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.

Trinity Term
[2021] UKSC 34
On appeal from: [2018] EWCA Civ 938

JUDGMENT

X (Appellant) *v* Kuoni Travel Ltd (Respondent)

before

Lord Hodge
Lord Lloyd-Jones
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

30 July 2021

Heard on 1 May 2019

Appellant
Robert Weir QC
Katherine Deal QC

(Instructed by Irwin Mitchell LLP (Birmingham))

Respondent
William Audland QC
Nina Ross
Achas Burin
(Instructed by MB Law Solicitors Ltd t/a MB Law (Leeds))

Intervener (ABTA Ltd)
Howard Stevens QC
James Hawkins
(Instructed by Kennedys Law LLP)

LORD LLOYD-JONES: (with whom Lord Hodge, Lady Arden and Lord Kitchin agree)

1. On or about 1 April 2010 the appellant and her husband ("Mr and Mrs X", anonymity orders having been made in respect of the appellant by the Court of Appeal and the Supreme Court) entered into a contract with the respondent tour operator ("Kuoni") under which Kuoni agreed to provide a package holiday in Sri Lanka which included return flights from the United Kingdom and 15 nights' all-inclusive accommodation at the Club Bentota hotel ("the hotel") between 8 and 23 July 2010.

2. The contract provided in relevant part:

> "Your contract is with Kuoni Travel Ltd. We will arrange to provide you with the various services which form part of the holiday you book with us." (Booking Conditions, clause 2.2)

> "… we will accept responsibility if due to fault on our part, or that of our agents or suppliers, any part of your holiday arrangements booked before your departure from the UK is not as described in the brochure, or not of a reasonable standard, or if you or any member of your party is killed or injured as a result of an activity forming part of those holiday arrangements. We do not accept responsibility if and to the extent that any failure of your holiday arrangements, or death or injury: is not caused by any fault of ours, or our agents or suppliers; is caused by you; … or is due to unforeseen circumstances which, even with all due care, we or our agents or suppliers could not have anticipated or avoided." (Booking Conditions, clause 5.10(b))

3. 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.

4. 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 (SI 1992/3288) ("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").

Relevant legislation

5. Article 5 of the Directive provided in relevant part:

> "Article 5
>
> 1. Member states shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.
>
> 2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, member states shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:
>
> - the failures which occur in the performance of the contract are attributable to the consumer,
>
> - such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,
>
> - such failures are due to a case of force majeure such as that defined in article 4(6), second sub-paragraph (ii), or to an event which the organizer

and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

…

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the member states may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2."

6. Regulation 15 of the 1992 Regulations provides in relevant part:

"(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.

(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.
>
> …
>
> (5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term."

7. Pursuant to section 13 of the Supply of Goods and Services Act 1982, Kuoni was required to carry out the services promised under the contract with reasonable care and skill.

The proceedings

8. At trial, Mrs X's case was essentially that the rape and assault amounted to the improper performance of a contractual obligation. (Before the Supreme Court, although a claim for breach of the 1992 Regulations was maintained, counsel for Mrs X emphasised that the claim was essentially a claim for breach of contract.) On her behalf, it was accepted that there was no basis for suggesting that N should have been identified as a risk. Furthermore, it was no part of her case that there was systemic or organisational negligence on the part of Kuoni or the hotel (such as failure to supervise N or carelessness in selecting N as an employee) causative of the attack. The assault was caused by N alone.

9. In its defence, Kuoni admitted that it was "responsible to the claimant for the proper performance of the obligations under the holiday contract whether or not such obligations were to be performed by the defendant or another supplier of services" and that the "said obligations would be performed with reasonable skill and care". However, Kuoni denied that the rape and assault by N constituted a breach of any obligations owed by Kuoni to Mrs X under the contract or the 1992 Regulations. In particular it denied that they constituted improper performance of any obligation under the contract. Furthermore, Kuoni relied, by way of defence, on clause 5.10(b) of the Booking Conditions and regulation 15(2)(c)(ii) of the 1992 Regulations.

10. At first instance, Judge McKenna, sitting as a judge of the High Court [2016] EWHC 3090 (QB), concluded (at paras 44 to 48) that "holiday arrangements" in clause 5.10(b) did not include a member of the maintenance staff conducting a guest to reception. He further held, obiter, 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. Although it was not necessary to decide the point, he held that the hotel would not have been vicariously liable for the rape and assault as a matter of Sri Lankan law, which it was agreed was the same as English law for these purposes.

