THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of her family in connection with these proceedings.

Trinity Term
[2019] UKSC 37
On appeal from: [2018] EWCA Civ 938

JUDGMENT

X (Appellant) *v* Kuoni Travel Ltd (Respondent)

before

Lord Kerr
Lord Hodge
Lord Lloyd-Jones
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

24 July 2019

Heard on 1 May 2019

Appellant
Robert Weir QC
Katherine Deal QC

(Instructed by Irwin Mitchell LLP (Birmingham))

Respondent
William Audland QC
Nina Ross
Achas Burin

(Instructed by MB Law Solicitors Ltd (Leeds))

Intervener (ABTA Ltd)
Howard Stevens QC
James Hawkins

(Instructed by Kennedys Law LLP)

LORD LLOYD-JONES: (with whom Lord Kerr, Lord Hodge, Lady Arden and Lord Kitchin agree)

The facts

1. On or about 1 April 2010 the appellant and her husband ("Mr and Mrs X", anonymity orders having been made in respect of the appellant by the Court of Appeal and the Supreme Court) entered into a contract with the respondent tour operator ("Kuoni") under which Kuoni agreed to provide a package holiday in Sri Lanka which included return flights from the United Kingdom and 15 nights' all-inclusive accommodation at the Club Bentota hotel ("the hotel") between 8 and 23 July 2010.

2. The contract provided in relevant part:

> "Your contract is with Kuoni Travel Ltd. We will arrange to provide you with the various services which form part of the holiday you book with us." (Booking Conditions, clause 2.2)

> "… 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. 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 suppliers; 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." (Booking Conditions, clause 5.10(b))

3. 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.

4. In these proceedings Mrs X claims damages against Kuoni by reason of the rape and the assault. The claim is brought for breach of contract and/or under the Package Travel, Package Holidays and Package Tours Regulations 1992 ("the 1992 Regulations") which implement in the United Kingdom Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ("the Directive").

Relevant legislation

5. Article 5 of the Directive provided in relevant part:

> "Article 5
>
> 1. Member states shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.
>
> 2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, member states shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:
>
> - the failures which occur in the performance of the contract are attributable to the consumer,
>
> - such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,
>
> - such failures are due to a case of force majeure such as that defined in article 4(6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

…

In the matter of damage other than personal injury resulting from the non- performance or improper performance of the services involved in the package, the member states may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2."

6. Regulation 15 of the 1992 Regulations provides in relevant part:

"(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(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 -

(a) the failures which occur in the performance of the contract are attributable to the consumer;

(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or

(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.
>
> …
>
> (5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term."

7. Pursuant to section 13 of the Supply of Goods and Services Act 1982, Kuoni was required to carry out the services promised under the contract with reasonable care and skill.

The proceedings

8. At trial, Mrs X's case was essentially that the rape and assault amounted to the improper performance of a contractual obligation. (Before the Supreme Court, although a claim for breach of the 1992 Regulations was maintained, counsel for Mrs X emphasised that the claim was essentially a claim for breach of contract.) On her behalf, it was accepted that there was no basis for suggesting that N should have been identified as a risk. Furthermore, it was no part of her case that there was systemic or organisational negligence on the part of Kuoni or the hotel (such as failure to supervise N or carelessness in selecting N as an employee) causative of the attack. The assault was caused by N alone.

9. In its defence, Kuoni admitted that it was "responsible to the claimant for the proper performance of obligations under the holiday contract whether or not such obligations were to be performed by the defendant or another supplier of services" and that the "said obligations would be performed with reasonable skill and care". However, Kuoni denied that the rape and assault by N constituted a breach of any obligations owed by Kuoni to Mrs X under the contract or the 1992 Regulations. In particular it denied that they constituted improper performance of any obligation under the contract. Furthermore, Kuoni relied, by way of defence, on the clause 5.10(b) of the Booking Conditions and regulation 15(2)(c)(ii) of the 1992 Regulations.

10. At first instance, Judge McKenna, sitting as a judge of the High Court, concluded (at paras 44 to 48) that "holiday arrangements" in clause 5.10(b) did not include a member of the maintenance staff conducting a guest to reception. He further held, obiter, that Kuoni would in any event have been able to rely on the statutory defence under regulation 15(2)(c)(ii) because the assault was an event which could not have

been foreseen or forestalled (by inference by the hotel) even with all due care. Although it was not necessary to decide the point, he held that the hotel would not have been vicariously liable for the rape and assault as a matter of Sri Lankan law, which it was agreed was the same as English law for these purposes.

11. The Court of Appeal (Sir Terence Etherton MR, Longmore and Asplin LJJ) dismissed the appeal by a majority (Longmore LJ dissenting).

