All at sea:
regulation 14 of the Package Travel *etc* Regulations 1992 and "*appropriate*" compensation

This article considers a recent (multi-party) case decided by reference to regulation 14 of the Package Travel etc. Regulations 1992: ***Lara Tanner & Others v TUI UK Limited, trading as Thomson Holidays*** *(10 - 12 October 2005; judgment (on liability only) 18 October 2005. HHJ Karsten QC, Central London County Court). By comparison with regulation 15, regulation 14 has been the subject of few judicial decisions. The* ***Lara Tanner*** *decision provides little comfort for either Claimants or Defendants.*

***Lara Tanner*: factual background**

On 9 November 2001, SS *The Topaz*, a cruise liner, sailed out of Palma Majorca. The charterers were Thomson Holidays and around 1,000 passengers were on board. The vessel was scheduled to visit 5 ports in the course of a cruise that would end with the disembarkation of the passengers at Palma during the morning of 16 November 2001. Passengers had paid a basic cost of £650 each, although many had paid extra for upgrades and for holiday extensions; this was a relatively inexpensive holiday (presumably, as a result of the relatively low demand for holidays in and on the Mediterranean in Autumn).

The contracted amenities and services, scheduled to be available on board, were set out in the Defendant's brochure and included, among other things, open meal sittings, entertainment, 24 hour dining, table wines/draught lager/cocktails/brand name spirits, gala nights and the like. A variety of facilities were also scheduled to be available on board (eg. 3 restaurants, 4 bars, 2 lounges, discotheque, whirlpool, swimming pool, hairdresser and massage and so forth).

It is worth briefly setting out the scheduled itinerary for the cruise.

Day 1 (9 November 2001) sail from Palma, Mallorca;

Day 2 at sea;

Day 3 Arrive Civitavecchia, Italy in morning. Excursion to Rome. Sail pm;

Day 4 Arrive Livorno in morning. Excursions to Pisa/Florence. Sail pm;

Day 5 Arrive Marseilles in morning. Sail pm;

Day 6 Arrive Sete in morning. Sail pm;

Day 7 Arrive Barcelona in morning. Sail pm;

Day 8 Arrive Palma in morning.

The Claimants' enjoyment of their holidays was severely curtailed; the reason was some extremely rough weather conditions. A number of changes had to be made to the itinerary. The *Topaz* left Palma on schedule on 9 November 2001 and entered gale force winds (NE Force 8 – 9) while at sea on 10 November 2001 on route to Civitavecchia. The *Topaz* arrived at Civitavecchia 3 ½ hours late on 11 November 2001 (a Sunday) and stayed there overnight. On 12 November 2001 the vessel set sail for Livorno and arrived on 13 November 2001. The *Topaz* departed Livorno in the evening on 13 November 2001 and sailed to Barcelona (missing Marseilles and Sete altogether). On 14 November 2001 the *Topaz* remained at sea and the weather deteriorated to winds of force 9 – 10 (Strong gale/storm force on Beaufort scale). The *Topaz* arrived outside Barcelona very early on 15 November 2001 (after a rough passage in high winds); the Port of Barcelona was closed by the local authorities. The log recorded winds of force 12 at noon (Hurricane force on Beaufort scale). The Captain decided to sail on to Palma and was secured alongside at 0300 hours on 16 November 2001 whereupon the passengers disembarked (with considerable relief).

The Claimants were on board the *Topaz* uninterruptedly from around 1900 hours on 13 November 2001 until around 0300 hours on 16 November 2001: a period of 56 hours. The Claimants missed scheduled stops at Marseilles, Sete and Barcelona altogether.

The effects of the rough weather on the passengers' enjoyment of the holiday were not limited to the itinerary; there was also an impact on the amenities/services on board. A large number of passengers were violently seasick and unable to leave their berths and, during the especially rough weather (the second half of the passage to Civitavecchia and the second half of the passage to Barcelona), announcements were made to passengers that they should not leave their cabins unless they had a good reason for doing so. The swimming pool, whirlpool and upper deck were closed during the rough weather. The upper deck Bar was also closed during rough weather. A Café, which had to be entered by means of an outside deck and which provided meals for 24 hours, was frequently closed. Hot food was not available in the restaurant on route to Barcelona: it was not safe to prepare hot meals (an alternative choice of cold food was provided). The cabaret entertainment was curtailed and could not take place during the rough weather. The lifts on board the vessel were out of use during the rough weather.

