ITLJ May 2006

LITERALLY A TRIUMPH FOR CONSUMERS

Introduction

The decision of Goldring J. in *ABTA v CAA*[1] may have sent a shiver down the spines of our European brethren based as it is on a strict construction of the words and phrases used in the Package Travel (Etc.) Regulations 1992 as adopted by the ATOL Regulations 1995 (and amended in 2003). Not a sniff of *in dubio pro consumatore*[2] in the Administrative Court of the Queen's Bench Division – or so they may say. The English "literalists" have once again spiked the consumer protection guns of the European regulators – the argument goes. By means of a narrow interpretation of the words "*inclusive price*" the definition of a "package" has been confined and consumer protection has been thwarted. Not so, is the short answer. The literal interpretation of statutory regulation brings with it several important consumer benefits of which two general and two specific are worth mentioning:

- Certainty is the biggest friend of the citizen when *any* law falls to be construed - and literalism is the hand maiden of certainty (what the CAA tries today in the name of consumer protection, the Revenue will do tomorrow in the name of "efficient" tax collecting);
- The scope and reach of statutory regulation must be defined by *Parliament* not by non-governmental organisations such as the CAA. So it is *not* for the CAA to tell us what constitutes a regulated package by the adoption of some teleological method of interpretation in what the CAA may think is in the best interests of consumers. If the literal definition is not liked, then Parliament should be lobbied for a change. Change should not be introduced by extra-statutory dictat;
- Specific to the cause in issue, it is not self evident to many (however obvious it may appear to the CAA) that split contracting in holiday arrangements *is* a bad thing. Split contracting increases consumer choice, and reduces prices;
- ATOL licences cost money and are likely to increase prices to the consumer and the need for ATOLs may compromise the viability of some travel agent businesses thus further reducing consumer choice.

Here also lies the main problem with any "schematic" or "purposive" approach to statutory interpretation (whatever the legislative source of the statute). It is all very well construing (or re-interpreting) regulations on the foundation of

[1] [CO/2828/2005]16 January 2006.
[2] See: *Klaus Tonner – Liability According to the EU Package Tours Directive & National Implementation* [2005] ITLJ 203 at 206. See also McDonald: *Revisiting Organiser Liability under the Package Travel Directive* [2003] ITLJ 131-147 & 211-225. Also McDonald: *Distance Contracts Directive and Tourist Bookings* [2005] ITLJ192.

consumer protection, but *who* determines what lies in the best interests of consumers? We have been here before. There are those who still get sclerotic at the very idea that regulation 15 of the Package Travel (Etc.) Regulations 1992 ("PTR") has not been used in England as a vehicle for imposing strict liability on tour operators or reversing the burden of proof in travel damages cases. Apparently "*[I]t is generally understood by European lawyers that Art. 5(1)*" – of The Package Tours Directive – "*means that the tour operator is under a strict liability to properly perform the contract. Art. 5(2)*[3] *allows the tour operator a defence only on one of the three grounds enumerated in this provision*"[4]

Generally understood it may be. But can it be right, and what does it mean? At the risk of causing the consumer-protection merchants to reach for their Warfarin, all Article 5(1) of the Directive says is that "*Member States shall take the necessary steps to ensure that the … party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract* (irrespective of who performs those obligations)". It is quite simply *impossible* linguistically or logically to get from the starting point of a proper performance of the contractual obligations, to the conclusion that Art. 5(1) imposes strict liability or creates new procedural rules for the *lex fori* by means of the reversal of the burden of proof. To reach such a conclusion one has to inflict actual bodily harm on the words of the *Directive* (never mind our own PTR). One cannot assess proper performance without knowing what the obligations under the contract *are*. To the extent that those obligations are, in accordance with the law of the contract, obligations to exercise reasonable care, proper performance *cannot* imply strict liability.

The CAA, wearing its consumer protection hat, in its Guidance Note 26 of March 2005, attempted to elasticate the statutory meaning and scope of a regulated package (which would significantly affect both the ATOL Regulations and the PTR) and the CAA did so by adopting a definition of "*inclusive price*" that was equally difficult to justify in language or logic. The CAA also appeared to have been oblivious to the fact that it is not its function to re-define statutory terms to meet changing travel contract trends.

