Personal Injury

Getting everything you bargained for: X v Kuoni Travel Limited [2021] determines the scope of 'holiday arrangements' in Package Travel claims

Posted on 03 August, 2021 by | Rob Hunter | Sam Way

Introduction

In an important case for package travel claims, the Supreme Court has clarified that a broad approach should be taken to determining the scope of the services provided under a package holiday contract. The tour operator is liable for the performance of ancillary services which are necessary to provide a holiday of the required standard.

The case also establishes the narrow ambit of the defence based on an events which could not be foreseen or forestalled even with all due care. The defence will not be available where the damage was associated with the act or omission of an employee of the supplier.

Rob Weir QC of Devereux Chambers acted for the successful appellant.

Background

Mrs X and her husband purchased a package holiday in Sri Lanka from Kuoni, which included return flights from the United Kingdom and all-inclusive accommodation at the Club Bentota hotel for 15 nights. The contract set out Kuoni's responsibility under the contract as follows:

"Your contract is with Kuoni Travel Limited. We will arrange to provide you with the various services which form part of the holiday you book with us.

… we will accept responsibility if due to fault on our part, or that of our agents or suppliers, any part of your holiday arrangements booked before your departure from the UK is not as described in the brochure, or not of a reasonable standard, or if you or any member of your party is killed or injured as a result of an activity forming part of those holiday arrangements."

The contract also provided Kuoni with a defence in the following terms:

"We do not accept responsibility if and to the extent that any failure of your holiday arrangements, or death or injury: is not caused by any fault of ours, or our agents or supplies; is caused by you; … or is due to unforeseen circumstances which, even with all due care, we or our agents or suppliers could not have anticipated or avoided."

It was common ground throughout proceedings that the contract replicated Kuoni's statutory liability under the Package Travel, Package Holidays and Package Tours Regulations 1992 ('the Regulations'), which implemented Directive 30/314/EEC of 13 June 1990 on package travel, package holidays and package tours ('the Directive')

Lord Lloyd-Jones summed up the facts on which Mrs X's claim was based as follows:

"In the early hours of 17 July 2010, the appellant was making her way through the grounds of the hotel to the reception. She came upon a hotel employee, N, who was employed by the hotel as an electrician and (on the facts found by the judge) known to her as such. N was on duty and wearing the uniform of a member of the maintenance staff. N offered to show her a shortcut to reception, an offer which she accepted. N lured her into the engineering room where he raped and assaulted her."

Mrs X brought claims under both the Regulations and for breach of contract. Given that the contract in question mimicked the obligations under the Regulations, those two causes of action were co-extensive.

The Claimant argued that the rape and assault constituted improper performance of the contractual obligations; it was committed during the performance of the holiday arrangements that were to be provided under the Package Travel contract. Kuoni defended the case by arguing that: (1) the rape and assault took place during performance of the holiday arrangements; (2) the employee was not a 'supplier' for whose actions they were liable under the contract, and (3) in any event they could rely on the defence under the contract.

Both the High Court and Court of Appeal (by a majority) held that the services provided under the contract did not extend to a member of the maintenance staff conducting a guest to reception. The Court of Appeal also agreed that the employee was not a 'supplier of services', as Kuoni argued.

Similarly, both Courts held that the assault was an event which could not have been foreseen or forestalled with all due care and so Kuoni could also rely on the statutory defence.

Longmore LJ dissented, in a judgment that was later to find favour with the Supreme Court, arguing that the employee was providing the service of guiding Mrs X to reception, which, once offered, was a service which must be provided to a reasonable standard. The purpose of the Directive and the Regulations was to provide consumers with a remedy against their contractual opposite, and it would be contrary to this purpose to hold that the employee was a separate supplier of services whom the consumer would have to pursue. Longmore LJ would therefore have held that the services were part of the holiday arrangements contracted for and that the employee was not a distinct supplier of services.

