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INTRODUCTION

MATTHEW CHAPMAN QC

In this edition, I have mined the archives (topically, I hope) for some case notes dating back to 2004 when Sarah Prager and I did battle in an appeal arising out of the cancellation of a package holiday to Hong Kong at the time of the SARS epidemic. The scale of the present crisis may now make SARS seem like a minor inconvenience, but it is perhaps useful (and comforting?) to know that, in the law at least, there is nothing (wholly) new under the sun (even if regulations 12 and 13 of the Package Travel Regulations 1992 are now regulation 11 of the Package Travel Regulations 2018). In other news, and in an effort to avoid the BBC news live feed, I have also been looking back at what one might call “plague era literature” (yes, it’s a barrel of laughs in my household these days). Perhaps Gabriel Garcia Marquez is an obvious choice, but “Love in the Time of Cholera” is a rich source of apposite quotes: try these, “Humanity, like armies in the field, advances at the speed of the slowest.” and “wisdom comes to us when it can no longer do any good.” However, as I sit here awaiting the Chancellor of the Exchequer’s latest financial stimulus package, I think I prefer these lines from John Donne (wise, funny and perhaps better-suited to this strange Spring): “And though each spring do add to love new heat,/As princes do in time of action get/New taxes, and remit them not in peace,/No winter shall abate the spring’s increase.” (“Love’s Growth”) Let’s hope that the winter of covid-19 will abate ... and soon.

All the best to all our readers.

Coronavirus and “constrained”: the “last flicker of hope” and regulation 11 of the Package Travel Regulations 2018

Matthew Chapman QC

Introduction

Many countries are now in what the media refer to as “lockdown” and there are travel restrictions – of uncertain duration – in place around the world. Large numbers will already have purchased package holidays (up, low and middle market) scheduled to commence later in the year: let us say, in the Autumn at a time when it is uncertain (to put it mildly) where we will be as to practical options for (package and, indeed any other kind of) travel. Let us also assume that, in these cases, the tour operator’s Booking Conditions provide no better cancellation and refund rights than those that can be found in the latest iteration of the Package Travel Regulations (SI No 634/2018). How do the 2018 Regulations manage such traveller rights: what is the gateway to (mixing metaphors) the cascade of rights that the 2018

Regulations contain? Perhaps the pre-2018 case law can provide some answers. First, a recap of the relevant legislation. Regulations 12 and 13 of the Package Travel etc. Regulations 1992 (considered in the *Lambert* and *Clark* cases discussed below) provided as follows:

“Significant alterations to essential terms

12. In every contract there are implied terms to the effect that— (a)where the organiser is constrained before the departure to alter significantly an essential term of the contract, such as the price (so far as regulation 11 permits him to do so), he will notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular to withdraw from the contract without penalty or to accept a rider to the contract specifying the alterations made and their impact on the price; and (b)the consumer will inform the organiser or the retailer of his decision as soon as possible [emphasis added].

Withdrawal by consumer pursuant to regulation 12 and cancellation by organiser 13.—(1) The terms set out in paragraphs (2) and (3) below are

implied in every contract and apply where the consumer withdraws from the contract pursuant to the term in it implied by virtue of regulation 12(a), or where the organiser, for any reason other than the fault of the consumer, cancels the package before the agreed date of departure. (2) The consumer is entitled— (a)to take a substitute package of equivalent or superior quality if the other party to the contract is able to offer him such a substitute; or (b)to take a substitute package of lower quality if the other party to the contract is able to offer him one and to recover from the organiser the difference in price between the price of the package purchased and that of the substitute package; or (c)to have repaid to him as soon as possible all the monies paid by him under the contract. (3) The consumer is entitled, if appropriate, to be compensated by the organiser for non-performance of the contract except where— (a)the package is cancelled because the number of persons who agree to take it is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the description of the package; or (b)the package is cancelled by reason of unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised. (4) Overbooking shall not be regarded as a circumstance falling within the provisions of subparagraph (b) of paragraph (3) above.”