Purposive-and-Literal

Lord Denning once commented[5] on what is, to us, an alien approach to statutory construction:

"*European Judges adopt a method they call in English by strange words – the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go*

[3] 5(1) and 5(2) being our Regulations 15(1) and 15(2) of the PTR.
[4] *Klaus Tonner* – above page 205.
[5] Although it must be said that his comments barely do justice to the complexities of the theories of so-called "purposive" construction.

by the design or purpose behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in the gaps, quite unashamedly, without hesitation."[6]

In its Guidance Note 26 of March 2005 the CAA adopted a similar approach to the interpretation of the expression "*package*" in paragraph 3 (1A) of the ATOL regulations 1995 (as inserted by amendment in 2003) and in particular words such as "*inclusive price*". This approach was driven by what the CAA must have thought was the underlying purpose not only of its own function but also the purpose of the ATOL Regulations and PTR, rather than the words and grammar of the statutory language itself. It was the CAA's teleological interpretation of the definition of a "*package*" that led to *ABTA v CAA*. In short the Guidance Note purported to alert travel agents to the fact that they might be prosecuted if they failed to purchase ATOLs on the basis of what the CAA thought the definition of a "package" *should* be as opposed to what it actually *was*. ABTA on behalf of its member travel agents sought a declaration from the High Court to the effect that this was *misGuidance* – and they were adjudged right.

The English approach to statutory construction is as often misunderstood as it is misstated. The preferred or presumptive method of statutory construction in England is not simply "literal" as some critics would have it. It is "*Purposive-and-literal*" according to Bennion (*Statutory Interpretation* 4th. edition 2002). In other words to invest statutory words with their literal meaning is presumed to realise the purpose underlying the legislation and *vis-versa* – the purpose of the legislation should permit a literal interpretation of the words used. After all, the legislature has adopted those words intending that they should convey what they mean. If a construction is not *purposive-and-literal* it can only be *purposive-and-strained.* Giving a statutory clause a strained meaning (however purposive) surely defeats the intention of the author.

A problem arises sometimes where statutory words have more than one purposive-and-literal meaning. In this situation the underlying purpose of the legislation may take centre stage in order to determine which of the several literal meanings is the appropriate one. The result should still be a literal interpretation of the statute but one that resolves an ambiguity as to what the literal meaning is.

The CAA and ATOL Regulations

The CAA was conceived (amongst other things) as the licensing authority concerned with the *financial* protection of consumers following a number of high-profile tour operator failures which left holidaymakers stranded abroad or

[6] James Buchannan & Co. Ltd. V Babco Forwarding & Shipping (UK) Ltd [1977] 2 WLR 107 at 112.

abandoned at home without holidays for which they had paid[7]. Licensing provisions were introduced with regard to the provision of flight accommodation. By means of the ATOL Regulations 1995 introduced under the Civil Aviation Act 1982 as subsequently amended in 2003 the consumer was supposedly protected against tour operator business failures by means of the fact that any flight accommodation provided had to be directly traceable back to an ATOL holder, and the holding of an ATOL would itself be a badge of security protecting the consumer effectively guaranteeing repatriation and/or compensation in the event of insolvency. The relevant 2003 amendment to the ATOL Regulations provided that "*A person shall not make available flight accommodation which constitutes a component of a package in the capacity of an agent for a licence holder except where all the components of the package are made available under a single contract between the licence holder and the consumer.*"

The apparent objective of this amendment was to cure the perceived mischief of contract splitting - to put a stop to "unscrupulous" travel agents hiving off air transport from hotel services, and making each the subject of *separate* contracts so that only the air transport element was protected under the ATOL. The consumer, it was thought, was likely to believe that they were purchasing a package holiday (hotel and flights) whereas they were not, due to the separate contracts. The 2003 amendment to the ATOL Regulations simply provided that if the seller was acting as an agent for an ATOL holder, the flights sold to a consumer as part of a package had to be sold as part of a *single contract* between the ATOL holder and consumer encompassing all package elements. The amended regulations did *not* say that wherever split contracting was attempted by the travel agent the travel agent should be deemed to have entered into a package contract with the consumer. The ATOL Regulations as amended in 2003 adopted the same definition of a "package" as the Package Travel (Etc.) Regulations 1992 - but it was not the 2003 amendment to the ATOL Regulations that was open to challenge but Guidance issued pursuant to it.

Guidance Note 26

By Guidance Note 26 the CAA advised (in short) that a number of contract-splitting arrangements were likely to constitute *regulated packages* requiring travel agents (assuming the provision of flight accommodation) to have ATOLs. Examples were given in the Guidance Note of which the following 3 will suffice by way of illustration as to how the travel agent was to be required to have an ATOL:

- Where a travel agent advertised a number of travel facilities that were mixed-and-matched or put together by the consumer from different providers to form a single holiday.
- Where a travel agent offered the consumer a choice of facilities from different providers and that choice resulted in the sale of a holiday.

[7] Remember "Court Line" or as Professor Grant describes it at [2005] ITLJ 165, "the Court Line *disaster*".

