Insight 195

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we consider:

The decision of the Court of Justice of the European Union on the circumstances in which package holiday operators can be liable for the actions of employees of their suppliers.

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All inclusive... and liable for the actions of supplier employees?

X v Kuoni Travel Ltd C-578/19

We have reported on this case on three previous occasions, following it through the High Court in Insight #37 in December 2016; the Court of Appeal in Insight #79 in May 2018 and the UK Supreme Court in Insight #128 in August 2019.

The Court of Justice of the European Union (CJEU) has now found that, where an employee's actions are a service that the holiday operator has contracted to provide, the holiday company may be liable for the employee's improper performance or non-performance of the contract. The case will now return to the UK Supreme Court to apply the CJEU's ruling to the facts of this particular claim.

Background

X went on a Kuoni package holiday to Sri Lanka in July 2010. During her holiday an employee of the hotel, who was known to the claimant as part of the maintenance staff, offered to show her a shortcut to the reception area. Instead of taking her to reception, he took her to the engineering room, where he assaulted and raped her.

She pursued a claim for damages against Kuoni for breach of contract and/or under the Package Travel, Package Holidays and Package Tour Regulations 1992, which implemented European Council Directive 90/314/EEC on package travel, package holidays and package tours in the UK.

Kuoni contended that under article 5(2)(iii) of the Directive, liability did not attach if the improper performance of the holiday occurred as a result of an event which, even with due care, could not have been foreseen.

X was unsuccessful at first instance and in the Court of Appeal.

High Court: The deputy High Court judge decided that the employee was not the defendant's supplier, that was the hotel, and the employee, when he lured the claimant into the engineering room, was not discharging any of the duties he was employed to do. The services of an electrician who happened to be employed by the hotel were not services which the defendant agreed to provide to the claimant under the contract.

Although the claimant made no direct claim against the hotel, the High Court Judge also dealt with the issue of vicarious liability. He found that in this case the employee was an electrician and not a security guard and there was no close connection between his duties and the attack so as to make it just for the hotel or the defendant to be held vicariously liable for that attack. The employee's offer to show the claimant a shortcut to reception had no connection whatsoever with his duties.

Court of Appeal: Dismissing the claimant's appeal, by a majority of two to one, the Court of Appeal (CA) held that there were three principal issues which arose on this appeal under the contract:

(1) Whether the conduct of the electrician formed part of "the holiday arrangements" in clause 5.10(b) for which the defendant accepted responsibility under the first part of that clause.

The High Court judge concluded that, on its proper interpretation, "holiday arrangements" did not include a member of the hotel's maintenance team, known to be such to the hotel guest, conducting the guest to the hotel's reception, which was no part of the functions for which the employee was employed.

The CA confirmed his approach was not illogical or flawed.

(2) If so, whether

(a) the electrician or hotel was to be treated as the "supplier" of that part of the holiday arrangements.

The CA took the view that the judge correctly held that the hotel, and not the electrician, was the supplier of any services performed by him;

(3) or (b)the defendant avoided liability to the claimant because of the exclusion of liability under the final part of clause 5.10(b) where any failure of the holiday arrangements or injury resulting from the holiday arrangements was due to "unforeseen circumstances which, even with all due care, [the defendant or [its] agents or suppliers could not have anticipated or avoided".

It was not necessary for the CA to decide whether or not the judge was correct on the issue of the hotel's vicarious liability because, even if he was wrong, the defendant's liability was excluded by the provision in clause 5.10(b) since the judge found that failure of the holiday arrangements in respect of the electrician's wrongdoing was, in the words of clause 5.10(b).

It was clear that this limitation of liability compressed together and was intended to reflect both limbs of regulation 15(2)(c)(i) and (ii). They were themselves plainly intended to give effect to Article 5.2 of the Directive, namely force majeure and a failure due to an event which neither the package holiday operator nor its supplier, even with all due care, could have foreseen or forestalled.

Supreme Court: on appeal to the Supreme Court (UKSC) there were two main issues:

(1) Did the rape and assault of the claimant constitute improper performance of the obligations of Kuoni under the contract?

(2) If so, was any liability of Kuoni in respect of the employee's conduct excluded by clause 5.10(b) of the contract and/or regulation 15(2)(c) of the 1992 Regulations?

The UKSC referred the matter to the CJEU, who was asked to assume that:

(1) the employee directing X to the reception area was within the scope of the 'holiday arrangements';

(2) directing X was a service that Kuoni had contracted to provide; and

(3) the rape and assault constituted improper performance of the contract.

The CJEU decision

The CJEU considered that an employee of a hotel could not be considered a supplier of services within the meaning of article 5(2), on the basis that an employee performs work on behalf of a supplier of services and is not a separate supplier themselves.

The court found that the Directive was intended to ensure a high level of consumer protection and that, where the duties arising from a package travel contract are performed by an employee of a supplier of the services, the performance or non-performance by the employee may represent a non-performance or improper performance by the supplier in relation to their obligations arising from the package travel contract, making the tour operator liable.

Article 5(2)(iii) of the Directive refers to an event that the "organiser or the supplier of services…could not foresee or forestall".

The CJEU found that the exemption could be relied upon where events "…cannot be foreseen, irrespective of whether they are usual, or from events which cannot be forestalled, irrespective of whether they are foreseeable or usual…". The exemptions listed in article 5(2) contained specific instances where the supplier of services was not liable for improper or non-performance, but these were limited to circumstances where the failure did not fall within the supplier's control. The hotel employee's acts or omissions in this case fell within the tour operator's control and therefore could not be considered unforeseeable.

The case will now return to the UK Supreme Court to apply the CJEU's ruling to the facts of this case.

Commentary:

This judgment will have a significant impact on tour operators, as it limits the circumstances in which they can avoid liability for the acts of an employee of a hotel.

The 1992 Package Travel Regulations (which enacted the Directive in the UK) continue to apply post Brexit.

If X had booked directly with the hotel, the findings may have been very different and liability for the actions of the hotel employee would have turned on whether the party contracting with the consumer was vicariously liable for the hotel employee.

We will report on the final outcome once the UKSC case has concluded and the judgment is handed down.

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