Causes of action

The Lara Tanner passengers sued the tour operator for their spoilt holidays (or, at least, around 240 of them did so).

It was common ground that the Claimants' holidays were "*packages*" within the meaning of regulation 2(1) of the Package Travel etc. Regulations 1992. The Claimants relied on two causes of action (both framed in contract):

a. the mandatory implied contractual term contained in regulation 14 of the Package Travel etc. Regulations 1992; and, alternatively,

b. breach of the implied term to exercise reasonable care and skill (derived from section 13 of the Supply of Goods and Services Act 1982) giving rise to liability on the part of the Defendant tour operator for the negligence of its suppliers, their sub-contractors, servants or agents (regulation 15(1) and (2) of the 1992 Regulations): the "*negligence*" cause of action.

Regulation 14: the parties' submissions

It is not proposed to summarize in the course of this article the parties' submissions, assisted by expert evidence, with respect to the negligence cause of action. The Claimants' case on this issue was that the severe weather conditions were clearly forecast and that the Master of the *Topaz* was negligent in sailing into a forecast force 10/11 storm on route to Barcelona. There was an additional, subsidiary, allegation that the Master had failed to make sufficient use of the vessel's stabilizers while on route to Italy at the start of the cruise. These issues were resolved in the Defendant's favour at trial (on the basis that the trial Judge was reluctant to second guess the decisions made by the Master and on the basis that he preferred the Defendant's expert evidence in any event).

The more interesting (legal) argument concerned the submissions made on the application of regulation 14 of the Package Travel etc. Regulations 1992. The regulation reads as follows:

" Significant proportion of services not provided

14.—*(1) The terms set out in paragraphs (2) and (3) below are implied in every contract and apply where, after departure, a significant proportion of the services contracted for is not provided or the organiser becomes aware that he will be unable to procure a significant proportion of the services to be provided.*

(2) The organiser will make suitable alternative arrangements, at no extra cost to the consumer, for the continuation of the package and will, where appropriate, compensate the consumer for the difference between the services to be supplied under the contract and those supplied.

(3) If it is impossible to make arrangements as described in paragraph (2), or these are not accepted by the consumer for good reasons, the organiser will, where appropriate, provide the consumer with equivalent transport back to the place of departure or to another place to which the consumer has agreed and will, where appropriate, compensate the consumer."

The following observations can be made about regulation 14:

a. it applies irrespective of the *cause* of the failure to provide services;

b. it applies regardless of any *force majeure*/unforeseeability defence (cf. reg 13(3)(b) of the 1992 Regulations); and,

c. it is not limited by the escape provisions of reg 15(2)(c) - compensation is payable "*where appropriate*";

d. there is no definition of "*services contracted for*" and no guidance on the circumstances in which compensation will be "*appropriate*".

It was conceded by the Defendant in submissions that it was not possible to insert the "*escape*" clauses of regulation 15(2) into regulation 14. In summary, the Defendant's submissions were as follows:

a. the starting point for the application of regulation 14 was the parties' contract and this required consideration of the Defendant's booking conditions and the incorporated conditions of carriage;

b. the booking conditions and conditions of carriage qualified the obligation to provide the itinerary and other services promised in the brochure – the Defendant was under no obligation to provide the scheduled itinerary or, indeed, the services and amenities on board in the case of severe weather and, in these circumstances, the booking conditions made it clear that no compensation would be payable;

c. in the light of the qualifications set out in the booking conditions, a failure to provide services in the event of adverse weather could not amount to a failure to provide "*the services* ***contracted for***" [emphasis added];

d. it was not, in any event, "*appropriate*" to compensate the Claimants.

