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"THE ONE THING NEEDFUL"[1]

The Association of British Travel Agents Ltd. v Civil Aviation Authority [2006] EWCA Civ 1299 (Chadwick LJ)

Introduction

"Now, what I want is, Facts. Teach these boys and girls nothing but Facts. Facts alone are wanted in life. Plant nothing else, and root out everything else. You can only form the minds of reasoning animals upon Facts: nothing else will ever be of any service to them. This is the principle on which I bring up my own children, and this is the principle on which I bring up these children. Stick to Facts, sir! … In this life, we want nothing but Facts, sir; nothing but Facts! … The speaker … backed a little, and swept with [his] eyes the inclined plane of little vessels then and there arranged in order, ready to have imperial gallons of facts poured into them until they were full to the brim."

It is unusual for those of us engaged in Travel Law to be considered as "reasoning animals" let alone "little vessels" just waiting to have facts poured inside, but this is how the Court of Appeal sees us. True enough Chadwick L.J. did not say so explicitly on either count, but such is the irresistible inference to be drawn from his judgment in the *ABTA v CAA* appeal.

In my discussion of Goldring J.'s decision at first instance[2] I emphasized the tendency of English judges to the "purposive and literal" strand of statutory interpretation. In considering the judgment on appeal, however, one is struck by another familiar golden thread that weaves its way through the fabric of English law. It is this. Never lay down a *principle* and certainly not a *rule* if a decision can turn on a *fact*. This is why it is *dangerous* to assume that the decision currently under discussion provides final (or indeed any) answers to vexed questions such as: What is an inclusive price; can tour operators

[1] With apologies to Charles Dickens' Mr. Gradgrind in"Hard Times" (Chapter 1).
[2] 2006 ITLJ 80.

unwrap packages and sell components dynamically; when is a travel agent to be regarded as an organizer of regulated packages in need of an ATOL? Tour operators tempted to offer holiday items for sale "off-package" that were previously packaged need to exercise great care. The Court of Appeal's judgment is simply a decision to the effect that the CAA's Guidance was *on this occasion* capable of misleading the uniformed reader and for that reason should be withdrawn. It is not a licence to avoid the application of either the Package Travel (Etc.) Regulations 1992 or the ATOL Regulations 2003.

The Judgment

Three particular extracts from the judgment in conjunction with the Guidance under challenge will be enough to illustrate the point that facts are more important than principles.

Paragraph 4.7 of the CAA Guidance provided:

"If an agent advertises that he can provide tailor-made holiday arrangements or he can provide dynamic packages, then he will need an ATOL to cover the majority of such sales …"

Chadwick LJ comments as follows (emphasis added):

"The first sentence is a correct statement of the law in so far as it relates to "dynamic packages" – provided of course that the package includes flight accommodation. On the other hand "tailor-made holiday arrangements" are not necessarily within the definition of "package"; although some (indeed, perhaps the majority) will be. That issue will turn on the facts of the particular case: is the advertisement to be seen as an offer to sell a pre-arranged combination of travel services … or as an offer to sell a number of separate services, each at its own price."

Paragraph 5.4 of the Guidance included the following:

"A customer buys a flight from an agent … and at a later date returns to buy accommodation. The sale of 2 services at different times does not, unless they are linked by documentation, create a package."

Chadwick LJ:

"The question, in each case, is whether, at the time of the first sale, the combination of the service then sold with the service to be sold by the second sale was pre-arranged. Common documentation might point to the conclusion that there was a pre-arranged combination; but it will not always do so."

Paragraph 6.1 of the Guidance:

"…if (the consumer) approaches an agent and explains that he wants to buy a flight and accommodation and/or services, or merely wants to buy a holiday, then it is likely that the arrangements will have been sold or offered for sale to him as a package."

Chadwick LJ:

"As I have explained, an offer to sell two or more separate travel services at the same time does not necessarily lead to the conclusion that the services are being sold of offered for sale as components in a pre-arranged combination at an inclusive price; but, on the facts of a particular case, it may be so.

Those who look for firm answers to hard questions may be forgiven a degree of dismay at such fact sensitive judging but it was ever thus.

The last extract should be seen in the context of paragraphs 27 to 31 of the judgment in which Chadwick LJ suggests that where a travel agent offers a consumer 3 components priced at £X, £Y and £Z for the single price of £[X+Y+Z] there is likely to be a prearranged combination at an inclusive price[3] - a regulated package – but where these are bought on separate occasions there is *not* likely to be a regulated package even though the same services for the same price are provided. Still plenty of room for avoidance strategies here then.

Déja Vu

Any trial lawyer will tell you that we have been here many, many times before. Just as nature abhors a vacuum[4], English judges abhor principles[5]. Before concluding that something is or is not a regulated package an English judge needs all the *facts*; to see all the *documents;* to hear the *witnesses*. After that a judge may conclude that such-and-such is *not* a regulated package, but a pack of drunken Club 18-30 reps. will not drag out of him what *would* have constituted a package.