11. The Court of Appeal (Sir Terence Etherton MR, Longmore and Asplin LJJ) dismissed the appeal by a majority (Longmore LJ dissenting): [2018] EWCA Civ 938; [2018] 1 WLR 3777.

12. In a joint judgment the Master of the Rolls and Asplin LJ held that on their proper interpretation, the words "holiday arrangements" in clause 5.10(b) did not include a member of the hotel's maintenance team, known to be such to the hotel guest, conducting the guest to the hotel's reception. This was no part of the functions for which the employee was employed (para 34). The 1992 Regulations were not designed to facilitate a claim against a tour operator for wrongful conduct by an employee of a supplier where that conduct was "not part of the role in which he was employed" and where the supplier would not have been vicariously liable under either the consumer's domestic law or the foreign law applicable to the supplier (para 37).

13. The majority further held, obiter, 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. The judge had properly held that the hotel and not N was the supplier of any services performed by N. The booking conditions referred to "our agents or suppliers", which denoted a need for a direct contractual or promissory relationship between Kuoni and whoever was to be regarded as a supplier. Furthermore, this reading was supported by regulation 15. Nothing in regulation 15 suggested some other meaning of the word "supplier" in clause 5.10(b) or the expression "supplier of services" in regulation 15 itself. The express reservation in regulation 15(1) of "any remedy or right of action which [the package tour operator] may have against [the] suppliers of services" was consistent with a direct relationship between the operator and the supplier and may be indicative of an assumption that there would be such a relationship. In a situation where one contracting party assumes primary and personal liability for the provision of services by agents or suppliers to a reasonable standard to the other contracting party, the natural meaning of "supplier" is the person who assumes a direct contractual or promissory obligation to provide such services and not an employee of such a person (at paras 38 to 41). There were no discernible policy reasons for imposing liability

on a tour operator when neither it nor the hotel were "at fault" and the express exclusion of liability under regulation 15(2)(c)(ii) pointed clearly to the contrary. Furthermore, in such circumstances it was not realistic to suppose that the tour operator could protect itself via an indemnity from the employee or the hotel or by way of insurance (at paras 43 to 47).

14. The majority considered it unnecessary to decide the question of vicarious liability on the part of the hotel for N's conduct because even if the hotel were vicariously liable Kuoni could nevertheless rely on the statutory defence incorporated into its booking conditions (at para 51).

15. Longmore LJ (dissenting) concluded as follows:

(1) He was not sure that Kuoni was correct in denying that there was a contractual obligation on the hotel or its staff to guide guests to reception but he was sure that if a member of the hotel staff offered to guide a guest to reception, as the judge had found, that was a service for which Kuoni accepted responsibility for it being done to a reasonable standard (at para 11).

(2) He rejected Kuoni's submission, founded on the judge's finding that N had lured Mrs X to the engineering room, that N was not providing a service at all. Mrs X thought that N was providing a service and had every reason to suppose that he was. Furthermore, N's actual motive was irrelevant (at para 12).

(3) There was no express term of the contract that any electrician employed by the hotel would also provide Mrs X with general assistance such as showing her to reception. However, in order that the "holiday arrangements" at a four-star hotel, which Kuoni had contracted to provide, should be provided to a reasonable standard, hotel staff must be helpful to guests when asked for assistance and all the more when offering assistance. On no view did N assist Mrs X in a reasonable way when he guided her to the engineering room (at para 13).

> "I would therefore conclude that the holiday arrangements for Mrs X were not of a reasonable standard and constituted improper performance within regulation 15(2). Kuoni must, subject to any available defences, take responsibility for that. So far, the identity of the supplier of the services is not critical. The Hotel supplies the service of assisting its guests and performs that service by means of its employees. But the

> question whether N was also supplying the service is critical when it comes to a consideration of the defences. If, as the judge held, it was the Hotel and only the Hotel which was the supplier, Kuoni has a good defence since the improper performance was due neither to Kuoni nor the Hotel because, on the findings of the judge, the failure of proper performance was due to an event which neither Kuoni nor the Hotel, even with all due care, could foresee or forestall. The Hotel did not fail to take up references for N and had no reason to suppose, from past history or any other reason, that he would rape one of the guests. If, however, N was a supplier of the service of assisting, rather than or as well as, the Hotel, then he (as that supplier) could foresee or forestall his own criminal activity." (at para 14)

(4) The use of the word "our" in Kuoni's booking conditions could not be decisive to indicate whether the supplier was N or the hotel (at para 15).