The Claimants agreed that a sensible starting point was the Defendant's brochure. The representations contained in the brochure as to itinerary, services and amenities on board had implied warranty (ie. *contractual*) status by reason of regulation 6(1) of the Package Travel etc Regulations 1992. It was submitted that "*services*" (within the meaning of reg 14(1)) comprised the amenities on board and the scheduled itinerary which were set out in the brochure. The Claimants submitted that it made no

difference to the application of regulation 14 that the Defendant sought, in its booking conditions, to qualify its performance/provision of these services. Defining the circumstances in which services were to be provided did not, on a fair construction of regulation 14(1), prevent these from being "*services contracted for*" (eg. where the Defendant promised, as a matter of contract, to provide a swimming pool, the "*service*" contracted for was the swimming pool, not, it was submitted, the Defendant's best effort to provide the same, subject to any *force majeure* events). Further, it was pointed out that regulation 14 does not require there to have been any breach of contract before its provisions take effect (cf. the position under regulation 15 of the 1992 Regulations where there has to have been a *failure to perform or improper performance of* ***the contract*** before the extended liability provisions of that regulation apply); regulation 14 applies where there has been a failure to provide a significant proportion of services *whatever the cause of this and whether as a breach of contract or otherwise*. In respect of the Defendant's Booking Conditions, it was submitted that their wording was ambiguous and, effectively, meaningless; the Claimants argued that any successful contracting out of the obligation to provide the remedies contained in regulation 14 had to be clear and carefully expressed. Finally, it was submitted for the Claimants that the appropriateness or otherwise of the compensation available under regulation 14 was directed *not* to whether the Defendant could or could not rely on defences provided by booking conditions, common law or regulation 15(2), but on what the Defendant had done to ensure the continuation of the package or its termination in accordance with its regulation 14 duties. If, for example, the Defendant arranged the continuation of a package by providing consumers with upgraded accommodation or a superior alternative holiday then it would plainly be inappropriate to compensate the consumers. The Claimants

submitted that the failure to provide visits to 3 out of 5 scheduled ports of call and the amenities advertized in the brochure constituted a failure to provide a "*significant proportion*" of the contracted services.

Regulation 14: judgment

A reserved judgment was given by HHJ Karsten QC on 18 October 2005. The Judge commenced by construing the Defendant's booking conditions and the conditions of carriage. I shall not set out the specific passages of the booking conditions to which reference was made (This article is concerned with the proper meaning of regulation 14, rather than the booking conditions of one tour operator). However, it may be worth recording that the Judge concluded that the Defendant had successfully drafted its booking conditions so as to reserve the right to alter the scheduled itinerary of the cruise holiday in the event of adverse weather, but had not succeeded in achieving the same result with respect to alterations made to the services/amenities on board. The Judge declined to deal with an alternative submission made on behalf of the Claimants; namely, that the Defendant's booking conditions offended the reasonableness provisions of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. It was implicit that, on his construction of the same, he did not regard the booking conditions as entitling the Defendant to make changes to what was promised without providing any compensation. The Judge's conclusions on these points of construction, while lacking any general significance, do illustrate, again, the importance (for tour operators) of ensuring that booking conditions read clearly and make sense (of particular importance is the need to ensure that there is consistency and clarity where there is cross reference from one section of the booking conditions to another).

Having cleared his way through the Defendant's booking conditions, the Judge went on to consider the parties' arguments with respect to regulation 14. He confessed, as preface to his conclusions, that his mind had "*wavered*". The following conclusions are taken from my (unapproved) note of the judgment:

> "*At the end of the day, I conclude that* … [Claimants' counsel] *is right in his purposive construction of regulation 14. If* … [Defendant's counsel's] *construction were right, it would mean tour operators would be able to leave consumers high and dry if an event made it impossible to continue with the holiday. That is not what people entering into contracts would expect. I conclude that it was precisely to avoid that that regulation 14 was included in the 1992 Regulations. Regulation 14 does come into play when a tour operator is unable to provide a significant proportion of the services contracted for whether or not he is in breach of contract.*"

Having reached this conclusion, the Judge had no difficulty in deciding that the cumulative effect of failing to visit 3 out 5 scheduled ports and the loss of amenities/services on board constituted a failure to provide a significant proportion of services (he indicated, *obiter*, that he would have reached a different conclusion, on the evidence, if the only services not provided were those on board the *Topaz*, rather than the changes to the itinerary).