Regulation 11 of the 2018 Regulations provides as follows:

“Alteration of other package travel contract terms 11.—(1) The provisions of this regulation are implied as a term in every package travel contract. (2) The organiser must not unilaterally change the terms of a package travel contract before the start of the package, other than the price in accordance with regulation 10, unless—(a)the contract allows the organiser to make such changes; (b)the change is insignificant; and (c)the organiser informs the traveller of the change in a clear, comprehensible and prominent manner on a durable medium. (3) Paragraphs (4) to (11) apply where, before the start of the package, the organiser - (a) is constrained by

circumstances beyond the control of the organiser to alter significantly any of the main characteristics of the travel services specified in paragraphs 1 to 10 of Schedule 1; (b) cannot fulfil the special requirements specified in paragraph 1 of Schedule 5; or (c) proposes to increase the price of the package by more than 8% in accordance with regulation 10(4). (4) The organiser must, without undue delay, inform the traveller in a clear, comprehensible and prominent manner on a durable medium, of— (a) the proposed changes referred to in paragraph (3) and, where appropriate, in accordance with paragraph (7), their impact on the price of the package; (b) a reasonable period within which the traveller must inform the organiser of the decision pursuant to paragraph (5); (c) the consequences of the traveller's failure to respond within the period referred to in sub-paragraph (b); and (d) any substitute package, of an equivalent or higher quality, if possible, offered to the traveller and its price. (5) The traveller may, within a reasonable period specified by the organiser— (a) accept the proposed changes; or (b) terminate the contract without paying a termination fee. (6) Where the traveller terminates the contract pursuant to paragraph (5)(b), the traveller may accept a substitute package, where this is offered by the organiser. (7) Where— (a) the changes to the package travel contract referred to in paragraph (3), or (b) the substitute package referred to in paragraph (6), result in a package of lower quality or cost, the traveller is entitled to an appropriate price reduction. (8) Where— (a) the traveller terminates the contract pursuant to paragraph (5)(b), and (b) the traveller does not accept a substitute package, the organiser must refund all payments made by or on behalf of the traveller without undue delay and in any event not later than 14 days after the contract is terminated. (9) Where paragraph (8) applies, regulation 16(2) to (10) applies. (10) Where the traveller does not confirm, within the period specified in paragraph (5), whether the traveller wishes to— (a) accept the proposed change, or (b) terminate the contract, in accordance with that paragraph, the organiser must notify the traveller, a second time, of the matters in sub-paragraphs (a) to (d) of paragraph (4). (11) If, having been notified under paragraph (10), the traveller fails to respond,

the organiser may terminate the contract and refund all payments made by or on behalf of the traveller without undue delay and in any event not later than 14 days after the contract is terminated. [emphasis again added]”

This paper is not concerned with the cascade of rights that the consumer or traveller (as the case may be) will have where the relevant set of Regulations are engaged (it appears that, where it applies, regulation 12 of the 2018 Regulations is more generous than the equivalent provisions in the 1992 iteration and may provide a consumer-friendly remedy where regulation does not). Instead, this paper focuses – in the context of the English case law where this has been discussed – on the gateway to regulation 11 rights and, in particular, on the meaning of the word “constrained” (cf. the French text of the 2015 EU Package Travel Directive (No 2302/2015) at Article 11(2), “*Si, avant le début du forfait, l'organisateur se trouve contraint de modifier ...*.”)

***Lambert v Travelsphere Ltd* [2005] CLY 1977 (1 September 2004, Peterborough CC, HHL Darroch)**
In January 2003 Mr and Mrs L booked a package tour with T, a tour operator, for the 23 day period between 27th April and 19th May 2003. The package included flights to Beijing, a tour of China, and, at the end of the holiday, 3 days in Hong Kong. In March 2003 as a result of the SARS (severe acute respiratory syndrome) epidemic the World Health Organisation issued warnings to international travellers intending to travel to Hong Kong. On 2nd April 2003 the World Health Organisation and the Department of Health strongly advised holidaymakers not to travel to Hong Kong. On 8th April 2003 T wrote to the Claimants notifying them that they were rearranging some travel itineraries but that they might be able to visit Hong Kong at the end of the holiday. On 12th April 2003 Mr and Mrs L cancelled the holiday but reserved their rights as to the cancellation fee charged by T pursuant to their standard terms and conditions. On 23rd April 2003 T cancelled the holiday and provided other holidaymakers with a full refund in accordance with Regulations 12 and 13 of the Package Travel, Package Holidays and Package Tours Regulations 1992. Mr and Mrs L brought an action against T for a refund of

the cancellation fee on the basis that they were entitled to cancel the holiday without fee pursuant to Regulations 12 and 13, since T had been constrained to alter the itinerary before departure. T argued that their notification did not constitute an alteration, because it was still possible that the Ls might be able to travel to Hong Kong, and that the inclusion of Hong Kong in the itinerary was not an essential term of the contract in any event. At first instance the District Judge held that T's notification that they 'would or might' alter the itinerary was a significant alteration in one of the essential terms of the holiday contract, which T had been constrained to make as a result of the SARS epidemic.

