TATLA

TRAVEL AND TOURISM LAWYERS' ASSOCIATION

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July 2016

***Brexit* means … what exactly?** With uncharacteristic lack of foresight, the most recent edition of this Newsletter contained an article describing some of the changes introduced by the new EU Package Travel Directive. As a result of 23 June 2016, cross border litigation and travel law more generally will operate in a much less certain legal environment. Brussels I (recast), the Rome Regulations and, yes, the Package Travel Directive are all likely to be affected by *Brexit* and the results of the UK Government's withdrawal negotiations. For the moment, only the reckless would predict an outcome. However, in the (perhaps likely?) event that the UK retains some/all of the EU provisions on jurisdiction and applicable law, it can be assumed that the Court of Justice will continue to develop and interpret the meaning of these legislative instruments in circumstances where UK Judges are no longer nominated for appointment to the Court. Not, perhaps, an ideal position. We live – like the Chinese curse – in interesting times. In the meantime, Happy Holidays to all TATLA Members!

Dawn Riddell v Hotels4U.com Ltd, 23 June 2016, Milton Keynes CC

In August 2013 the Claimant stayed at an Hotel in Hammamet, Tunisia. It was common ground that the index holiday was *not* a regulated "*package*" within the meaning of regulation 2(1) of the Package Travel etc. Regulations 1992 because individual holiday components (accommodation, flights etc) were individually priced and purchased. While staying at the Tunisian Hotel the Claimant contracted gastric illness. The Defendant company accepted that, as a result of a causative breach of duty in respect of food/drink served by the Hotel, the Claimant suffered (to some extent) from gastric illness. Equally, it was accepted that the Claimant must have stayed at the Hotel pursuant to a contract entered with someone. The issue for trial was discrete: which party owed the Claimant a contractual obligation with respect to the food and/or drinks served to her at the Hotel accommodation? The Claimant's case was that this was the Defendant (either because the Defendant was principal to the accommodation contract or because it had acted as agent for an undisclosed principal and, accordingly, was liable to be sued as if it were the principal). The Defendant's case was that the principal to the accommodation contract was the Hotel itself and the Defendant company was simply an agent.

In order to resolve this issue as to liability, it was necessary to analyse the manner in which the contract had been formed. There were a number of relevant phases in this process.

Stage 1: February 2013 (online search)

Claimant searched online and located the Sunshine.co.uk website: an online travel agent.

Stage 2 (selecting holiday components)

Claimant clicked through the Sunshine.co.uk website and selected the individual holiday components that she required.

Stage 3 (making a booking)

When she had identified her preferred combination of travel components the Claimant clicked on a button marked "*book now*" and added her personal details. The website contained the following caution throughout this process, "*Sunshine.co.uk acts only as agent in respect of all bookings we take and/or make on your behalf. For all arrangements, your contract will be with the supplier of the arrangements in question. You may decide to make one or more bookings with us at the same time, however all bookings are available to be purchased separately at the same price as they are if booked together. This means that any multiple bookings do not constitute a package as defined in the Package Travel Regulations 1992. Please see our booking details for further details*."

Stage 4 (making a payment)

Prior to making a payment online the Claimant had to press a button to indicate that she agreed to Sunshine.co.uk's booking conditions and she was unable to make a payment without giving this indication.

Stage 5 (the completion of the contract)

The booking was confirmed instantaneously/electronically once payment was

received. The Claimant received a Confirmation of Booking email dated 27 February 2013.

This Confirmation identified the separate elements of the holiday and confirmed that a payment (a deposit) had been paid. This email document identified the Hotel (Iberostar Chich Khan Hotel) and the suppliers of the flight (JustSunshine) and transfers (A2B Transfers). **However, there was no mention of the Defendant company on this document (in any capacity).** The Booking Conditions of Sunshine.co.uk stated in terms that confirmation of the booking (evidenced in this case by this email dated 27 February 2013) completed the contract-making process:

Stage 6 (customer's receipt of the Sunshine.co.uk invoice and accommodation voucher)

The generation and receipt of this documentation *followed* the completion of the contract at **Stage 5** above:

The accommodation voucher generated by Sunshine.co.uk contained the following:

- "***Supplier Reference: Med Hotels 4155969***"
- "***Supplier Notes*** *Med Hotels advise that in the event of any problems with your accommodation whilst in resort you must firstly report these to the hotelier and, if the situation is not resolved quickly, to then use the emergency contact number shown below. Please note that complaints will only be considered upon your return (these must be put in writing to sunshine.co.uk within 28 days of your return home) where contact has also been made with the local agent in resort via the telephone number shown below within a reasonable period after the complaint has become apparent. It is very important to note that customers who fail to follow the above complaints procedure will waive any right to compensation as a result*."
- "*Sunshine.co.uk are acting as a disclosed agent on behalf of Chich Khan Hotel, who is the principal with whom your accommodation is booked*".

