X v Kuoni: an answer at last?

By Katherine Deal QC

Facts

X and her husband booked a package holiday with the Defendant tour operator which included 15 nights' all-inclusive accommodation at a hotel in Sri Lanka between 8 and 23 July 2010. In the early hours of 18 July 2010, X was making her way through the grounds of the Hotel. She came upon a Hotel employee, 'N'. He was employed by the Hotel as an electrician and, as the trial judge found contrary to X's evidence, was known to X as a member of the maintenance staff. N was on duty and wearing his Hotel uniform. X told N that she was going to reception. N indicated that there was a faster route through the grounds of the Hotel and that she should follow him which she did. In fact, N took her via the engineering department and there raped and assaulted her.

Proceedings to date

In October 2016 HHJ McKenna, sitting as a judge of the High Court (judgment at [2016] EWHC 3090 (QB)), found against X on her claim for damages for the injuries and consequential losses she sustained as a result of the assault. By the time the trial started it was conceded on behalf of X that N was indeed an electrician and not a security guard; and conceded too that there was no negligence on the part of either Kuoni or the hotel – the fault was entirely that of N. In a reserved judgment HHJ McKenna found that, since N was an electrician, guiding guests across the grounds was not part of the role for which he was engaged and thus his services qua guide were not part of the contractual services X was entitled to expect from him. As a result there was no improper performance of the contract. In any case, Kuoni was entitled to rely on the second of the two statutory defences set out in Regulation 15(2)(c) of the Package Travel (Etc) Regulations 1992 because neither it nor the hotel could have foreseen or forestalled the attack, which was entirely down to N, even with the exercise of all due care, which they each exercised. N was not, the Judge found, a 'supplier' within the meaning of the Regulations.

X appealed on the law (but did not challenge the various adverse findings of fact). The appeal was the first time the Court of Appeal has had cause to consider deliberate assaults in the course of a package holiday. By a majority (Longmore LJ, that stalwart of package travel litigation from as far

back as the seminal decision in Hone v Going Places [2001] EWCA Civ 947, dissenting) the Court dismissed the appeal. The majority held that the holiday arrangements between X and Kuoni did not include N conducting X to reception. The majority further held that Kuoni was not liable under either the express terms of the contractual clause which effectively mirrored the statutory defence, or Regulation 15, since N was not a 'supplier' within the meaning of those provisions, which only covered those in a direct contractual or promissory relationship with the tour operator.

Consternation and confusion ensued at practitioner level. Should the focus not be on the services rather than the job description of the one who supplied them? How would emphasis on N's role fit with the traditional insouciance of contract law as to the identity of the one who provides the contracted-for services, as memorably set out by Lord Diplock in Photo Production v Securicor [1980] AC 827? Was it really the case that a tour operator was only responsible where the defective services were provided by someone with whom it was in a direct contractual relationship? What about the many instances where a hotel delegates performance not to an employee but to an independent sub-contractor? X sought to appeal again – and the Supreme Court granted permission. The appeal was the first time the Supreme Court has ever considered a claim under the Package Travel Regulations. Before the hearing, permission to intervene was granted to ABTA, as representative of the travel industry.

X reiterated her arguments that her contract with Kuoni reasonably included the provision in this case of guiding services in the grounds by an on duty uniformed member of staff (whatever his precise job title). Since by no yardstick were those services provided to a reasonable standard by N, she had established breach of contract by Kuoni. The statutory defences did not operate to exculpate a tour operator from the consequences of its breach when the facts underpinning reliance on the defence were precisely those which put the tour operator in breach. Kuoni reiterated its previously successful arguments that impromptu guiding services via predatory electricians was not part of the contracted-for services; that there was no improper performance of the contract because of the way in which N carried out the guiding (which was in fact nothing of the sort but merely an opportunistic attack); and in any event N had neither express nor implied authority to act as he did. ABTA did not seek to address the facts of the case, but on the principles argued for the same conclusion as Kuoni. It did, additionally, make the argument that the issue had to include consideration of whether the hotel was to be regarded as vicariously liable for N's assault, which it maintained was a question which had to be answered under the law of the employment contract, in this case, Sri Lanka. It submitted that such a question would be ordinarily uncontroversial (although that might come as a surprise to those who regularly run package claims involving questions of local standards).

