

# Kuoni referred to the CJEU by Supreme Court for clarification - possible impact on breach of contract, vicarious liability and assumption of responsibility claims for sexual abuse and assault

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25 July 2019

We were hoping to be able to give you some interesting insights following this judgment, but that will have to wait for another day. The Supreme Court has concluded, in its interim judgment, that a referral to the Court of Justice of the European Union (CJEU) is required first.

## Facts

Mr and Mrs X booked all-inclusive package holiday to Sri Lanka with Kuoni. Once in their hotel Mrs X, who was on her way to reception, came upon a man N who the judge at first instance found she knew to be an electrician. He was wearing a maintenance staff uniform. He offered to show her a short cut but in fact led her to the engineering room where he raped and assaulted her.

The claim was brought on the basis of breach of contract between the claimant and defendant and amongst other things under the Package Travel, Package Holidays and Package Tours Regulations 1992.

Regulation 15 provides:

*“(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because –*

*(a) the failures which occur in the performance of the contract are attributable to the consumer;*

*(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or*

*(c) such failures are due to –*

*(i) unusual and unforeseeable circumstances beyond the control of the party by whom the exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or*

*(ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.”*

## The history of the claim

Perhaps unusually this has always been put forward as a claim in contract. Although it was never pleaded, the Judge at first instance held that the hotel would not have been vicariously liable as a matter of law. This was not a claim that perpetrator was a known risk, or that there was systemic or operational negligence. The Judge also found that there was a statutory defence to the claim in contract.

The majority of the Court of Appeal also considered it unnecessary to consider the question of vicarious liability, finding Kuoni could reply on the statutory defence incorporated into its booking conditions.

Longmore LJ dissented concluding that the rape and circumstances leading up to it constituted “improper performance” for which Kuoni must take responsibility. His view was that under the law of England and Wales, the governing principle is that a person who undertakes contractual liability retains liability for his side of the bargain even if he performs it through others. He pointed out that the whole point of the relevant Directive and the Regulations was to give the holiday maker whose holiday had been ruined a remedy against his contractual opposite. It should be left to the tour operator to sort out the consequences of the ruined holiday. He was not convinced that the hotel would not be vicariously liable

## The Supreme Court

By the time the case was heard the main questions had boiled down to:

- Did the rape and assault of Mrs X constitute improper performance of the obligations of Kuoni under the contract?
- If so, is any liability of Kuoni in respect of N’s conduct excluded by clause 5.10(b) of the contract and/or regulation 15(2)(c) of the 1992 Regulations?

Unfortunately, in order to answer those questions (particularly the second one) the Supreme Court has found it necessary to make a referral to the CJEU on the interpretation of relevant Council Directives. This should determine the approach to package travel cases arising out of the criminal acts of suppliers of holiday services, and may well be relevant to other industries facing claims arising out of the criminal act of their employees and agents.

## Contact

Sarah Erwin-Jones

Partner

Sarah.Erwin-Jones@brownejacobson.com

+44 (0)115 976 6136

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