It was the Defendant's case at trial that it was unambiguously clear that that the accommodation contract was concluded at **Stage 5** and – ***at this stage* – the Claimant did *not* know of the existence of the Defendant**. Further, at **Stage 5** all of the matters necessary for a contract – dates/accommodation and board/flights/price/payment – were complete and a contract for the provision of accommodation was therefore in place and the Hotel was principal to the same. The Accommodation Voucher and the Invoice were, it was submitted for the Defendant, only received *later* and, in the circumstances, the Defendant was *neither* principal to the accommodation contract *nor* agent for an undisclosed principal (the Hotel). (By obvious contrast to other undisclosed principal cases (***Moran v First Choice Holidays & Flights Ltd*** [2005] EWHC 2478 (QB), ***Parker v TUI UK Ltd*** [2009] EWCA Civ 1261, ***Rogers v Night Riders*** [1983] RTR 324 (CA), ***Brownlie v Four Seasons Holdings Inc*** [2015] EWCA Civ 665), the Defendant argued that the Claimant did not know of the existence of the alleged agent for the undisclosed principal at the time of contracting and, by contrast, the Claimant *did* know of the existence

and identity of the Hotel (run by the internationally well-known Iberostar company) and the Booking Conditions of Sunshine.co.uk alerted her to the fact that this Hotel (the only other entity of which she was aware at the time of contracting) was the accommodation supplier). The Claimant's argument was that, as a consumer, she had reasonably assumed that the Defendant was the other party to the accommodation contract (and this assumption was consistent with the Claimant's receipt of the accommodation voucher which did name the Defendant company).

It was ***held*** at trial that the contract had been concluded at **Stage 5**. Accordingly, the Judge accepted the Defendant's submission that the Defendant company could not have been principal to the contract nor agent for an undisclosed principal at the time of contracting (when the Claimant was unaware of the existence of the Defendant). The claim was dismissed.

In this case the Accommodation Voucher identified the Defendant and, in its ambiguity, was potentially unhelpful to the Defendant's argument that it acted only as agent for a disclosed principal. It was necessary for the Defendant to subject the contract-making process to the careful analysis set out above in order to demonstrate to the satisfaction of the Judge at trial that, by the time that the Claimant became aware of the existence of the Defendant, the contractual guillotine had already descended. The accommodation voucher was received by the Claimant *after* the contract had been formed (between, so the Court held, the Claimant and the Hotel: a disclosed principal) and, accordingly, had no contractual status.

Committeri v Club Mediterranee SA & Anor.
[2016] EWHC 1510 (QB, Dingemans J)

As indicated above, we might have to make the most of the English case law on EU legislation while we can (Lord Denning's flood will in due course become a trickle … sob).

The Claimant took part in a team building exercise in France which was organised by his (London-based) employer, BNP Paribas. The Claimant slipped and fell while on a climbing wall. Although he was caught by the rope he struck his foot during the fall, sustaining injury. The activity was organised by the Defendant tour operator, based in France, with whom BNP had entered a contract for the provision of travel, accommodation and the activity for its employees. The contract contained a 'Law and jurisdiction clause' which provided that the booking conditions would be governed by English law. It was common ground that if English law applied to the claim, it would fail. This was because the Claim would be governed by the Package Travel Regulations 1992 (the UK's implementation of the EU Package Travel Directive) which had been interpreted by the Court of Appeal in ***Hone v Going Places*** (2001) EWCA Civ 947 as requiring proof of fault, which the Claimant accepted he could not establish on the facts However, if the claim was governed by French law, it would succeed. This was because in France, the EU Package Travel Directive had been interpreted differently by the French courts, imposing a strict liability. Accordingly, the same Directive, implemented into two legal systems, had resulted in two very different standards of liability.

The critical question for the court was whether or not the Claimant's claim under French law was

non-contractual/tortious, or contractual. If it was tortious (and therefore governed by the Rome II Regulation (EC 864/2007)) the 'choice of law' clause in the booking conditions did not apply and the claim would succeed under French law. If his claim was contractual (and therefore governed by the Rome I regulation (EC 593/2008))the choice of law clause would lead to the application of English law, and the claim would fail.

The Court accepted that whether something was non-contractual/tortious or contractual had to be considered by reference to freestanding European law concepts. Nonetheless, the judge was wholly satisfied that the cause of action in France was a contractual one. The French courts had considered that the '*proper performance of the contract'* (the wording of the Directive and the French tourism code) in a package holiday setting required absolute consumer safety, but it was clear that the liability was still one arising from the contract entered into between BNP and the Defendant. It was also significant (although not decisive) that under both country's domestic legal regimes, the Courts had characterised claims arising from the directive (as implemented) as contractual. The result was that the claim failed.

Editor
Matthew Chapman