

### Notes of hearing

**Appellant:** X  
**Respondent:** Kuoni Travel Ltd  
**Intervener:** ABTA Ltd

**Issue:** Whether the respondent is liable to the appellant for breach of contract and/or under Reg 15 of the Package Travel, Package Holidays and Package Tours Regulations (SI 1992/3288)

#### Summary of the appellant's submissions

- The respondent expressly promised to provide all holiday services carefully and to a reasonable standard and that any failure by a third party to deliver those holiday services carefully and to a reasonable standard puts the respondent in breach of contract.
- The brochure advertised the Hotel as a 4 star hotel and this under English law is a warranty – relied on *Jarvis v Swans Tours* as authority.
- Regulation 15(1) states that a tour operator 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 – submitted that this mirrors the position under English contract law.
- Regulation 15(5) states that liability cannot be excluded by any contractual term – the contract uses the phrase 'our suppliers' and it was submitted that the use of the word "our" in the contract should not be read as to limit the liability of the promisor to those with whom they are in a contractual/promissory relationship.
- Holiday services include all services which are of benefit to the customer and are actually provided to the customer while they are on their holiday. The respondent drafted the contract and they elected not to explicitly set out all the services provide i.e. in an attached schedule. They promised "various services" and this was not fixed at the time of the contract. The key point made was that the services offered were of benefit to the customer and the provision of directing/guiding services falls within the services the customer contracted for.
- Referred to the hotel's "House Rules" which require all employees to learn where the facilities are so that they can guide guests to them – submits that the assailant ('N') did therefore have authority to guide X to the reception.
- When construing the express words of the contract, any doubt over interpretation should be resolved by applying the interpretation which is most favourable to the consumer – Relied on UCTA 1977 as authority for this point.
- The motive of N is irrelevant – relied on *Mohamud v Morrison Supermarkets plc [2016]* – the importance should be placed on what the assailant did not why he did it.
- You cannot separate N from the hotel to the advantage of the respondent - if the hotel is considered to be the supplier of services under Reg 15 that embraces the conduct of N who carries out the services.
- On the force majeure issue – referred to an ECJ case where a sub-contractor committed fraud and the contractor was not permitted to rely on force majeure – emphasised that this is how far the court has gone in saying that it is not unforeseeable.

- Vicarious liability is not relevant here. The law on vicarious liability differs from country to country and it would not be right to expect a claimant to understand how vicarious liability operates in the country in which they are holidaying. The appellant brings her case in England under English law she should not need to know the contractual relationship between the foreign hotel and its employees and whether vicarious liability applies in order to bring her claim.

### **Court's response:**

- Questioned the relationship between UCTA 1977 and the Travel Regulations – The appellant argued that the EC Directive implies the minimum standards and if a Member State has more stringent standards such as UCTA, these will apply.
- The court did not actively dispute or question the submission that the offering of a service by a member of the hotel staff then renders that service part of the contractual services offered by the tour operator.
- The court stated that it is not in a position to interpret the “house rules” but did accept that they were relevant.
- The court seemed to accept the argument that guiding/directing services are ancillary to the services provided by a hotel.
- Questioned the reliance on *Mohamud v Morrison Supermarkets plc [2016]* as in this case N was not discharging a duty for which he was employed.

### **Summary of the respondent's submissions**

- The respondent was not under a contractual duty to provide guidance services at all hours of the day and night by all employees of the hotel. If the court finds to the contrary the respondent will argue that N was not providing such services in fact or in law. In fact N was “luring” not guiding, and in law N did not have the authority to act as he did and he acted in a purely personal capacity.
- It would not be reasonable to place a contractual obligation on the respondent to provide unlimited guidance.
- A “supplier” includes every legal person in the contractual chain; it does not include every individual agent of the legal persons in that chain. If N is held to be a “supplier” this will create an unlimited liability and the tour operator will have no defence where there is no fault, this cannot be the intention of the legislation. Gave the example of the bombings in Sri Lanka and argued that if there is an unlimited liability the hotel would have been liable for the actions of its employee who planted the bomb.
- Invited the court to create a special rule of attribution in relation to the special circumstances of this case – N's act cannot be attributed to the hotel or the tour operator.
- A lot of emphasis was put on the legislative history leading up to the EC Directive and Regulations and it was argued that the primary purpose was to strike a balance between the rights of the consumer and the travel industry and to provide market harmonisation:
  - Article 5 of the Directive moved away from a strict liability regime to a fault based liability regime so that a tour operator could avail itself to a defence in the absence of fault
  - Legislators considered widening the scope of liability to include criminal acts and they chose not to
  - Article 5 of the Directive originally used “third parties” and this was then changed to “suppliers” which is narrower in scope and an express reservation on the right of recovery

