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CASE NOTES

A TALE OF TWO CONVENTIONS

NORFOLK v MYTRAVEL GROUP PLC

21 August 2003: Plymouth County Court. HHJ Overend

The Claimant took a package holiday aboard the Cruise vessel "Carousel" on which she had an accident. She issued proceedings outside the 2 year limitation period sanctioned by the Athens Convention. The main issue was whether the Claimant's action was time-barred by virtue of article 16 the Convention or whether she had a claim under the Package Travel Regulations 1992 which would allow her a 3 year limitation period. Article 14 of the Convention provides that "*no action for damages for ... personal injury to a passenger ...shall be brought against the carrier otherwise than in accordance with this Convention*".

The Claimant argued that the Defendant had not incorporated the provisions of the Athens Convention into the package holiday contract and as a result could not rely on the Convention and the shorter limitation period. Regulation 15(3) of the Package Travel [Etc] Regulations 1992 provides that the holiday contract "*...may provide for compensation to be limited in accordance with the international conventions which govern such services.*" In other words, without incorporation into the package holiday contract, the Defendant could not rely on the provisions of the Athens Convention. The Defendant's case was that the Convention applied automatically as a matter of law.

The judge concluded that the claim arose out of a contract for international carriage. Like the Warsaw Convention governing carriage by air (see e.g. *Sidhu v British Airways* [1997] 2 WLR 26) the Athens Convention was intended to provide a uniform code applicable to international carriage by sea. The Convention was not either expressly or implicitly compromised by the Package Travel [Etc.] Regulations. Judge Overend said:

> *"If the effect (of the Convention) was to have been qualified, indeed partially repealed so as to make the Convention applicable only in circumstances where there had been an express reference in the contract involving the carrier, rather than the Convention applying a as a matter of law, then in my judgment the draughtsman would and should have said so in clear terms.*
>
> *...the limitation* (in regulation 15(3) of the Package Travel [Etc.] Regulations) *can be interpreted as being a reference to the damage-capping provisions of articles 7 and 8 rather than to the time-bar*

*provisions of article 16. Accordingly, I hold that there is no conflict between the (*Regulations and the Convention) *on the issue of the time-bar. The Regulations do not contain any provisions relating to a specific time-bar and the Athens Convention applies without the need fro any express reference."*

Therefore, where a package holiday includes international carriage by sea and the Defendant is the performing or contracting carrier, the Athens Convention "prevails" over the Package Travel Regulations at least in respect of those parts of the holiday concerned with the sea carriage.

AKEHURST v THOMSON HOLIDAYS LIMITED & BRITANNIA AIRWAYS LIMITED

Cardiff County Court - 6 May 2003

HHJ Graham Jones

The Claimants' package holiday flight crash-landed at Gerona Airport. The Claimants suffered physical and psychological injuries. Britannia admitted that they were liable in respect of the physical injuries pursuant to article 17 of the Warsaw Convention (but not, of course, for any psychological elements). The tour operator argued that it too was entitled to rely on the limiting provisions of the Warsaw Convention (both in respect of the amounts of compensation payable and the bar to claims for psychological injury) *because their Fair Trading Charter purported to incorporate Britannia's conditions of carriage which referred to the Warsaw Convention.*

A number of preliminary issues were tried. The important ones for present purposes were these:

1. Were Britannia's conditions of carriage incorporated into the holiday contracts via the Thomson Fair Trading Charter?

2. Were the holiday contracts subject to article 17 of the Warsaw Convention which restricts compensation for accident resulting in "bodily injury"?

In this action Thomson conceded that it was not the "carrier" for the purposes of the Warsaw Convention (compare with MyTravel in the *Norfolk* case above where it was conceded that the tour operator was the contracting carrier). Accordingly, it was conceded that the Warsaw Convention did not apply directly or automatically to the holidays as against Thomson, but would only do so *if expressly incorporated into the holiday contracts by the tour operator.*

The Judge concluded as follows.

1. The tour operator's terms and conditions expressly stated that all holiday components (including international transport) would be supplied to a reasonable standard and the tour operator accepted liability for injuries (not limited to bodily injuries) caused by any failure to provide the holiday services properly or by the fault of a service provider (such as an airline).
2. The small print also included the following: "The Conditions of Your Ticket": *Conditions of Carriage will apply to your journey. You can ask your travel agent booking your holiday to get you a copy of any conditions that apply to your journey …*
3. The attempt by Thomson to incorporate the carrier's ticket conditions was an attempt to qualify the otherwise clear fault-based acceptance of liability in the body of the small print.
4. An objective observer would not realise that *despite* the liability provisions in the small print, Thomson was trying to exclude liability for psychological injury. The reference to "The Conditions of Your Ticket" was at best ambiguous and would be taken not to be limiting the tour operator's liability but as a reference to the liabilities arising between the consumer and the *carrier - airline.*
5. The provisions attempting to incorporate Britannia's ticket conditions and thus the Warsaw Convention were at best ambiguous and had to be construed against Thomson. Any ambiguity being resolved in favour of the Claimant led to the only sensibly available conclusion that the ticket conditions applied only to the relationship between consumer and *carrier* and did not water-down Thomson's otherwise clearly expressed and accepted liability for injury sustained in the delivery of any of the package holiday services.
6. Furthermore, the attempt at excluding Thomson's liability for psychological injury had not been brought properly to the attention of the Claimants, and what's more this failure offended against regulation 9(1)(b) and (2) of the Package Travel [Etc.] Regulations 1992 which demands that written copies of the terms and conditions applicable to the holiday contract are supplied to the consumer. In seeking to rely on exclusionary provisions in the Warsaw Convention not properly communicated to the consumer under regulation 9 Thomson was attempting to take advantage of its own wrong and should not be permitted in law to do so.

The judge's conclusion was that the contentions against Thomson in respect of the incorporation of the Warsaw Convention into the package holiday contracts were so overwhelming that it was unnecessary to consider the impact of the *Unfair Terms in Consumer Contracts Regulations* 1994.

As a result the judge concluded that the Warsaw Convention had *not* been incorporated into the package holiday contract by reference to the Britannia ticket conditions or otherwise. Accordingly, the tour operator was bound by its own contract terms to the effect that in injury cases (including psychological injury) it accepted liability for the proper performance of contract services *and* delivery of the services to a reasonable standard.

That left but one issue outstanding. Did the fact that the tour operator contractually agreed to provide services to a "reasonable standard" mean that Thomson were bound to compensate passengers even though the crash landing occurred *despite the exercise of reasonable skill and care on the part of the carrier?* In other words, reasonable care being exercised by the flight crew, where the plane nonetheless crashes, is the result that the transport part of the package holiday is not *ipso facto* to a "reasonable standard" (or the transport part of the package has *ipso facto* not been properly performed) and the tour operator is thus liable? This issue was left for further argument on another day. Detailed reasons are still awaited.

There is no inconsistency between *Akehurst* (no direct application of Warsaw Convention) and *Norfolk* (direct application of Athens Convention) not least of all because the exclusivity of the remedies permitted under the respective international conventions affects only the performing and contracting *carriers*. In *Norfolk* (as with many cruise holidays) the tour operator was at least the *contracting* carrier. In *Akehurst* the tour operator conceded (wisely or otherwise) that it was not any species of carrier. What *Akehurst* does illustrate is that those who draft travel and holiday contracts (the "small print") should never overlook the general law on the incorporation and construction of contractual terms - both of which appear to have gone badly array in the relevant Thomson small print for these holidays. This is a hard lesson we have encountered before (see e.g. Case Note: *Horan* [2002] ITLJ 59. One day the lesson may be learnt.