12. In a joint judgment the Master of the Rolls and Asplin LJ held that on their proper interpretation, the words "holiday arrangements" in clause 5.10(b) 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. This was no part of the functions for which the employee was employed (para 34). The 1992 Regulations were not designed to facilitate a claim against a tour operator for wrongful conduct by an employee of a supplier where that conduct was "not part of the role in which he was employed" and where the supplier would not have been vicariously liable under either the consumer's domestic law or the foreign law applicable to the supplier (para 37).

13. The majority further held, obiter, that Kuoni was not liable under either the express terms of clause 5.10(b) or regulation 15 since N was not a "supplier" within the meaning of those provisions. The judge had properly held that the hotel and not N was the supplier of any services performed by N. The booking conditions referred to "our agents or suppliers", which denoted a need for a direct contractual or promissory relationship between Kuoni and whoever was to be regarded as a supplier. Furthermore, this reading was supported by regulation 15. Nothing in regulation 15 suggested some other meaning of the word "supplier" in clause 5.10(b) or the expression "supplier of services" in regulation 15 itself. The express reservation in regulation 15(1) of "any remedy or right of action which [the package holiday operator] may have against [the] suppliers of services" was consistent with a direct relationship between the operator and the supplier and may be indicative of an assumption that there would be such a relationship. In a situation where one contracting party assumes primary and personal liability for the provision of services by agents or suppliers to a reasonable standard to the other contracting party, the natural meaning of "supplier" is the person who assumes a direct contractual or promissory obligation to provide such services and not an employee of such a person (at paras 39 to 41). There were no discernible policy reasons for imposing liability on a tour operator when neither it nor the hotel were "at fault" and the express exclusion of liability under regulation 15(2)(c)(ii) pointed clearly to the contrary. Furthermore, in such circumstances it was not realistic to suppose that the tour operator could protect itself via an indemnity from the employee or the hotel or by way of insurance (at paras 43 to 47).

14. The majority considered it unnecessary to decide the question of vicarious liability on the part of the hotel for N's conduct because even if the hotel were

vicariously liable Kuoni could nevertheless rely on the statutory defence incorporated into its booking conditions (at para 51).

15. Longmore LJ (dissenting) concluded as follows:

(1) He was not sure that Kuoni was correct in denying that there was a contractual obligation on the hotel or its staff to guide guests to reception but he was sure that if a member of the hotel staff offered to guide a guest to reception, as the judge had found, that was a service for which Kuoni accepted responsibility for it being done to a reasonable standard (at para 11).

(2) He rejected Kuoni's submission, founded on the judge's finding that N had lured Mrs X to the engineering room, that N was not providing a service at all. Mrs X thought that N was providing a service and had every reason to suppose that he was. Furthermore, N's actual motive was irrelevant (at para 12).

(3) There was no express term of the contract that any electrician employed by the hotel would also provide Mrs X with general assistance such as showing her to reception. However, in order that the "holiday arrangements" at a four-star hotel, which Kuoni had contracted to provide, should be provided to a reasonable standard, hotel staff must be helpful to guests when asked for assistance and all the more when offering assistance. On no view did N assist Mrs X in a reasonable way when he guided her to the engineering room (at para 13).

> "I would therefore conclude that the holiday arrangements for Mrs X were not of a reasonable standard and constituted improper performance within regulation 15(2). Kuoni must, subject to any available defences, take responsibility for that. So far, the identity of the supplier of the services is not critical. The Hotel supplies the service of assisting its guests and performs that service by means of its employees. But the question whether N was also supplying the service is critical when it comes to a consideration of the defences. If, as the judge held, it was the Hotel and only the Hotel which was the supplier, Kuoni has a good defence since the improper performance was due neither to Kuoni nor the Hotel because, on the findings of the judge, the failure of proper performance was due to an event which neither Kuoni nor the Hotel, even with all due care, could foresee or forestall. The Hotel did not fail to take up references for N and had no reason to suppose, from past history or any other reason, that he would rape one of the guests. If, however, N was a supplier of the service of assisting, rather than or as well as, the Hotel, then he (as that supplier) could foresee or forestall his own criminal activity." (at para 14)

(4) The use of the word "our" in Kuoni's booking conditions could not be decisive to indicate whether the supplier was N or the hotel (at para 15).

(5) The arguments as to who was the supplier were finely balanced and were to be decided on principle (at para 20). In the law of England and Wales, the governing principle is that a person who undertakes contractual liability retains liability for his side of the bargain even if he performs it through others (at para 21).

(6) The whole point of the Directive and the 1992 Regulations was to give the holiday maker whose holiday had been ruined a remedy against his contractual opposite. It should be left to the tour operator to sort out the consequences of the ruined holiday with those with whom it had itself contracted who could then sort things out further down the line whether with their own employees or their independent contractor (at para 22).