(5) The arguments as to who was the supplier were finely balanced and were to be decided on principle (at para 20). In 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 (at para 21).

(6) The whole point of the Directive and the 1992 Regulations was to give the holidaymaker 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 with those with whom it had itself contracted who could then sort things out further down the line whether with their own employees or their independent contractor (at para 22).

(7) There was no justification for concluding that the concept of supplier should stop with the hotel in the case of an independent contractor or an employee. The concept of supply may be no more than a question of degree (at para 24). However, there could be no doubt that some employees should be regarded as suppliers.

> "The captain of a cruise ship, for example, supplies the important service of navigating the ship without exposing it to danger; the fact that he is the employee of the shipping line makes little difference to the holiday makers on board and the travel operators should not be able to deny responsibility, even

if the shipping line had taken reasonable steps to procure the services of an experienced captain." (at para 23)

(8) Although vicarious liability on the part of the hotel was not decisive, he was far from certain that the hotel would not be vicariously liable under English law for a rape carried out by an employee in uniform and represented to the world as a reliable employee (at para 25).

The issues before the Supreme Court

16. On further appeal to the Supreme Court there were two main issues.

Issue 1: Did the rape and assault of Mrs X constitute improper performance of the obligations of Kuoni under the package travel contract?

Issue 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?

The submissions of the parties before the Supreme Court

17. The Supreme Court granted permission to ABTA Ltd ("ABTA") (a trade association representing British travel agents) to intervene in the appeal.

18. The parties agreed that clause 5.10(b) was intended to replicate the terms of regulation 15(2)(c) which, in turn, was intended to implement article 5 of the Directive. It was further agreed that liability under regulation 15 cannot be excluded by any contractual term (regulation 15(5)). The defence in contract is coextensive with the statutory defence.

19. The principal submissions made on behalf of Mrs X in relation to the first issue were as follows:

(1) The contract was designed to provide the consumer with an enjoyable experience. The tour operator was undertaking to provide a holiday of a certain quality and this encourages a broad, not a narrow, interpretation of the holiday services contracted for.

(2) The services which the operator contracted to provide were not limited to provision of transport, accommodation and meals, but necessarily included a range of ancillary services.

(3) The provision of guiding services around the hotel grounds is inherent in the supply of hotel accommodation to a holidaymaker. This is so, a fortiori, where a member of the hotel staff approaches the holidaymaker and invites her to follow his shortcut to reception.

(4) The Court of Appeal was wrong to introduce the issue of the functions for which the employee was employed. The issue here is what were the holiday services the consumer contracted for and whether they were improperly performed.

(5) There was a clear failure to provide the holiday service of guiding carefully. N's egregious conduct does not alter this fact.

(6) The question being one of breach of contract, issues of vicarious liability do not arise. Were it necessary to invoke the principle of vicarious liability, claims against tour operators would assume a whole new layer of complexity and expense.

20. The principal submissions made on behalf of Mrs X in relation to the second issue were as follows:

(1) Kuoni cannot rely on the contractual exclusion clause because it seeks to exclude Kuoni's liability for personal injury resulting from negligence which is prohibited by sections 1(1)(a), 1(3) and 2 of the Unfair Contract Terms Act 1977. Furthermore, to the extent that the claim is one for breach of contract Kuoni cannot rely upon the terms of the defence under regulation 15(2)(c)(ii) which is a defence to a claim under the Regulations. This is purely a matter of domestic law.

(2) The approach of the majority in the Court of Appeal to this issue is unduly restrictive.

(a) If the supplier can only be someone in a contractual or promissory relationship with the tour operator, even a hotel providing accommodation may not qualify as a supplier of services under

regulation 15 as there can be no certainty that the tour operator will contract directly with the hotel.

(b) Furthermore, a tour operator would be able to avoid liability where there was ordinary operational negligence by an employee of a hotel (let alone a sub-contractor).

(3) The defence under regulation 15(2) only arises in circumstances where there has been a "failure to perform the contract or the improper performance of the contract". The defence itself applies where such failure or improper performance is due neither to the fault of the tour operator nor to that of "another supplier of services" for the reasons set out in sub-paragraphs (a) to (c). Where the improper performance of the contract is fault-based, there is no room for a "no fault" defence.