- Where a travel agent advertised his services as including the provision of "dynamic" packages or tailor-made holidays and an arrangement with more than one supplier resulted.

The common thread in these 3 examples is not simply that they purported to extend the occasions on which a travel agent would need an ATOL (an expensive business) but that the examples applied *regardless* of whether the holiday components were supplied as part of *one* contract with *one* ultimate supplier at an "inclusive price" or several separate contracts with several suppliers at a "total (or aggregate) price". The total price at the bottom of the list of separately purchased facilities from separate providers *was* the necessary "inclusive price" as required to constitute a regulated "package" maintained the CAA. In other words a travel agent was likely to need an ATOL wherever the travel agent actively interposed himself between consumer and holiday service providers. So, travel agents were in need of ATOLs not because Parliament expressly said so and not because the courts have so construed the definition of a "package" or interpreted the words "inclusive price" but because an autonomous public (but non-governmental) organisation *said* it was necessary in the interests of consumer protection. The essence of the ABTA challenge was that the CAA was not empowered to impose its own interpretation of what constituted a regulated package on the rest of us and the interpretation it was circulating ignored significant statutory words, not least of all "*inclusive price*". The CAA was surely here attempting to *redefine* a regulated package. This can only be a legitimate function for Parliament.

CAA – Purposive-and-Strained

The *strained* and rejected interpretation of what was an "*inclusive price*" for the purposes of the ATOL Regulations and PTR went along the following lines. The concept of an inclusive price focused on whether the different components of a holiday were sold or offered for sale *together*. It was sufficient that the travel agent was asking the consumer to pay a price that reflected a number of separate or discrete components just as long as they were all on offer at the same time. The fact that each component might be provided by a different supplier was irrelevant for the purposes of deciding whether the travel agent was offering or selling something at an "inclusive price". Inclusiveness was to be evidenced by no more that the arithmetical total of the different components.

There were two major arguments canvassed against this strained interpretation of the expression "inclusive price". The first was that it was difficult to see what would *not* be an inclusive price if all that was required was an invoice with a list of separate contract prices totaled at the bottom. Second, the CAA's argument implicitly ignored established principles of the English law of agency because in making the travel agent liable as the package provider under the ATOL regulations, the CAA was implying that the travel agent was a principal to a contract between itself and the consumer when in fact more often than not it was

merely an agent standing between the consumer and the various component providers.

Without the binding cement of an "inclusive price" the three examples given above (and many others not cited here) of what the CAA *advised* were regulated packages making travel agents subject to the ATOL Regulations in Guidance Note 26, could *not* be regulated packages. Goldring J. did not side with the CAA and concluded that for "*...the sale of a package at an inclusive price the relationship between the component parts of that package must be such as to mean that the consumer is buying and paying for them as a whole: that the sale or offer for sale of one component part is in some way connected with or dependent on the sale or offer for sale of the others.*" He went on: "*Although the PTR provide for an extension of liability in the limited and specific ways set out within them, they do not ... mean that a wider definition of 'inclusive price' than that understood to be the ordinary and natural one, should be applied.*"

Literal, Ordinary & True

The short point underlined by Goldring J. was simply this. The prohibition on making flight accommodation available in ATOL Regulation 3(1A) bites only where the travel agent is selling flights that constitute a component of a "package" as defined therein and in the PTR. The travel agent is not selling flights as components of packages unless the sale or offer for sale of the flights with other components is at an inclusive price, and an inclusive price is different from the sum total of several separate prices. Thus, where there is no inclusive price, there is no package and the travel agent may continue with the practice of split-contracting. It was, he implied, not good enough to stretch the ordinary meaning of the word "inclusive" merely on the strength of a perceived regulatory need to protect consumers from the evils of split contracting or based on the mere fact that the source of the expression was the European Package Travel Directive.

What one should not conclude from the decision of Goldring J. is that the classic tour-operator-supplied-package can easily be deconstructed to produce a constellation of components sold at *separate* prices shown on a single invoice where the reality is that the holiday is a single contract at an inclusive price. One suspects that judges will continue to look just as closely at ATOL and PTR avoidance mechanisms as Goldring J. looked at the CAA's attempt to stretch the meaning of "inclusive price" in order to bring travel agents generally within the class of persons requiring ATOL licenses. Nonetheless, as so often happens in English law we are much clearer now on what an inclusive price is *not* than we are in fixing on a definition of what an inclusive price *is.* It's the old routine of trying to define an elephant. We all know one when we are trampled by one[8] but its damned difficult to come up with a workable, all-encompassing definition.

Alan Saggerson

[8] *James v Travelsphere* Cardiff County Court January 2005.

Barrister
1 Chancery Lane