The appeal was heard on 1 May 2019, with further submissions in writing a few weeks later.

The reference

As no-one could have foreseen back in October 2016, the outcome came in July. By its judgment so far [2019] UKSC 37 (incidentally the first ever handed down in Welsh, courtesy of Lord Lloyd-Jones) the JSC decided to refer two questions to the CJEU . This reference is the first time the CJEU has had to grapple with the provisions of the Package Travel Directive which exculpate a tour operator from the rule that it is liable for proper performance of the contractual obligations it has undertaken.

The Supreme Court asked the CJEU to proceed on the assumption that in guiding X to reception N *was* providing a service within the scope of the 'holiday arrangements' which the tour operator had contracted to provide, and that the rape and assault constituted improper performance of the holiday contract. In other words, the CJEU was

asked to proceed on the basis that under national law N did not exercise reasonable skill and care in guiding X to reception in the middle of the night, and were it not for the application of the defence in the second part of the third alinea to Article 5(2), Kuoni would be liable for the injury, loss and damage she thereby sustained.

This does not mean, of course, that the JSC have decided that there was improper performance of the contract for which, bar the statutory defence, Kuoni is liable. Although it is self evident that if they had decided already that the Court of Appeal's approach to this question was correct, the reference would not be required, it is of course possible that the decision to refer was made at this stage before the route was closed off at the end of the transition period. But the JSC do nothing by chance and it may turn out to be very relevant the matters the CJEU was asked to assume are those which X has maintained from the outset is the correct approach to the facts as found and to the law.

The questions referred by the Supreme Court were as follows:

(1) Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organizer or retailer with a consumer to provide a package holiday to which Council Directive 90/314/EEC applies, and that failure to perform or improper performance is the result of the actions of an employee of a hotel company which is a provider of services to which that contract relates:

i. Is there scope for the application of the defence set out in the second part of the third alinea to article 5(2); and if so,

ii. By which criteria is the national court to assess whether that defence applies?

(2) Where an organizer or retailer enters into a contract with a consumer to provide a package holiday to which the Directive applies, and where a hotel company provides services to which that contract relates, is an employee of that hotel company himself to be considered a "supplier of services" for the purposes of the defence under article 5(2), third alinea of the Directive?

The second part of the third alinea to article 5(2) (transposed into UK law as Reg 15(2)(c)(ii)) reads as follows

"With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable *unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because*:

…

- such failures are due to a case of force majeure such as that defined in Article 4(6), second subparagraph (ii), *or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall*…"

The parties, including ABTA as intervener, lodged their respective observations with the CJEU under Case C-578/19; as did the Commission. The Court then invited all parties to answer a series of questions, apparently in lieu of an oral hearing.

On 10 November 2020 Advocate General Szpunar handed down his opinion, largely accepting the Claimant's arguments. Although he did not

consider that an employee was necessarily to be considered a 'supplier', he considered that X's rape could not be an 'event' within the meaning of the second part. Critically, he considered,

"*That concept of an 'event' cannot under any circumstances include wrongful acts committed intentionally which, in themselves, constitute the failure to perform or the improper performance of the contractual obligations. It would even be illogical to examine whether the intentional acts of a supplier of services can be foreseen or forestalled, including where those acts are committed by its employees*."

On 18 March 2021 the CJEU agreed with the Advocate General. In a careful judgment (CURIA - Documents (europa.eu)) emphasising the consumer protection objective behind the Directive the Court rejected the idea that an employee such as N could count as a supplier in his own right. The concept of 'employee' indicated some form of subordination that 'supplier' did not. Someone in N's position had not concluded any agreement with the package travel organiser for the purposes of providing services to the latter, but merely performed work on behalf of the supplier of services which had concluded such an agreement with that organiser.