- The appellant's argument that the scope of the contractual services were not fixed and were determined ex facto during the holiday is not permissible at law. The terms of the contract must be construed at the time the contract was made. N cannot vary the contract after it has been formed and he has no authority to act on the respondent's behalf.
- The appellant has been unable to formulate a contract term consistently which is capable of clear expression and which catches the special circumstances of this case.
- An officious bystander would not expect to be provided with guiding services at all times of the day and night to the reception area by all members of staff. i.e. if a customer was looking to be guided to reception in the early hours of the morning and no one was there to provide this they would not feel that there had been a breach of contract.
- In any event, nothing N did was in pursuit of performing the contract. N was acting dishonestly against the interests of the respondent and cannot be held to have had authority. Relied on *Freeman and Lockyer [1964]* in relation to apparent authority and submitted that N did not make any representations and in any event the appellant did not rely on any representations made by N.
- Sexual assault is not a breach of the contract and assault is not a failure to guide, it is a criminal act. Referred to *Mohamud v Morrison Supermarkets plc [2016]* and Salmon's judgment which drew a distinction between an employee who is charged with the duty to protect the goods from theft and then commits theft and an employee who is not charged with this duty and commits theft. In the latter example, Salmon stated that an employer would not be liable. Here, N was not charged with a duty to look after the appellant and therefore the circumstances are more akin to Salmon's exception.
- If liability does arise it is an excluded liability under Reg 15.2(c)(ii), as it has been conceded that there has been no fault by the tour operator or the hotel and the respondent argues that the acts of N could not have been reasonably foreseen. This defence is intended for exactly this kind of case. Argued that s.21 of UCTA is not applicable as the respondent has not been negligent and that s.29 of UCTA entitles the respondent to rely on the defence in Reg 15.
- Proposes no arguments in relation to force majeure as it does not take the case any further.

### Court's response

- Raised the appellant's point regarding the lack of schedule of services and questioned whether guidance fell within the expected range of services – the respondent argued that guidance is a common courtesy and not a contractual obligation.
- Questioned what services the contract envisaged – the respondent made a distinction between customer facing staff and any member of staff – this was not accepted by the court and by Lord Kerr in particular who stated that it could not be the case that services were only owed by customer facing staff, giving the example of a chef.
- Questioned whether a request by a customer for guidance had an impact as to whether it is considered to be a service – The respondent stated that in this case the appellant did not request guidance, it was N who offered guidance and then lured her off in a different path.
- Questioned whether N's uniform constituted a representation in relation to the point regarding apparent authority - the respondent argued that the appellant knew N to be maintenance and at trial it was found that she had embellished her case and she did not trust him because she thought he was a security guard.

- On *Mohamud* Lady Arden referred to Art 5 of the Directive and stated that it does not distinguish between employees and the “right employee” and questioned why we need to look at the common law of attribution. The respondent argued that the language “attributable” is used within the Directive and you have to ask whether the act in question is attributable to the company.
- They seemed to accept that a person is a “supplier” if they are supplying services for which they have been authorised to supply.
- Lord Lloyd-Jones questioned whether it is a question of EU law as to whether “supplier” extends to employment contracts.
- The court did not accept that the appellant’s submissions on force majeure were irrelevant. It is illustrative of the method of reasoning in relation to unforeseeable events – the respondent argued that the legislative history trumps authority based on a different defence and that insurance and indemnity are not aids to construing a contract.

### **Appellant’s reply**

- Sought to undermine the importance placed on the legislative history and argued that the decision not to include criminal acts was in relation to unrelated criminal acts. Also stated that CJEU case law has confirmed that consumer protection is the main motive for the directive – the court seemed to accept the argument that consumer protection trumps market harmonisation.
- Sought to undermine the Sri Lanka example by submitting that this is not akin to the circumstances here, as the planting of a bomb is unconnected with holiday services and it is not what Art 5 of the Directive was seeking to protect customers against.
- Emphasised that the right and remedy of the customer lies with the tour operator and in turn the tour operator can protect itself with indemnity and insurance – referred to *Wood v Tui* where the floodgate argument was not accepted by the court.
- Clarified that it is common ground that the tour operator and hotel are not directly at fault.
- Emphasised that the focus should be on the services not the supplier – this was not accepted by the court, Lord Lloyd-Jones stated that the scope of the meaning of “supplier” is critical and is the basis upon which Longmore dissented.

### **ABTA**

- Due to time constraints ABTA proposed to make written submissions to the court.
- ABTA to present its written submissions to the court within seven days, the appellant will have seven days from then to submit a written reply.

The court did not give an indication as to when a judgment is likely to be handed down.

***Lily Clemence, Trainee Solicitor, BLM***