Take the most basic illustration of this feature of English trials, the often times heard judicial expression "*your problem, Mr. Saggerson …"* and the particular problem the judge has in mind is: "*I didn't believe a word your witness said".* What is overlooked more often than not is that judges decide which way the case should go, and *then* reason backwards from that conclusion. It is not principle that drives them forward towards a conclusion it is the facts that help keep them away

[3] Really?
[4] As indeed, I suspect, does my housekeeper.
[5] See above footnote 4.

from the statement of any principle and more to the point, it is facts that frequently absolve the judge from making a difficult legal decision at all.

In Travel Law we see this all the time in the context of, for example, excursions. Too much has been written about excursions already[6] and anyone who has persevered thus far will almost certainly know what I mean. The industry searches for a magic answer to the question: when is a tour operator liable for a locally supplied excursion? The *only* answer to this question is: *it depends!* On what does it depend? It depends on the documents and what the witnesses say happened.[7] That is, it depends on the *facts*. Naturally, tour operators can be advised on how to minimize the chances of them being found liable for accidents that occur during the course of locally purchased excursions but the end result will still depend on how the evidence turns out in court.

Let me give another example from the coal face. Complex arguments arise about the scope and applicability of article 17 of the Warsaw Convention and the extent of the carrier's liability for bodily injury to a passenger in the course of embarkation in the event of a qualifying accident. Each side produces a lever arch file of authorities, which, conflicting, are capable of supporting their respective contentions. In this situation[8] it is a racing certainty that a Circuit Judge faced with conflicting strands of appellate and international authority will decide *on the facts* that there was *no accident* at all, and that the Claimant has lied about falling down the stairs at her departure terminal – and that is *precisely* what the judge decided (and who can blame her?). The two strands of conflicting authority remain unresolved.

Occasionally and ill-advisedly judges stray from this well worn path. A colleague tells me of one particularly preposterous recent example in which a District Judge – who shall be nameless – concluded that where a consumer books a half board regime there is an improper performance of the holiday contract where the main meal provided has fewer than 3 courses. With such absurdities in mind it is easy to see why judges generally try to avoid laying down immutable rules.

Plus Ça Change

[6] *Chapman: A Voyage Round Regulation 2(1)* [2004] ITLJ 129.
[7] An otherwise impeccable "excursion defence" can be scuppered when a Claimant alleges (truthfully or otherwise) that the local representative orally promised them it was a tour operator-managed excursion – and is believed.
[8] A real situation.

All of which brings us back to Chadwick LJ and *ABTA v CAA.* Consider what he said in the context of the CAA Guidance advice about the sale of separate components for separate sums. At paragraph 36 of his judgment he says:

"The vice, as it seems to me, is that – in the absence of any explanation as to what is meant by the phrase 'sold or offered for sale at an inclusive price' – the uninformed reader might be led to think that 'inclusive price' was synonymous with 'total price' … If a reader might be led to that conclusion, the paragraph[9] is potentially misleading."

In other words, the vice of the CAA's Guidance was, at least in part, that it was not *fact sensitive enough*. Its broad sweep failed to account for the almost infinite different situations that might arise – some of which would involve pre-arrangement and some of which would be offered at inclusive prices – and some both. One might say that the CAA strayed where the judiciary fears to tread but in doing so committed a cardinal sin by implying to the uniformed that an ATOL would be required wherever components were sold for an aggregate *total* price without clearly distinguishing between that and an *inclusive* price. Although he has a go at narrowing the scope for argument, Chadwick LJ does not give us (and did not intend to give us) an all-encompassing definition of *inclusive price* or, for that matter, *pre-arranged.* In each of the 3 extracts from the judgment used as examples in above he goes out of his way to emphasize that even where there may be a general assumption, the facts in a given case may lead to the opposite conclusion. He did not provide an all-singing-all-dancing definition because it was not *necessary* for him to do so in order to decide the case in point, namely that the CAA's Guidance was potentially misleading to the general reader as it stood and, therefore, could not be allowed to stand. It was not necessary for the Court of Appeal to say what the Guidance *should* have said.

Judgments & Technology

Why then, some may ask, does it take the Court of Appeal 67 dense paragraphs to expound "Appeal Dismissed"? One might ask more generally, why are judgments so long these days? Mr. Justice Holland may have the answer. It is his theory that before the invention of the pocket calculator, personal injury damages were, perforce, simple and straightforward because the calculations had to be done by hand in a notebook. With the advent of the calculator all became more sophisticated and with sophistication came Schedules and Counter-

[9] Paragraph 2.5 of the CAA Guidance Note.

Schedules of (sometimes) inordinate length and mind-numbing complexity.

Perhaps it is with the advent of word processors that “Appeal Dismissed” now takes 67 paragraphs.

One Final Fact

I hope I will be forgiven for reminding those of you in attendance at the International Travel Law Conference at Newcastle in May 2006 that “*I told you so*” – and that, were this article to be my last word on Travel Law, would be a splendid epitaph. *Please* tell me this case is not going to the House of Lords.

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