However that did not preclude the employee's acts or omissions being treated in the same way as those of the supplier. Consistent with the high degree of protection to be afforded to consumers (and indeed consistent with the judgment of Longmore LJ) the obligations arising from a package travel contract, the improper performance or non-performance of which renders the organiser liable "*cannot be interpreted restrictively. Those obligations comprise all the obligations associated with the provision of transport, accommodation and tourism services arising from the purpose of the package travel contract, irrespective of whether those obligations are to be performed by the organiser itself or by suppliers of services*." There must be a link between the act or omission which caused damage to the consumer and the organiser's obligations arising from the package travel contract.

Having accepted the premise of Kuoni's liability on the facts assumed, the CJEU went on to consider the statutory defence on which Kuoni had relied (the English Regulation 15(2)(c)(ii)). It accepted X's contention that a tour operator cannot rely by way of an exemption on exactly the situation which placed the tour operator in breach of its obligations to its guest. The absence of fault to which this part of the Directive is addressed means that the event which could not be foreseen or forestalled referred to in the third indent of Article 5(2) of Directive 90/314 must be interpreted as referring to a fact or incident which does not fall within the "sphere of control" of the organiser or the supplier of services. Those acts or omissions of the employee which put the tour operator in breach cannot therefore be regarded as outside the sphere of control of the supplier.

Accordingly, and consistent with X's case throughout the long-drawn out domestic saga, the CJEU therefore answered the questions referred as follows:

"***The third indent of Article 5(2) of Directive 90/314, in so far as it provides for a ground for exemption from liability of an organiser of package travel for the proper performance of the obligations arising from a contract relating to such travel, concluded between that organiser and a consumer and governed by that directive, must be interpreted as meaning that, in the event of non-performance or improper performance of those obligations, which is the result of the actions of an employee of a supplier of services performing that contract:***

- ***that employee cannot be regarded as a supplier of services for the purposes of the application of that provision, and***
- ***the organiser cannot be exempted from its liability arising***

from such non-performance or improper performance, pursuant to that provision."

Conclusions

So what now for X? Her case now returns to the Supreme Court, who will now determine the appeal with the benefit of the input of the CJEU (but alas, without the benefit of Lord Kerr, who heard the appeal). It is clear that X's appeal must succeed to the extent that the Courts below accepted its reliance on the statutory defence under Regulation 15(2)(c)(ii). However at all levels below that has been simply obiter because the Courts have ruled against X on whether N's act of guiding fell within the scope of the package. To an extent it may be that the CJEU has made things easier for the Supreme Court by its emphatic statement "*It follows that, in a situation such as that at issue in the main proceedings, Kuoni may be held liable to a consumer such as X for improper performance of the contract between the parties, where that improper performance has its origin in the conduct of an employee of a supplier of services performing the obligations arising from that contract*."

However it remains to be seen whether the Supreme Court will in fact adopt the course it invited the CJEU to assume (which would mean overturning the judgment of the Court of Appeal on the question of whether there was improper performance by Kuoni of its obligations under the original holiday contract); or whether it will seek further submissions on this or any other point.

On its final reference to the CJEU under the Package Travel Directive, the UK has helped clarify the law across the whole EU. The extent to which English courts will feel constrained to follow X v Kuoni in construing the 1992 or 2018 Regulations is a whole new battleground...

Katherine Deal QC acted for X at first instance and as junior counsel (with Robert Weir QC of Devereux Chambers) before the Court of Appeal, Supreme Court, and on the reference to the CJEU.

Katherine Deal QC (1997 Call, 2019 Silk) is renowned for her expertise in travel and aviation law. She has acted in many of the leading cases on jurisdiction (at all levels up to and including the Supreme Court and Court of Justice of the European Union), and is widely regarded as a specialist on Rome II and issues of choice of law. Most of her claims involve injuries of maximum severity or death. She also undertakes work concerning package travel, and is currently instructed in a reference to the CJEU concerning the statutory defences, as well as in the claim arising out of the Tunisia terrorist attack, amongst many others. Her aviation practice is largely focussed on personal injury claims but she has in addition considered ATOL renewals during the COVID-19 pandemic and has recently successfully defended an airline in a Privy Council appeal arising from the theft of one of its aircraft from an airport in The Bahamas.

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