Insight 205

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight, in which we report on the final chapter in the long running case of X v Kuoni following the UK Supreme Court's final determination, which sets out the scope of the obligations of a travel operator under a package travel contract.

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Finally... the end of the road!

X v Kuoni Travel Ltd

We have reported on this case on four previous occasions following it through the High Court in Insight#37 in December 2016; the Court of Appeal in Insight#79 in May 2018; the UK Supreme Court in Insight#128 in August 2019 and The Court of Justice of the European Union (CJEU) in Insight#195 in April.

Following the CJEU judgment the case returned to the UK Supreme Court for final determination. The decision was handed down on 30 July 2021.

Background

X went on a Kuoni package holiday to Sri Lanka in July 2010 with her husband. During her holiday X was on her way to the reception when an electrician who was part of the hotel maintenance staff indicated to X there was a shortcut to reception which he would show her. He led her to an engineering room where he physically assaulted her and raped her.

X 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.

The High Court Decision

The deputy High Court Judge held that:

1. The hotel employee was not the Kuoni's supplier. The supplier was the hotel.
2. The employee's actions were outside the terms of his contract of employment with the hotel and the services of an electrician employed by the hotel were not services Kuoni agreed to provide under the contract.

The deputy High Court Judge also considered whether the hotel could be vicariously liable for the actions of the employee.

The Judge found there was no close connection between the employee's duties as an electrician and his attack on X. The hotel was not vicariously liable for his actions.

The claim was dismissed.

The Court of Appeal Decision

The Court of Appeal considered three principal issues:

1. Whether the conduct of the electrician formed part of "the holiday arrangements". The Court of Appeal agreed with the deputy High Court Judge that it did not.
2. Whether the electrician or the hotel was to be treated as the "supplier" of that part of the holiday arrangements. The Court of Appeal held that the hotel and not the electrician was the supplier of any services supplied by the electrician.
3. Whether the defendant could avoid liability due to an exclusion of liability under clause 5.10(b) where any failure of the holiday arrangements or injury resulting from the arrangements was due to "unforeseen circumstances which, even with all due care, could not have been anticipated or avoided".

The Court of Appeal held that the exclusion applied.

The Court of Appeal further held it was not necessary to consider vicarious liability as the actions of the electrician were covered by clause 5.10(b).

The appeal by X was dismissed by a majority of two to one.

The UK Supreme Court Decision No.1

On appeal there were two main issues

1. Did the rape and assault of X constitute improper performance of the obligations of Kuoni under the contract?
2. If so, was Kuoni's liability excluded by clause 5.10 (b) of the contract or regulation 15(2) (c) of the 1992 Regulations?

The UKSC referred the matter to the CJEU.

The CJEU decision

The CJEU were asked to assume:

1. The employee's directing X to the reception area was within the scope of the holiday arrangements;
2. Directing X was a service Kuoni had contracted to provide;
3. The rape and assault constituted improper performance of the contract.

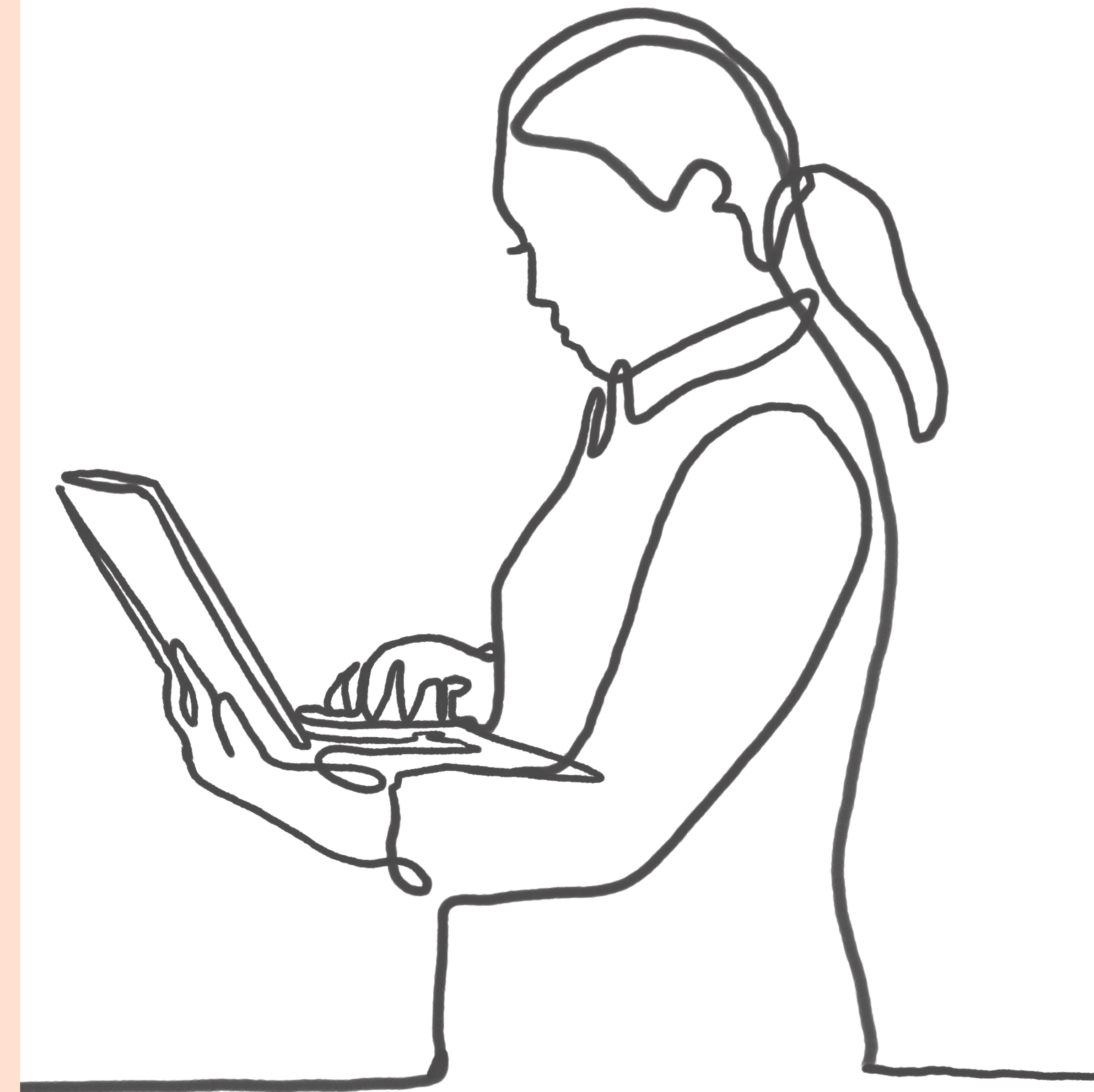
The CJEU held:

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

Where duties arising from a package travel contract are performed by an employee of a supplier of 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.

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

The exemptions listed in article 5(2) contained specific instances when a supplier of services was not liable for improper or non-performance, but these were limited to circumstances beyond the supplier's control.



The hotel employee's acts or omissions in this case fell within the tour operator's control and therefore were not unforeseeable.

The case was referred to the UK Supreme Court to reconsider.

The UK Supreme Court Decision No.2

The Supreme Court granted ABTA permission to intervene and make submissions in the appeal.

The Supreme Court held:

The purpose of the holiday contract was to confer an enjoyable holiday experience. This included a broad range of holiday services including providing guests with assistance on matters affecting them at the hotel. Guidance by a staff member from one part of the hotel to another was a service within the holiday arrangements Kuoni had contracted to provide.

Whilst the Court of Appeal had held that guidance was not part of the employee's duties this ignored the scope of the services Kuoni had undertaken to provide.

The issue was governed by the contract between X and Kuoni not the contract between the hotel and its employee.

The employee had been able to carry out the assault on X as a consequence of his purporting to act as her guide. The assault resulted from the failure to provide the guiding service with due care.

Although the CJEU had considered an employee of a supplier of services could not be a separate supplier within article 5 and regulation 15, this did not prevent an employee's actions being treated for the purpose of contractual liability under the directive in the same way as the supplier.

Thus, Kuoni could be held liable for improper performance of the contract where that improper performance resulted from the actions of a supplier's employee.

The exemption from liability in article 5(2) had to be applied strictly. As the actions of the employee fell within the sphere of control of Kuoni the actions were not actions which could not be foreseen or forestalled. Kuoni could not rely upon the exemption and was liable to X under regulation 15.

It followed that Kuoni was liable to X for breach of contract; the liability clause in the contract was intended to replicate the terms of regulation 15 and article 5 and the defence in contract was coextensive with the statutory defence.

It was not necessary for the Supreme Court to address the issues relating to vicarious liability. Kuoni were liable under the Directives as implemented by the 1992 Regulations and in breach of contract because the services it undertook to provide were not provided with care and skill by an employee of the hotel which was a supplier of the services to Kuoni.

Moreover, to introduce the principle of vicarious liability into the operation of the Directive would defeat its purpose, making claims against tour operators unnecessarily complex and expensive. Questions of vicarious liability of a hotel for the acts of its employees should be governed by the law applicable where the hotel is situated.

Conclusion

The Supreme Court has taken a broad view of the scope of obligations undertaken by an operator under a package travel contract. In particular, those obligations include not merely the provision of transport, accommodation and meals but also other services ancillary thereto which are necessary for the provision of a holiday of a reasonable standard. In the present case the guiding of X from one part of the hotel to another fell within the scope of obligations undertaken by Kuoni under its package travel contract with X.

The CJEU has taken a very narrow view of the exemption from liability under article 5(2). It has no application where the failure of performance obligations under a package travel contract are the result of acts or omissions of employees of suppliers of services performing those obligations.

The exemption only applies if the failure of performance obligations are attributable to the consumer or attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable or the failures are due to a case of force majeure as defined in article 4(6).

Commentary:

The judgment will have a major impact on tour operators.

The scope of the tour operator's obligations under a package travel contract is now broad and there will be very few, if any, instances where the tour operator is not liable for the acts or omissions of a supplier's employee.

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