Held, allowing T's appeal, that although as at 8th April 2003 T was constrained to consider altering the Ls' itinerary, they were not constrained actually to alter it. Any uncertainty in the Ls' minds as to whether or not they would be able to go to Hong Kong was a product of the SARS epidemic and not of T's letter. Therefore T had not added any uncertainty as to the itinerary, but was merely notifying the Ls that their itinerary was subject to consideration. In the circumstances, Regulation 12 was not engaged.

obiter, it was an essential term of the holiday contract that the Ls would go to Hong Kong as part of the package.

obiter, a tour operator cannot shut its eyes to an obvious danger so as to deny that it is constrained to alter an essential term, but it is permissible for it not to alter the term until there is not a flicker of hope that the contract can be performed in accordance with the original term. In order for a tour operator to be constrained to alter a term, it must be absolutely inevitable and unavoidable for it to be altered.

Clark & Others v Travelsphere Ltd (22 October 2004, Leeds CC)

This case concerned two couples who had booked regulated package holidays with the Defendant tour operator to travel to mainland China and Hong Kong between 12 and 27 April 2003. The principal components of the holiday comprised an 11 day tour of China followed by 3 days in Hong Kong and Guangdong. The couples paid the full cost of the

holiday in advance, but became increasingly concerned about the progress of the SARS epidemic. The Defendant tour operator informed them that the planned trip – including the Hong Kong element – would go ahead as planned subject to the proviso that if FCO advice remained (as it was at the time of enquiry) that Hong Kong should not be visited then holidaymakers would be flown home at the end of the China leg of the tour (instead of proceeding as scheduled to Hong Kong). The **Clark** Claimants elected not to turn up at their departure airport. Instead, they sent an email to the Defendant tour operator the following day purporting to terminate the holiday contract on the basis of their concerns about the SARS outbreak. The Booking Conditions provided that no refund would be provided in the event of consumer cancellation within 72 hours of departure. Notwithstanding this, the **Clark** Claimants sued for damages in reliance on the 1992 Regulations. They relied in part on the fact that the Hong Kong element of the holiday had ultimately (but after departure from the UK) been cancelled for all other holidaymakers (who had received a refund of that part of the holiday cost). The **Clark** Claimants failed at Trial; the Defendant succeeded in persuading the Judge (citing **Lambert**) that, at the time that the itinerary commenced (if not later), there remained a plausible prospect – a flicker of hope – that the Hong Kong portion of the trip would proceed as planned. (see also, in a similar vein, **Wilkinson & Others v First Choice Holidays & Flights Ltd** (16 September 2008, Liverpool CC).

What do these cases tell us about the present crisis? They clearly illustrate the resonance of a striking phrase: His Honour Judge Darroch's "*last flicker of hope*" has enjoyed a long afterlife in the textbooks and other academic sources (see, D Grant et al, **Holiday Law** (7th ed, 2018), paras 10-036 and the leading textbook, Chapman, Prager & Harding, **Saggerson on Travel Law and Litigation** (6th ed, 2017), paras 4.133 – 4.141. See also, Saggerson and Prager, "*Case Note: a Flicker of Hope*" [2004] ITLJ 183). More significantly, the case law shows us how the English judiciary are able to turn a regulation designed (surely) to put a brake on a tour operator's ability to make late changes prior to departure into something far less consumer friendly (to use the *mot juste*, constraining, rather than

enlarging, the consumer's right to redress).

It remains to be seen whether – in the present uncertain context (and where foreign travel almost anywhere is planned for the later part of the year) – judicial sympathy for the plight of the traveller/consumer will permit a different outcome than in Lambert and Clark (perhaps aided by the stronger rights contained in the 2018 Regulations).

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