(7) There was no justification for concluding that the concept of supplier should stop with the hotel in the case of an independent contractor or an employee. The concept of supply may be no more than a question of degree (at para 24). However, there could be no doubt that some employees should be regarded as suppliers.

> "The captain of a cruise ship, for example, supplies the important service of navigating the ship without exposing it to danger; the fact that he is the employee of the shipping line makes little difference to the holiday makers on board and the travel operators should not be able to deny responsibility, even if the shipping line had taken reasonable steps to procure the services of an experienced captain." (at para 23)

(8) Although vicarious liability on the part of the hotel was not decisive, he was far from certain that the hotel would not be vicariously liable under English law for a rape carried out by an employee in uniform and represented to the world as a reliable employee (at para 25).

The issues before the Supreme Court

16. On further appeal to the Supreme Court there were two main issues.

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

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

This request for a preliminary ruling on a point of EU law relates specifically to the second issue.

The submissions of the parties before the Supreme Court

17. The Supreme Court granted permission to ABTA Ltd ("ABTA") (a trade association representing British travel agents) to intervene in the appeal.

18. The parties agree that clause 5.10(b) was intended to replicate the terms of regulation 15(2)(c) which, in turn, was intended to implement article 5 of the Directive. It is further agreed that liability under regulation 15 cannot be excluded by any contractual term (regulation 15(5)). The defence in contract is coextensive with the statutory defence.

19. The principal submissions made on behalf of Mrs X in relation to the second main issue are as follows:

(1) Kuoni cannot rely on the contractual exclusion clause because it seeks to exclude Kuoni's liability for personal injury resulting from negligence which is prohibited by sections 1(1)(a), 1(3) and 2 of the Unfair Contract Terms Act 1977. Furthermore, to the extent that the claim is one for breach of contract Kuoni cannot rely upon the terms of the defence under regulation 15(2)(c)(ii) which is a defence to a claim under the Regulations. This is purely a matter of domestic law.

(2) The approach of the majority in the Court of Appeal to this issue is unduly restrictive.

(a) If the supplier can only be someone in a contractual or promissory relationship with the tour operator, even a hotel providing accommodation may not qualify as a supplier of services under regulation 15 as there can be no certainty that the tour operator will contract directly with the hotel.

(b) Furthermore, a tour operator would be able to avoid liability where there was ordinary operational negligence by an employee of a hotel (let alone a sub-contractor).

(3) The defence under regulation 15(2) only arises in circumstances where there has been a "failure to perform the contract or the improper performance of the contract". The defence itself applies where such failure or improper performance is due neither to the fault of the tour operator nor to that of "another supplier of services" for the reasons set out in sub-paragraphs (a) to (c). Where the improper performance of the contract is fault-based, there is no room for a "no fault" defence.

(4) Applying a restrictive approach to the interpretation of regulation 15(2)(c)(ii) and reasoning by analogy from regulation 15(2)(c)(i) and the decision of the Court of Justice of the European Union in *Anthony McNicholl Ltd v Minister for Agriculture* (Case C-296/86) [1988] ECR 1491, it must be foreseeable that a supplier, whether contractor or sub-contractor or further removed down the chain of contracts, will act unlawfully in the provision of the service that the tour operator has contracted to provide.

(5) There is no requirement under regulation 15 to read "supplier of services" so as to limit its ambit to those in a contractual or promissory relationship with the tour operator. On the contrary, it should be given its natural and full meaning so that it can cover any third party provided that that party is supplying holiday services. If N is recognised as having been a relevant supplier, on no view can the defence be engaged because N was himself "at fault" and did not exercise "all due care" within the terms of regulation 15(2)(c)(ii).

(6) If the hotel and not N was the relevant supplier, the issue of the fault of the hotel has to be considered from the perspective of the services that the hotel has been committed by the tour operator to provide. The issue is not whether the hotel, as a company, is directly (as opposed to vicariously) at fault. The issue is whether the hotel as a supplier of services is at fault. If there was fault in the provision of the relevant service, then the hotel is at fault for the purposes of regulation 15(2). If N is not a supplier because N is part of the hotel's staff and the hotel is the relevant supplier, the services supplied by the hotel must include those provided by N.

20. The principal submissions made on behalf of Kuoni in relation to the second main issue are as follows:

(1) Kuoni joins issue with Mrs X on her submissions on the Unfair Contract Terms Act. In particular, Kuoni relies on section 29 which provides that nothing in the Act prevents reliance upon any contractual provision which (a) is authorised or required by the express terms or necessary implication of an enactment or (b) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement.

(2) On a proper construction of both the contract and the 1992 Regulations the "supplier" is the hotel. In this regard Kuoni concedes that there is no need to read "our suppliers" in the contract or "other suppliers of services" in the regulation so as to limit their ambit to those in a direct contractual or promissory relationship with the tour operator. The intention of the Directive, as supported by the travaux preparatoires, is that "suppliers of services" should include suppliers who are in a chain of contractual authority descending from the tour operator, which might include sub-contractors.