The decisions

On appeal to the Supreme Court, there were two main issues:

1. Was the rape and assault an improper performance of Kuoni's obligations under the contract?
2. If so, could Kuoni rely on the defence under the contract and the Regulations that the rape and assault was an action which could not have been anticipated or avoided.

In its first interim judgment, handed down on 24 July 2019, the Supreme Court referred the second of these two questions to the CJEU for determination. The Court asked the CJEU to assume that the rape and assault was an improper performance of the contractual obligations, and queried (1) whether an employee was a 'supplier' of services, and (2) whether Kuoni could nonetheless rely on the defence.

The CJEU held that (1) the employee was not a supplier of services and (2) that Kuoni could not rely on the defence. It noted that to hold an employee to be a supplier of services in their own right would be contrary to the purpose of the Directive:

"an unjustified distinction would be drawn between, first, the liability of organisers for acts committed by their suppliers of services, where those suppliers of services themselves perform obligations arising from a package travel contract and, secondly, the liability arising from the same acts, committed by employees of those suppliers of services performing those obligations, which would enable an organiser to avoid its liability." (para 49)

As to the defence, the CJEU noted that employees fall within the "sphere of control" of the organiser or supplier of services. As such, Kuoni could therefore not rely on the defence because the acts were not events that the "organiser or supplier of services, even with all due care, could not foresee or forestall". This was consistent with the requirement for an absence of fault in the Directive.

Only the first issue therefore remained to be determined by the Supreme Court.

In its second judgment, handed down on 30 July 2021, the Supreme Court found in favour of Mrs X on that issue and allowed her appeal. Unanimously adopting Longmore LJ's reasoning from the Court of Appeal, the Supreme Court adopted a broad interpretation of the scope of the services to be provided under the package travel contract. Lord Lloyd-Jones noted that a holiday contract is essentially a contract for pleasure, and that EU jurisprudence reflects this for providing a right for compensation for non-material damage for loss of enjoyment (Leitner v TUI Deutschland GmbH & Co KG (Case C-168/00)).

Accordingly, the scope of a holiday contract must be drawn broadly:

"As Mr Weir put it in his written case, a common sense interpretation of the extent of the holiday services, one consistent with the purpose of providing the holidaymaker with an enjoyable experience, necessarily requires that the services include so much more than the actual mechanics of travel or the provision of a mattress and overhead cover for the night. The precise content of the ancillary services may vary from one contract to another. However, for example, the obligation to provide the service of cleaning the hotel with reasonable care and skill would be inherent in every such contract. So would the service of looking after and serving holidaymakers courteously in matters relating to their holiday experience."

Applying this to the facts, Lord Lloyd-Jones noted that the package travel contract provided for accommodation in a four-star hotel and that "It is an integral part of the services to be provided on a holiday of such a standard that hotel staff provide guests with assistance with ordinary matters affecting them at the hotel as part of their holiday experience." Lord Lloyd-Jones emphasised that the focus should be on the services to be provided under the contract, whether or not that is part of the express functions of the staff who in fact carry out those services.

In the context of Mrs X's case (contrary to the majority in the Court of Appeal), the act of accompanying a guest to reception by a member of the hotel staff was a service falling within the scope of holiday arrangements, which Kuoni contracted to provide. Therefore. the rape and assault was improper performance of that contract for which Kuoni was liable.

Comment

The Supreme Court has clarified the scope of 'holiday arrangements' in a distinctly consumer-friendly fashion. Organisers are not only liable for failure to perform the core aspects of a package travel contract (accommodation, transport, etc), but are also liable for damage arising from the failure to perform the ancillary services that are necessary to provide a holiday of the standard contracted for.

The judgment and ruling by the CJEU also neutered the defence under regulation 15(2). This will not arise if an employee's actions have caused the damage on the grounds that – as interpreted by the CJEU – the defence requires an event outside the supplier's control whereas employees are within a relationship of control.

