It was common ground that property would not have to pass directly from First Choice to Mr and Mrs Wood. First Choice could fulfil its contractual obligations through others. He submitted that the appellants' characterisation of the food remaining the property of the hotel at all times until it was placed in the mouth of the customers at which point it was destroyed was unreal.

Discussion

17. No doubt since the beginnings of the hospitality business, the customers of restaurants and hotels have been poisoned occasionally by the food they have ordered and suffered injury. In the domestic sphere there is a regulatory regime quite apart from the 1979 Act and the 1982 Act which provides remedies. The most recent general legislation is the Consumer Rights Act 2015. Yet it is instructive to see how the issue has been treated hitherto in the straightforward context of the contamination of food causing a consumer of a meal in a restaurant to suffer food poisoning.

18. The issue arose for decision in *Lockett v A & M Charles Ltd* [1938] 4 All ER 170. Mr and Mrs Lockett stopped for lunch in the restaurant of an hotel. They ordered a meal. Mrs Lockett had whitebait. The fish were contaminated and she suffered food poisoning but there was no negligence on the part of the restaurant. The principal debate in the case was whether Mrs Lockett had a contractual claim. The couple each ordered their lunch but Mr Lockett paid. The restaurant argued that the contract was with Mr Lockett alone. That issue was resolved against the restaurant. In his short judgment Hilbery J accepted that:

> "When persons go into a restaurant and order food, they are making a contract of sale in exactly the same way as they are making a contract of sale when they go in and order any other goods."

Having concluded that as between the customer who ordered food and the restaurant, the customer is responsible for payment, unless the proprietor is made aware that an individual is the host, he continued:

> "It follows beyond all doubt that there is an implied warranty that the food supplied will be reasonably fit for human consumption. I hold that the whitebait delivered in this case were not reasonably fit for human consumption, and that there was a breach of warranty."

19. It is true that it is unclear whether the finding of liability was for breach of the implied condition that the food would be "reasonably fit for purpose" found in section 14(1) of the Sale of Goods Act 1893, or whether the court was founding liability on an equivalent common law implied term. That said, there was no question that the liability of the restaurant would be confined to the

proof of fault on its part. The judge acknowledged that an action in negligence would lie against the restaurant on proof of a failure to take reasonable care, but that was not even alleged. The terms "reasonably fit for purpose" and "reasonably fit for human consumption" are interchangeable in this context. "Reasonably fit for purpose" is a statutory precursor of "satisfactory quality" found in section 4(2) of the 1982 Act and section 14(2) of the 1979 Act. It was not argued that the contract between the restaurant and Mr and Mrs Lockett was a mixed contract for the supply of services (cooking, presentation and serving) and materials (the food) but given the way in which the judge approached the question of liability (breach of a warranty) it is difficult to imagine that the outcome would have been any different had it been.

20. No case was cited to us which calls into question the correctness of this decision in the straightforward circumstances of eating a meal in a restaurant which causes food poisoning because it is contaminated with bacteria.

21. The *PST* case did not involve food but fuel supplied to a ship for its propulsion. Such fuel is known as "bunkers". The first supplier, OW Bunker Malta Ltd, contracted with the ship owners to supply bunkers of fuel oil and gasoil for the propulsion of their vessel, then lying in a Russian port. The contract incorporated the first supplier's standard terms of business. Those provided for payment 60 days after delivery. Two clauses of the contract were of particular importance in the litigation. There was a retention of title clause under which property in the bunkers was not to pass to the ship owners until the bunkers had been paid for in full. In addition a clause entitled the owners to consume the bunkers to propel the vessel from the moment of delivery. It was possible that all the bunkers would be consumed before they were paid for and inevitable that a large part of the oil delivered would be used in that period, leaving at most only a small part at the end of 60 days in which title could then pass. A chain of further contracts for the supply of the bunkers was entered into but the actual delivery was made by a company at the port where the vessel was berthed. After the bunkers had been supplied, the parent company of OW Bunker Malta Ltd, which was the second supplier in the chain, began proceedings for restructuring which constituted an event of default under a financing agreement between the OW Bunker Group and its bank. The bank asserted a right to recover as assignee the debt owed by the owners to OW Bunker Malta Ltd for the supply of the bunkers. The third supplier asserted ownership of the bunkers for which it intended to seek payment from the owners.