(3) The word "fault" in regulation 15(2) and article 5(2) is defined by the three subparagraphs which follow it. If, and only if, none of the three subparagraphs applies can there be fault. "Fault" has no other meaning within the context of this provision and no independent meaning.

(4) There is no fault attributable to Kuoni or the hotel in the sense that neither Kuoni nor the hotel could have foreseen or forestalled the criminal acts of N.

(5) If the supplier of services is the hotel, N's crime should not be attributable to it, still less to Kuoni.

(6) N is not a supplier of services. On the contrary he was at all material times carrying on a criminal enterprise. Those acts are not attributable to the real supplier of services, his employer.

(7) The construction for which Mrs X contends runs contrary to the intention of the Directive in that, if N is a supplier:

> (a) A tour operator will never be able to avail itself of the defence under regulation 15(2)(c)(ii) in circumstances where neither the tour operator nor the supplier (here the hotel) were negligent or at fault in any way.
>
> (b) A tour operator is most unlikely to be able to recover an indemnity from a supplier hotel in respect of the criminal act of that supplier hotel's employee which was not attributable to any negligence or fault on the part of the supplier hotel.

For these reasons, Kuoni, referring to *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, invites the Supreme Court to formulate a special rule of attribution to enable a tour operator to avail itself of the defence in a case such as this.

21. The principal submissions made on behalf of ABTA in relation to the second main issue are as follows:

(1) An employee of a hotel is not to be regarded as "another supplier of services" for the purposes of regulation 15(2). While an employee is someone through whom the hotel acts and whose acts are therefore those of the hotel, it is the hotel that supplies and which has been contracted to supply the services under the contract. On a natural reading "supplier" connotes a person or entity responsible for the supply, not an employee of such a person or entity. In this regard ABTA draws attention to the term "prestataire de services" in the French text of the Directive which, it submits, envisages the commercial supply of services or merchandise.

(2) Notwithstanding the view of the majority of the Court of Appeal, it may be that "another supplier of services" in regulation 15(2) includes other contractors in the contractual chain of supply.

(3) If N is not "another supplier of services" and the hotel was not at fault (either directly or vicariously) for N's actions, the defence under regulation 15(2)(c)(ii) should succeed. Mrs X errs in equating fault in the provision of the service as a result of N's conduct with fault on the part of the hotel. The hotel would only be at fault if vicariously liable for N's conduct. Furthermore, the improper performance was not due to any fault on the part of the tour operator or hotel because it was due to an event which neither could have foreseen or forestalled even with all due care. The defence under regulation 15(2)(c)(ii) applies generally and is not limited to situations where there is no fault. It applies where the relevant supplier would not itself be liable for fault either directly through its own acts or omissions or vicariously liable for its employees. To uphold the case for Mrs X on this point would lead to the startling result that a tour operator can be liable despite the fact that its supplier would not be liable for the actions of its employee.

(4) ABTA accepts that if this submission is correct the majority in the Court of Appeal erred in considering it unnecessary to decide the issue of vicarious liability. However, it denies that the need to consider vicarious liability would introduce further complexity and expense in national proceedings. Not every case would require evidence of foreign law on the issue of vicarious liability. Expert evidence on foreign law and standards is, in any event, commonplace in package holiday claims.

(5) ABTA's proposed construction of the defence in regulation 15(2)(c)(ii) furthers internal market considerations.

(6) Alternatively, ABTA submits that regulation 15(2)(c)(ii) affords a defence where, as here, the acts of the employee, although performed within the scope of apparent authority, are criminal acts.

Conclusion

22. For the purposes of this reference, the Court of Justice of the European Union is asked to assume that guidance by a member of the hotel's staff of Mrs X to the reception was a service within the "holiday arrangements" which Kuoni had contracted to provide and that the rape and assault constituted improper performance of the contract.

23. In order to determine this appeal, the Supreme Court refers the following questions to the Court of Justice of the European Union:

(1) Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organizer or retailer with a consumer to provide a package holiday to which Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours applies, and that failure to perform or improper performance is the result of the actions of an employee of a hotel company which is a provider of services to which that contract relates:

(a) is there scope for the application of the defence set out in the second part of the third alinea to article 5(2); and, if so,

(b) by which criteria is the national court to assess whether that defence applies?

(2) Where an organizer or retailer enters into a contract with a consumer to provide a package holiday to which Council Directive 90/314/EEC applies, and where a hotel company provides services to which that contract relates, is an employee of that hotel company himself to be considered a "supplier of services" for the purposes of the defence under article 5(2), third alinea of the Directive?