At this point in the judgment the Claimants were looking forward to a finding that the Defendant was liable to compensate them. It was at this point that things started to go wrong for them.

The Judge went on to find that, in the circumstances, the Defendant had made "*suitable alternative arrangements, at no extra cost to the consumer, for the*

continuation of the package". This left a final, crucial, issue: namely, whether it was "*appropriate*", within the meaning of regulation 14(2), to "*compensate the consumer for the difference between the services to be supplied under the contract and those supplied*."

Again, the Judge's conclusions on this issue are set out from my (unapproved) note of judgment:

> "[Claimants' counsel] *urges that the services actually supplied were less valuable or less good than those promised and that it is, therefore, appropriate to compensate. I'm not convinced by that. I take the view that it is necessary to consider the circumstances leading to the need to make suitable alternative arrangements. Here, it was adverse weather that caused the shortfall in what was promised and it was weather which occurred through no fault of the organiser of the holiday. It would be quite wrong to expect the tour operator to provide compensation in those circumstances. A person taking a cruise holiday takes the risk of the weather conditions. As Longmore LJ pointed out in Hone v Going Places Leisure Travel Limited [2001] EWCA Civ 947, tour operators do not usually enter into absolute obligations, their contractual obligations are based on the need to exercise reasonable care and skill. That accords with the English common law. … Having regard to the fact that there are no absolute obligations to provide services in the form of the itinerary and amenities on board and the fact that there are good reasons why the Defendant was not able to provide these services, I conclude that it is not appropriate to compensate the Claimants under regulation 14*".

The Claimants' claims were, accordingly, dismissed and permission to appeal was refused.

Comment

The judgment in *Lara Tanner* provides little for either Claimants or Defendants to cheer about.

From the Defendant perspective, the judgment:

- cut a swathe through a set of booking conditions (finding that they signally failed to achieve the result contended for); and,
- made it clear that a Defendant cannot contract out of regulation 14 by seeking to qualify, by means of booking conditions, what are and are not the "*services contracted for*" – regulation 14, by contrast to regulation 15, applies whether or not there is a breach of contract.

From the Claimant perspective, the judgment:

- reserves to the trial Judge a wide and unfettered discretion to decide when it is and is not "*appropriate*" to compensate under regulation 14; and,
- the appropriateness of compensation is not a concept dependent upon a comparison of what was promised with what was actually provided as a suitable alternative, but requires analysis of the reasons for the failure to provide.

In some respects the judgment is helpful and brings some clarity. It is the first decision to shed light on the meaning of the words "*services contracted for*" where used in regulation 14(1). It establishes that regulation 14 provides free-standing remedies and that it is not permissible to graft the escape clauses of regulation 15(2) of the 1992 Regulations onto regulation 14. It also casts considerable doubt on the reliability and usefulness of two first instance decisions by District Judges (*Cooper v*

Princess Cruises Limited [2002] (unreported) and *Charlson v Mark Warner Limited* [2000] ITLJ 196); the Claimants submitted that these decisions (which were included in the trial bundle) were simply wrong and they were not referred to in the Judge's judgment.

However, the problem remains that the words "*where appropriate*" have been relied upon to import general considerations of foreseeability, reasonableness and fairness which have much to do with a Judge's broad assessment of the general merits, but, it is suggested, little to do with the proper construction of regulation 14. In addition, consideration of the nature of the Defendant's contractual obligations, in the context of a discussion of whether it is appropriate to compensate the Claimants, sits uneasily alongside the earlier conclusion that, "*Regulation 14 does come into play when a tour operator is unable to provide a significant proportion of the services contracted for whether or not he is in breach of contract.*" No doubt, further (and, perhaps, different) answers to the questions considered in this article will be given as regulation 14 continues to be litigated in the courts.

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