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In 2017 Lord Sumption delivered a lecture to the Personal Injuries Bar Association entitled, "The Death of Personal Injury Law". This was (probably) just a provocative lecture title, rather than a manifesto. However, it may be fair to say that the content of this presentation sprang from scepticism about the use of personal injury law (as it has developed in our jurisdiction) as a means to achieve fairness and justice in the provision of remedy and compensation.

This edition concentrates on a "hot off the press" Court of Appeal decision which might fairly be subtitled, "The Death of Package Travel (Personal Injury) Law": ***X v Kuoni Travel Ltd*** [2018] EWCA Civ 938. It is difficult to overstate the potential effects of this decision. Coupled with the local safety standards defence, it may make all but a minority of personal injury claims (in a package holiday context) effectively unviable. It elevates the contractual obfuscation that can be found in ***Brownlie v Four Seasons*** [2018] 1 WLR 192 (SC) into a matter of principle.

When is a supplier not a supplier? The Court of Appeal decision in X v Kuoni Travel Limited (2018)

In **X v Kuoni Travel Limited** (2018) EWCA Civ 938 the Court of Appeal concluded that, for the purposes of Regulation 15 of the Package (Travel etc) Regulations 1992, the employees of foreign suppliers (conventionally, hoteliers) are not themselves 'suppliers' for whom the relevant contracting party (the tour operator) is liable. In doing so the Court has driven a coach and horses through the heretofore uncontroversial consensus amongst practitioners and the courts surrounding the operation of the regulations. This article considers the implications of the judgment and argues that the reasoning of the court was both unnecessary to the disposition of the case and in equal parts confused and confusing.

The judgment

On 8th July 2010, in the early hours of the morning, Mrs X made her way to the reception of the Club Bentota Hotel in Sri Lanka. *En route* she met a uniformed employee of the Hotel who offered to escort her. She wrongly believed that he was a security guard. In fact, he was an electrician. He led her to an engineering room where he sexually assaulted and raped her.

Mrs X was staying at the hotel pursuant to a package contract organised by Kuoni. She brought a claim for damages against Kuoni pursuant to the terms of the contract and under Regulation 15 of the Package (Travel etc) Regulations 1992. It was alleged that Kuoni was liable because:

i) Pursuant to its express terms and conditions, it accepted responsibility if, due to the fault of itself, its agents or suppliers, any part of the 'holiday arrangements' were not 'of a reasonable standard'. The Claimant contended that in escorting her to the reception (or purporting to do so) the hotel employee was providing services as part of the holiday arrangements, which were plainly not of a reasonable standard.

ii) In the alternative, Kuoni was liable pursuant to Regulation 15 for the 'improper performance of the obligations under the contract" irrespective of the fact that those obligations were performed by other 'suppliers of services' rather than by Kuoni directly.

Kuoni's response was robust. It contended that:

i) The acts of the hotel employee formed no part of the 'holiday arrangements' nor were they 'obligations under the contract'.

ii) In any event, the employee was not a 'supplier' of services for whom Kuoni had any liability, whether pursuant to the terms of the contract, or within the meaning of Regulation 15.

iii) Alternatively, in the event that Kuoni had any prima facie liability, it could rely upon the statutory defence in Regulation 15(2)(c)(ii) in circumstances where the improper performance of the contract was due to an event which "*the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall*". It was argued that the 'supplier' for these purposes must mean the immediate contracting party (here the Hotel) thereby enabling Kuoni, by extension, to avoid liability where the tortious act was performed by an employee or agent of the supplier acting in a way which could not have been predicted or prevented.

The leading judgment was delivered jointly by Sir Terence Etherton MR and Asplin LJ. Longmore LJ offered a strong dissenting opinion which is considered in greater detail below. In summary, the majority held as follows:

i) The phrase 'holiday arrangements' within the Defendant's standard terms and conditions did not, given the trial judge's (unchallenged) factual finding that Mrs X actually knew that the hotel employee was not a security guard, extend to the employee's conduct in purporting to escort her to the hotel reception. It was "*no part of the functions for which (he) was employed*". The majority explained that this conclusion, which reflected the proper construction of the contract at the time it was formed, did not, by necessity, rest on any decision as to whether the hotel was or would be