22. It was in those circumstances that the owners sought a declaration that they were not bound to pay either OW Bunker Malta Ltd or its bank for the bunkers supplied to the vessel, or alternatively damages for breach of contract, on the ground that OW Bunker Malta Ltd was unable to pass title in the bunkers. Their concern was that they might be liable to pay for the bunkers twice. Whilst this litigation involved only one ship with bunkers to the value of under $500,000, the outcome would determine the liability of a large number of ship owners. Arbitrators held that the retention of title clause combined with the owners' right to use the bunkers for the propulsion of the vessel in advance of

payment, meant that OW Bunker Malta Ltd had not undertaken to transfer property in the bunkers to the owners, and accordingly the contract was not "a contract of sale of goods" within the meaning of the 1979 Act. OW Bunker Malta Ltd could not claim the price of the bunkers under that Act but were entitled to recover the sum due as a simple debt. The owners appealed and both OW Bunker Malta Ltd and the bank cross-appealed. Males J affirmed the arbitrators' decision, holding that OW Bunker Malta Ltd had not undertaken to transfer property in the bunkers because both parties had envisaged that some or all of them were likely to have been consumed in the propulsion of the vessel before payment became due. They would then cease to exist and it would become impossible to transfer property in them. The Court of Appeal upheld the judge's decision as did the Supreme Court. Lord Mance, with whom the rest of the court agreed, concluded that the agreement between OW Bunker Malta Ltd and the owners was not a straightforward agreement to transfer property in the bunkers for a price. It was an agreement with two parts. First, to allow consumption of fuel prior to payment without property passing in the fuel so consumed; and secondly to transfer property in any remaining fuel when the price for all bunkers was paid. The contract was therefore not a contract for sale within section 2 of the 1979 Act but was *sui generis*. His conclusion is set out in paragraph 28 of his judgment. The owners were liable for the price. Had the contract been one for the sale of the bunkers then, applying *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232, [2014] 1 WLR 2365, section 49(1) of the 1979 Act would preclude recovery of the price of goods in circumstances where property had not passed to the buyer. The correctness of that decision was considered by Lord Mance starting at paragraph 40 of his judgment. At paragraph 58 he concluded that it was wrongly decided and, at paragraph 60, that even if the contract in question were one for the sale of goods, section 49(1) would not have barred the claim.

23. I have set out the substance of the decision in the Supreme Court at some length (and in doing so I acknowledge with gratitude the comprehensive headnote in the official report) because it is necessary to understand why at each level there was such focus upon the property in the fuel oil which had been consumed to propel the ship. The contract was silent upon whether property in the consumed bunkers passed to the owners before or at the point of consumption. Lord Mance rejected an argument that property in the oil must have been transferred a nanosecond before it was consumed and concluded that title in the consumed bunkers never passed to the owners.

24. Mr Aldous relied upon the reasoning in the *PST* case to support his contention that there was no intention that property in any food or drink served to Mrs and Mrs Wood would pass to them. Instead, the food and drink remained at all times the property of the hotel until the moment it was placed in its customers' mouths when it was destroyed, perhaps not instantaneously as with burning fuel oil, but for the purposes of legal analysis just as surely. The essential nature of a holiday contract that includes the provision of any food is simply to authorise consumption of food and drink belonging to the hotel, nothing more, he submitted.

25. I cannot accept that the *PST* case is authority for the broad proposition advanced by First Choice. The conclusion reached by the Supreme Court depended upon the relationship between the retention of title clause and the liberty nonetheless to consume fuel in which property had not already passed. The problem would not have arisen but for the retention of title clause. If the contract had been a straightforward one for the sale of fuel oil with no such clause, property in the bunkers would have passed on delivery, assuming the seller itself had property in them.

26. Lord Mance observed in paragraph 1 of his judgment that:

> "The parties' submissions have … lent a degree of metaphysical complexity to commonplace facts."