(4) Applying a restrictive approach to the interpretation of regulation 15(2)(c)(ii) and reasoning by analogy from regulation 15(2)(c)(i) and the decision of the Court of Justice of the European Communities in *Anthony McNicholl Ltd v Minister for Agriculture* (Case C-296/86) EU:C:1988:125; [1988] ECR 1491, it must be foreseeable that a supplier, whether contractor or sub-contractor or further removed down the chain of contracts, will act unlawfully in the provision of the service that the tour operator has contracted to provide.

(5) There is no requirement under regulation 15 to read "supplier of services" so as to limit its ambit to those in a contractual or promissory relationship with the tour operator. On the contrary, it should be given its natural and full meaning so that it can cover any third party provided that that party is supplying holiday services. If N is recognised as having been a relevant supplier, on no view can the defence be engaged because N was himself "at fault" and did not exercise "all due care" within the terms of regulation 15(2)(c)(ii).

(6) If the hotel and not N was the relevant supplier, the issue of the fault of the hotel has to be considered from the perspective of the services that the hotel has been committed by the tour operator to provide. The issue is not whether the hotel, as a company, is directly (as opposed to vicariously) at fault. The issue is whether the hotel as a supplier of services is at fault. If there was fault in the provision of the relevant service, then the hotel is at fault for the purposes of regulation 15(2). If N is not a supplier because N is part of the hotel's staff and the hotel is the relevant supplier, the services supplied by the hotel must include those provided by N.

21. The principal submissions made on behalf of Kuoni in relation to the first issue were as follows:

(1) The holiday that the appellant booked included hotel accommodation and Kuoni accordingly agreed to provide accommodation services. However, on a proper construction of the contract, those accommodation services did not include the guiding services which Mrs X says N was providing.

(2) No term to the effect that all hotel staff including back office staff would guide guests around the hotel at all times of the day and night can be implied in the contract. In particular, (a) such a term is neither reasonable nor equitable; (b) it is not necessary to give business efficacy to the contract; (c) it is not so obvious that it goes without saying; (d) it is not capable of clear expression.

(3) If Kuoni was not obliged at the time of making the contract to provide such a service, it cannot later have become obliged to do so by reason of N volunteering to offer it.

(4) If the contract did include a guiding term, Kuoni denies that N was performing it. N's actions were the performance of a criminal enterprise.

(5) N had neither actual nor apparent authority to guide Mrs X to reception. Furthermore, N was not in fact providing any contractual guiding services at the time, even if such a term existed under the package travel contract.

(6) Even if N was providing a contractual service when he was purportedly guiding Mrs X to the reception, the assault did not constitute a failure to provide that service with reasonable care and skill.

(7) The travaux préparatoires of the Directive indicate that it was not intended to impose liability on a tour operator for criminal acts.

22. The principal submissions made on behalf of Kuoni in relation to the second issue were as follows:

(1) Kuoni joins issue with Mrs X on her submissions on the Unfair Contract Terms Act. In particular, Kuoni relies on section 29 which provides

that nothing in the Act prevents reliance upon any contractual provision which (a) is authorised or required by the express terms or necessary implication of an enactment or (b) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement.

(2) On a proper construction of both the contract and the 1992 Regulations the "supplier" is the hotel. In this regard Kuoni concedes that there is no need to read "our suppliers" in the contract or "other suppliers of services" in the regulation so as to limit their ambit to those in a direct contractual or promissory relationship with the tour operator. The intention of the Directive, as supported by the travaux préparatoires, is that "suppliers of services" should include suppliers who are in a chain of contractual authority descending from the tour operator, which might include sub-contractors.

(3) The word "fault" in regulation 15(2) and article 5(2) is defined by the three sub-paragraphs which follow it. If, and only if, none of the three sub-paragraphs applies can there be fault. "Fault" has no other meaning within the context of this provision and no independent meaning.

(4) There is no fault attributable to Kuoni or the hotel in the sense that neither Kuoni nor the hotel could have foreseen or forestalled the criminal acts of N.

(5) If the supplier of services is the hotel, N's crime should not be attributable to it, still less to Kuoni.

(6) N is not a supplier of services. On the contrary he was at all material times carrying on a criminal enterprise. Those acts are not attributable to the real supplier of services, his employer.

(7) The construction for which Mrs X contends runs contrary to the intention of the Directive in that, if N is a supplier:

> (a) A tour operator will never be able to avail itself of the defence under regulation 15(2)(c)(ii) in circumstances where neither the tour operator nor the supplier (here the hotel) were negligent or at fault in any way.

(b) A tour operator is most unlikely to be able to recover an indemnity from a supplier hotel in respect of the criminal act of that supplier hotel's employee which was not attributable to any negligence or fault on the part of the supplier hotel.