'vicariously liable' for the conduct of its employee. However, it is clear that the Master of the Rolls and Asplin LJ were heavily influenced by what they regarded as the lack of any sufficient connection between the conduct complained of and the sphere of the tortfeasor's employment: an analogy was drawn with a situation in which "*a member of the hotel staff had conducted a group of hotel guests to a particular location, purporting to do so for their assistance, and then shot them all".* The Court was content to reach this conclusion notwithstanding its recognition of the fact that the underlying purpose of Regulation 15 was to provide the English consumer *"direct legal recourse against the package holiday operator for a failure in the provision of the promised arrangements to a reasonable standard".*

ii) The majority could (and it is submitted should) have ended their analysis at this point. However, they went on to rule, in the alternative, that the claim could not succeed under either the express terms of the contract, or regulation 15, because it was the Hotel itself, and not its employee, which was the '*supplier of services'* for all purposes. It considered that the framework of Regulation 15 envisaged the supplier as the person with whom the tour operator had a direct contractual relationship. Any other conclusion, it was said, would *'nullify the exclusion of liability'* contained in the statutory defence under Regulation 15(2)(c)(ii). Their lordships also considered that the difficulty in a tour operator obtaining a contractual indemnity against a hotelier in respect of the deliberate fault of its employees militated against any other conclusion.

Analysis

Opinions will differ amongst practitioners on whether or not the ultimate outcome in the case was the correct one on the facts found by the trial judge. In this author's opinion, for the reasons canvassed below, it was a proper finding that the assault committed by the hotel employee fell outwith the scope of both the express contractual wording and Regulation 15. However, difficult cases make bad law, and the majority of the Court of Appeal, seemingly in an attempt to iron-clad its judgment, has reached a conclusion on the meaning of the phrase 'supplier' which appears both unnecessary and so far removed from previous decisions (including many at Court of Appeal level) as to be obviously wrong.

Scope of the contract

The majority of the Court of Appeal made no attempt to hide their concerns about fixing both Kuoni and the Hotel with liability for the deliberate criminal conduct of the hotel employee. The conclusion that sexual assault formed no part of the 'holiday arrangements', based on the judge's findings of fact, may divide opinion but does not seem obviously wrong.

Longmore LJ, in reaching the opposite conclusion, considered that guiding guests to the hotel reception was clearly part of the holiday arrangements from Mrs X's perspective, whatever the tortfeasor's actual motive may have been. He considered that "*Kuoni accepts that the holiday arrangements at the four star hotel which they have selected are to be of a reasonable standard. For such a holiday to be a reasonable standard, hotel staff must be helpful to guests when asked for assistance*". This seems overly simplistic, for two reasons.
First of all, the wording of the contract in fact imposed liability only where Kuoni or its agents and suppliers "*due to fault*" failed to prove a holiday to a reasonable standard. Accordingly, liability was grounded firmly in negligence (in parallel with the implied duty under section 13 of the Supply of Goods and Services Act 1982) and could not be side stepped by focusing on the provision of a holiday as a whole. Secondly, even if 'vicarious liability' is a phrase which strictly only applies to claims brought in tort, it is difficult to see why the same concepts should not be relevant in at least informing the *scope* of the contractual obligations undertaken. In Lister v Hesley Hall (2002) 1 AC 215 the House of Lords emphasized that the mere *opportunity* to commit a tort is not enough to establish vicarious liability and gave the example of a groundsman at a children's home who abused a child in contra-distinction to one of the designated care staff. Whether or not one agrees that the electrician in this case was acting inside or outside the scope of his authority, it does not seem to be an irrelevant consideration. In Navarro v Moregrand (1951) 2 TLR 674 Denning LJ (obiter) stated as follows:

"But the judge inferred from those cases the converse proposition - namely, that if a servant or agent is not acting within his actual or ostensible authority, then he is not acting in the course of his employment. I do not think that that is correct: it is a confusion between the responsibility of a principal in contract and his responsibility in tort. He is only responsible in contract for things done within the actual or ostensible authority of the agent, but he is responsible in tort for all wrongs done by the servant or agent in the course of his employment, whether within his actual or ostensible authority or not. The presence of actual or ostensible authority is decisive to show that his conduct is within the course of his employment, but the absence of it is not decisive the other way."

The point is this: the disposition of the case, one way or another, could and, it is submitted, should, have focused solely on whether the act complained fell either within the scope of the concept of 'holiday arrangements' in the express terms of the contract or 'obligations' and 'services' under Regulation 15. It was unnecessary for the Court of Appeal to go further and consider the statutory defences and the meaning of the phrase 'supplier'. In doing so, they have potentially opened a Pandora's box in this area of the law.

