



THE COURT ORDERED that no one shall publish or reveal the name or address of the appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the appellant or of any member of her family in connection with these proceedings.

24 July 2019

PRESS SUMMARY

X (Appellant) v Kuoni Travel Ltd (Respondent)
[2019] UKSC 37
On appeal from [2018] EWCA Civ 938

JUSTICES: Lord Kerr, Lord Hodge, Lord Lloyd-Jones, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEAL

On or about 1 April 2010 the appellant and her husband (“Mr and Mrs X”) entered into a contract with the respondent tour operator (“Kuoni”) under which Kuoni agreed to provide a package holiday in Sri Lanka.

In the early hours of 17 July 2010, the appellant was making her way through the grounds of the hotel to the reception. She came upon a hotel employee, N, who was employed by the hotel as an electrician and (on the facts found by the judge) known to her as such. N was on duty and wearing the uniform of a member of the maintenance staff. N offered to show her a shortcut to reception, an offer which she accepted. N lured her into the engineering room where he raped and assaulted her.

In these proceedings Mrs X claims damages against Kuoni by reason of the rape and the assault. The claim is brought for breach of contract and/or under the Package Travel, Package Holidays and Package Tours Regulations 1992 (“the 1992 Regulations”) which implement in the United Kingdom Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (“the Directive”).

In the High Court, HHJ McKenna concluded that the contractual undertaking that “holiday arrangements” would be of a reasonable standard did not include a member of the maintenance team conducting a guest to reception. He further held that Kuoni would in any event have been able to rely on the statutory defence under regulation 15(2)(c)(ii) because the assault was an event which could not have been foreseen or forestalled (by inference by the hotel) even with all due care. The Court of Appeal (Sir Terence Etherton MR, Longmore and Asplin LJ) dismissed the appeal by a majority (Longmore LJ dissenting). In a joint judgment, the majority held that the holiday arrangements did not include N conducting Mrs X to reception. The majority further held that Kuoni was not liable under either the express terms of clause 5.10(b) or regulation 15 since N was not a “supplier” within the meaning of those provisions.

On appeal to the Supreme Court there were two main issues:

- (1) Did the rape and assault of Mrs X constitute improper performance of the obligations of Kuoni under the contract?
- (2) 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?

JUDGMENT

The Supreme Court unanimously decides to refer two questions to the Court of Justice of the European Union. The terms of the reference are set out by Lord Lloyd-Jones.

THE QUESTIONS REFERRED

For the purposes of this reference, the Court of Justice of the European Union is asked to assume that guidance by a member of the hotel's staff of Mrs X to the reception was a service within the "holiday arrangements" which Kuoni had contracted to provide and that the rape and assault constituted improper performance of the contract [22].

In order to determine this appeal, specifically in relation to the second issue identified above, the Supreme Court refers the following questions to the Court of Justice of the European Union [23]:

- (1) Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organizer or retailer with a consumer to provide a package holiday to which the Directive applies, and that failure to perform or improper performance is the result of the actions of an employee of a hotel company which is a provider of services to which that contract relates:
 - (a) is there scope for the application of the defence set out in the second part of the third alinea to article 5(2); and, if so,
 - (b) by which criteria is the national court to assess whether that defence applies?
- (2) Where an organizer or retailer enters into a contract with a consumer to provide a package holiday to which the Directive applies, and where a hotel company provides services to which that contract relates, is an employee of that hotel company himself to be considered a "supplier of services" for the purposes of the defence under article 5(2), third alinea of the Directive?

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>