For these reasons, Kuoni, referring to *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, invited the Supreme Court to formulate a special rule of attribution to enable a tour operator to avail itself of the defence in a case such as this.

23. The primary focus of ABTA in its submissions was on the second issue. However, it did make some submissions in relation to the first issue.

(1) No term requiring all members of hotel staff to assist guests by giving them directions or showing the way can be implied into such a package travel contract.

(2) N's actions, if or in so far as they amounted to guiding, were not authorised.

(3) N's conduct could not amount to the performance of any contractual service.

24. The principal submissions made on behalf of ABTA in relation to the second issue were as follows:

(1) An employee of a hotel is not to be regarded as "another supplier of services" for the purposes of regulation 15(2). While an employee is someone through whom the hotel acts and whose acts are therefore those of the hotel, it is the hotel that supplies and which has been contracted to supply the services under the contract. On a natural reading "supplier" connotes a person or entity responsible for the supply, not an employee of such a person or entity. In this regard ABTA draws attention to the term "prestataire de services" in the French text of the Directive which, it submits, envisages the commercial supply of services or merchandise.

(2) Notwithstanding the view of the majority of the Court of Appeal, it may be that "another supplier of services" in regulation 15(2) includes other contractors in the contractual chain of supply.

(3) If N is not "another supplier of services" and the hotel was not at fault (either directly or vicariously) for N's actions, the defence under regulation 15(2)(c)(ii) should succeed. Mrs X errs in equating fault in the provision of the service as a result of N's conduct with fault on the part of the hotel. The hotel would only be at fault if vicariously liable for N's conduct. Furthermore, the improper performance was not due to any fault on the part of the tour operator or hotel because it was due to an event which neither could have foreseen or forestalled even with all due care. The defence under regulation 15(2)(c)(ii) applies generally and is not limited to situations where there is no fault. It applies where the relevant supplier would not itself be liable for fault either directly through its own acts or omissions or vicariously liable for its employees. To uphold the case for Mrs X on this point would lead to the startling result that a tour operator can be liable despite the fact that its supplier would not be liable for the actions of its employee.

(4) ABTA accepts that if this submission is correct the majority in the Court of Appeal erred in considering it unnecessary to decide the issue of vicarious liability. However, it denies that the need to consider vicarious liability would introduce further complexity and expense in national proceedings. Not every case would require evidence of foreign law on the issue of vicarious liability. Expert evidence on foreign law and standards is, in any event, commonplace in package holiday claims.

(5) ABTA's proposed construction of the defence in regulation 15(2)(c)(ii) furthers internal market considerations.

(6) Alternatively, ABTA submits that regulation 15(2)(c)(ii) affords a defence where, as here, the acts of the employee, although performed within the scope of apparent authority, are criminal acts.

Reference to the Court of Justice of the European Union

25. On 24 July 2019 the Supreme Court made a preliminary reference to the Court of Justice of the European Union ("CJEU") ([2019] UKSC 37). The Supreme Court invited the CJEU, for the purpose of the reference, 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. The Supreme Court then referred the following questions, relating to Issue 2, to the CJEU:

(1) Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organiser or retailer with a consumer to provide a package holiday to which Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours 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 organiser or retailer enters into a contract with a consumer to provide a package holiday to which Council Directive 90/314/EEC 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?

26. The preliminary reference was registered by the Registry of the CJEU as *X v Kuoni Travel Ltd* (Case C-578/19). After considering the observations submitted by the parties, the intervener and the European Commission, and after hearing the opinion of Advocate General Szpunar delivered on 10 November 2020, the CJEU (Third Chamber) (A Prechal (Rapporteur), President of the Chamber, N Wahl, F Biltgen, LS Rossi and J Passer, Judges) delivered its judgment on 18 March 2021, EU:C:2021:213, in the following terms:

> "The third indent of article 5(2) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, in so far as it provides for a ground for exemption from liability of an organiser of package travel for the proper performance of the obligations arising from a contract relating to such travel, concluded between that organiser and a consumer and governed by that Directive, must be interpreted as meaning that, in the event of non-performance or improper performance of those obligations, which is the result of the actions of an employee of a supplier of services performing that contract:

- that employee cannot be regarded as a supplier of services for the purposes of the application of that provision, and

- the organiser cannot be exempted from its liability arising from such non-performance or improper performance, pursuant to that provision."