Who was the 'supplier'?

It is submitted that the answer,– at least for the purposes of Regulation 15 – is that this is the wrong question for the simple reason that it does not matter. The Hotel *may well* be the tour operator's immediate contractual supplier. However, as Longmore LJ explained in his lucid dissenting judgment, it is trite law that a party, particularly a corporate entity, who undertakes a contractual liability, will more often than not perform services through other persons. However, having made a contractual promise to perform the service itself, it will remain liable if it is not carried out with reasonable skill and care. The acknowledged purpose underlying the Regulations is to protect the consumer by providing a remedy against a UK-domiciled tour operator for the acts and omissions of its (almost invariably) foreign suppliers. Those suppliers, be they hotels, transport providers or other suppliers of ancillary services, will act through their employees or contractors in performing the services *which the tour operator has promised to the consumer*. If the services are performed negligently, there has, using the language of the regulations, been an 'improper performance' of the contractual obligations by the supplier, even though the actual tortious act may have been committed by an employee. Accordingly, the employee may not be a supplier but the supplier (the hotel) is still liable for acts and omissions which fall within the scope of the relevant contractual obligations and services, thereby imposing liability on the tour operator by virtue of the 1992 Regulations.

This has been the basic and well-understood principle underlying the regulations since their inception in 1993. Case-law *abounds* with references to tour operators being held liable under the regulations for the acts of their supplier's employees or agents. A striking example (by virtue of its mundanity) is Wreford-Smith v Airtours (2004) EWCA Civ 453 in which a claim was made against the Defendant tour operator for the negligent driving of a transfer coach which formed part of the package Holiday. Potter LJ summarized the position as follows:

"*The claimants' cause of action was framed in contract under their agreement with the defendants who organised and provided their holiday under The Package Travel, Package Holidays and Package Tours Regulations 1992 . By Regulation 15 of those regulations the defendant was made liable for the negligence of any independent contractor used by the defendant to provide holiday services. The effective issue was whether Ali Temel, the driver of the coach who was employed by the Turkish company, Co-operative, hired by the defendant, was negligent in a manner which caused or contributed to the accident"*

If the reasoning of the majority of the Court of Appeal in X v Kuoni is accepted, the Claimants in Wreford-Smith could have no claim against Airtours in respect of the coach crash in which they were injured unless they could demonstrate *primary* liability on the part of the Turkish coach company itself. In the context of a road traffic accident, which can of course occur without any fault in the recruitment or training of the driver, this is a startling conclusion. It would undermine the very purpose of the Regulations.

The majority's suggestion that the existence of the statutory defence in Regulation 15(2)(c)(ii) militates in favour of a different conclusion also appears misplaced. As Longmore LJ explained in Hone v Going Places (2001) EWCA Civ 947:

"I would not, for my part, accept that the existence of the fault-based exceptions in regulation 15(2) makes it otiose or nonsensical for the claimant to have to prove fault in an appropriate case. The exceptions will, in any event, come into play if the other party to the contract assumes obligations which are themselves not fault-based" (emphasis added)

In other words, the defences continue to serve a purpose even where primary liability is established

under Regulation 15(1) because not every case requires proof of fault in the first instance. There may well be cases where there is breach of an implied term which amounts to an absolute liability (the provision of food of satisfactory quality is a case in point) which has caused injury or illness but which the tour operator or the hotel (acting through its employees and agents) could not have foreseen or forestalled even with all due skill and care.

Lastly, the Court's reliance upon the existence or otherwise of an indemnity between the tour operator and its supplier in respect of the deliberate acts of an employee seems both irrelevant (why should this affect the statutory right of the consumer to pursue the tour operator?) and unduly pessimistic. It should not be forgotten that many tour operators have considerable contractual bargaining power and if an act is found to be within the scope of an employee's duties, thereby justifying the imposition of liability in the first place, why should it not fall within the negotiated terms of a commercial supply contract?

Conclusion

The *potential* implications of this judgment, if it is treated as binding on the question of the operation of Regulation 15(1), are very significant indeed. The vast majority of 'routine' accident claims, which stem from the individual tortious acts of foreign hotel employees, would now appear to fall outside the statutory regime unless it can be demonstrated that the hotel itself was primarily liable. It is submitted that this was never the intention of the statutory draftsmen in Europe, who would be most concerned by the emasculation of the consumer protection offered by the Regulation. It is understood that the Claimant intends to appeal to the Supreme Court.

JACK HARDING