The supply of bunkers is commonplace in the world of shipping. The provision of holidays, hotel accommodation, and weekend breaks or even casual stops at a bed and breakfast, often include an entitlement to food and drink within an overall price. Such contracts are made millions of times a year in this jurisdiction. We too have enjoyed submissions of a metaphysical nature which might surprise the many thousands of customers who enjoyed breakfast, perhaps with orange juice, tea or coffee, in their hotels or guest houses every morning in this jurisdiction or the world over as part of package holidays. Do they ever own the food and drink they are served? Do they own it when it is served to them on a plate? Do they own it when they serve themselves from a buffet? Do they own it when it is placed in their mouths? And who owns the scraps taken away at the end of a meal? Could a customer wrap a croissant from his plate in a napkin and eat it on the move if pressed for time, or would he be taking away the hotel's property? Could the hotel demand he leave the half sausage on his plate that he does not want to eat, or is he at liberty to take it to give to his dog waiting in the car?

27. In my opinion, in the absence of any express agreement to the contrary, when customers order a meal property in the meal transfers to them when it is served. The same is true of a drink served by the establishment. That is so whether the transaction has no other components, for example in a restaurant or café, or the transaction provides other services, the most usual being accommodation. It is unreal to suppose, for example, that the pizza placed in front of a customer remains the property of the hotel or restaurant any more than the content of a glass of wine or lemonade could do so after it was served to a customer. The fact that the food and drink may be laid out in a buffet to which customers help themselves can make no difference. When the customer helps himself to the meal or pours himself a drink property in the fare becomes that of the customer.

28. It follows that the conclusion reached by the judge was correct. The contract between First Choice and Mr and Mrs Wood was a contract both for the supply of services and the supply of goods. The food and drink supplied to Mr and Mrs Wood at the hotel in the Dominican Republic were goods in which it was agreed that property would be transferred. Those goods were not of satisfactory quality because the food in question was contaminated. Whether goods are of satisfactory quality is a question of fact but where food is

contaminated with bacteria that causes severe illness it is difficult to imagine that it could be described as of satisfactory quality.

29. Underlying this appeal was a concern that package tour operators should not become the guarantor of the quality of food and drink the world over when it is provided as part of the holiday which they have contracted to provide. Mr Aldous spoke of First Choice being potentially liable for every upset stomach which occurred during one of their holidays and the term "strict liability" was mentioned. That is not what the finding of the judge or the conclusion that he applied the correct legal approach dictates. The judge was satisfied on the evidence that Mr and Mrs Wood suffered illness as a result of the contamination of the food or drink they had consumed. Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and that the food was not "satisfactory". It is well-known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an accepted hazard of travel. Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted. Additionally, other potential causes of the illness would have to be considered such as a vomiting virus.

30. The evidence deployed in the trial below shows that the hotel was applying standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary.

31. In this case, the judge heard evidence not only from Mr and Mrs Wood but also from suitable experts in the light of the medical position recorded in the records Mr Wood's admissions to hospital in both the Dominican Republic and the United Kingdom. In my view he was correct to conclude the provision of contaminated food by the hotel amounted to a breach of the implied condition found in section 4(2) of the 1982 Act. In those circumstances it is unnecessary to consider Mr Weir's alternative argument based upon the common law. I would dismiss the appeal.

Lord Justice McFarlane

32. I agree.

Sir Brian Leveson, P

33. I also agree. In relation to the metaphysical arguments about property in and ownership of food taken from a buffet, there can be little doubt that once food has been taken onto the plate of the guest, it has been appropriated to him or her. It would not be open to the hotel or guesthouse to complain that the guest had taken too much. As for the removal of food to eat later, that might be a breach of an implied term that the guest is entitled only to take that which he or she wishes immediately to consume for the relevant meal but it could hardly be more than that.

34. Neither do I accept the floodgates argument which Mr Aldous advanced. I agree that it will always be difficult (indeed, very difficult) to prove that an illness is a consequence of food or drink which was not of a satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded. The fact is, however, that the judge found as facts that this had been proved in this case and no appeal has been pursued against those findings. In any event, although I recognise that tour operators will complain that they are being held liable for events outside their control, there are many ways in which protection from exposure in this area can be achieved.