Whilst the facts of X v Kuoni were distressing and unusual, the impact of the judgment will be felt more broadly. Finely balanced cases are now more likely to be determined in the consumer's favour. In future, it will be much more difficult for a tour operator to avoid liability to a consumer for acts of their suppliers' employees. Even criminal conduct which would test the boundaries of vicarious liability will ground a claim providing it can be linked to provision of a service that fell

within the holiday arrangements. Indeed, the growing body of law arising out of the concept of vicarious liability was expressly held to be “not relevant” to the question of attributing the employee’s conduct to the organiser under the contract. Unlike vicarious liability, there appears to be no upper limit to conduct which can be ascribed to the tour operator.

Future litigation at the margins is likely to test the boundaries of what conduct can be linked to services under the holiday contract. There will be little scope for organisers to argue that services which have a basis in the contractual material (including the brochures and other advertising material) are not part of the holiday arrangements. Consider instead, however, the example of the employee who leads a hotel guest to a fall in the course of a spontaneous offer to show them the quickest route to the next bay? Was the employee performing (or purporting to perform) a service as part of the organiser’s contractual obligation to provide an enjoyable holiday? Would it matter if the employee had finished their shift or met the employee way from the hotel premises? What if the employee merely directed the guest to a dangerous route, but did not accompany them? By confirming a broad interpretation of the holiday arrangements contracted for, the Supreme Court may have increased the scope for litigation in such cases.

The Supreme Court warned against the introduction of the concept of vicarious liability – a hot topic in the higher courts – for fear of additional complexity and cost. Kuoni’s argument that their employee was not providing a service was shortly rejected on the grounds that he was only able to assault Mrs X as a result of purporting to act as her guide. Further, the assault was a failure to provide that guiding service with due care. It seems likely, however, that the Courts will need to grapple with the ambit of liability in future. It remains to be seen to what extent the policy of consumer protection will drive a wedge between the liability of the organiser to the consumer under the Directive and the liability of a supplier to the tour operators under contractual indemnities.

The Package Travel Regulations 2018

The Regulations have now been superseded by The Package Travel and Linked Travel Arrangements Regulations 2018 (‘the 2018 Regulations’), implementing the newer Directive 2015/2302 on package travel and linked travel arrangements. The 2018 Regulations contain a material alteration to the limb (c) defence which Kuoni relied upon in this case. Whereas under the 1992 Regulations the defence stated:

"15(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 -

…

(c) such failures are due to –

(i) unusual and unforeseeable circumstances beyond the control of the party by whom the 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.

Under the 2018 Regulations, the defence was re-cast as follows:

16(4) The traveller is not entitled to compensation for damages under paragraph (3) if the organiser proves that the lack of conformity is —

…

(c) due to unavoidable and extraordinary circumstances."

The defence is expressed in much briefer terms, reflecting the same change of wording introduced into the 2015 Directive. In X v Kuoni, the CJEU emphasised that the 15(2)(c)(ii) defence was different from force majeure, which is a separate ground for exemption. In practice, the obligation to interpret the defence strictly, together with the more restrictive language of the later Directive and implementing Regulations, may result in an interpretation so narrow that it operates as force majeure in all but name.

Rob Hunter is recognised by the legal directories for his expertise in accidents abroad and international travel since 2016. The latest edition of Chambers UK Bar noted that Rob "frequently handles serious illness and catastrophic injury cases, including group actions, and regularly acts for claimant holidaymakers", and described Rob as "a strong advocate."?

??????Sam Way has quickly established a busy Fast Track and Multi-Track personal injury practice. He provided extensive research support to Rob Weir QC in X v Kuoni Travel Ltd [2019] UKSC 37; [2021] UKSC 34, both in the Supreme Court the Court of Justice of the European Union. He is therefore particularly well placed to advise on claims under The Package Travel and Linked Travel Arrangements Regulations 2018.