27. On receipt by the Supreme Court of the judgment of the CJEU, and following the retirement and untimely death of Lord Kerr of Tonaghmore, Lord Hodge, Deputy President, made a direction pursuant to section 43 of the Constitutional Reform Act 2005, with the agreement of the parties and the intervener, that the court is still duly constituted in the proceedings. The parties and the intervener also agreed that the Supreme Court should proceed to deliver its judgment without hearing further submissions.

Issue 1: Did the rape and assault of Mrs X constitute improper performance of the obligations of Kuoni under the package travel contract?

28. In making the preliminary reference to the CJEU the Supreme Court invited that court to assume, for the purpose of the reference, 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. That is the first issue which must now be addressed.

29. Regulation 15 of the 1992 Regulations states that "the other party to the contract is liable to the consumer for the proper performance of the obligations under the contract". In considering the scope of the obligations under a contract for a package holiday it is necessary to have regard to the nature of the subject matter. A holiday is intended to be a pleasant and enjoyable experience. This is reflected in the availability in domestic law of a remedy in damages for loss of enjoyment of the holiday experience (*Jarvis v Swan Tours Ltd* [1973] QB 233). It is also reflected in the approach required to be adopted in EU law under article 5(2) of the Directive which establishes a right of compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday (*Leitner v TUI Deutschland GmbH & Co KG* (Case C-168/00) EU:C:2002:163; [2002] ECR I-2631, para 24). In *Leitner* the Court of Justice emphasised (at para 22) that, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers. I accept the submission of Mr Weir QC on behalf of the appellant that the purpose of the agreement, namely to confer an

enjoyable experience, encourages a broad, not a narrow, interpretation of the holiday services contracted for.

30. In the case of any contract for a package holiday the provider of the holiday necessarily undertakes to provide not merely transport, accommodation and meals but also to provide other services ancillary thereto. This is, in my view, inherent in the express obligations undertaken because it is only in this way that an enjoyable holiday of the reasonable standard contracted for can be provided. As Mr Weir put it in his written case, a common sense interpretation of the extent of the holiday services, one consistent with the purpose of providing the holidaymaker with an enjoyable experience, necessarily requires that the services include so much more than the actual mechanics of travel or the provision of a mattress and overhead cover for the night. The precise content of the ancillary services may vary from one contract to another. However, for example, the obligation to provide the service of cleaning the hotel with reasonable care and skill would be inherent in every such contract. So would the service of looking after and serving holidaymakers courteously in matters relating to their holiday experience.

31. In the present case, Kuoni undertook to provide a package holiday at a four-star hotel in Sri Lanka. In his dissenting judgment in the Court of Appeal, Longmore LJ referred in detail to the contract description of the holiday and noted that all porterage, taxes and service charges were included in the holiday. He then drew attention (at para 11) to what he considered to be the critical wording of the contract: "we will accept responsibility if … any part of your holiday arrangement is … not of a reasonable standard". I agree with his conclusion that Kuoni therefore undertook to provide a holiday of a reasonable standard which itself must be judged against the description of the hotel as a four-star hotel offering the facilities described. I also agree with his conclusion on this issue which he stated as follows (at para 13):

> "I cannot therefore agree with the implication behind the judge's view that it was no part of the contract between Kuoni and Mrs X that any electrician employed by the Hotel for that particular purpose would also provide Mrs X with general assistance such as showing her a shortcut to reception. Formally the judge is no doubt correct in the sense that there was no express term to that effect. But that is not the end of the matter, because Kuoni accepts that the holiday arrangements at the four-star hotel which they have selected are to be of a reasonable standard. For such a holiday to be a reasonable standard, hotel staff must be helpful to guests when asked for assistance; all the more must a member of staff, who actually offers assistance, assist the guest in a reasonable way. On no view did N assist Mrs X in a reasonable way when he guided her to the engineering room."

32. It is an integral part of the services to be provided on a holiday of such a standard that hotel staff provide guests with assistance with ordinary matters affecting them at the hotel as part of their holiday experience. In my view, guidance by a member of the hotel's staff of Mrs X from one part of the hotel to another was clearly a service within the "holiday arrangements" which Kuoni had contracted to provide.

33. Kuoni objects, however, that guiding a guest from one part of the hotel to another was no part of the functions for which N, an electrician and a member of the hotel's maintenance team, was employed. This is a submission which found favour with the majority of the Court of Appeal (at para 34). This, with respect, loses sight of the question under consideration which concerns the scope of the services which Kuoni had undertaken to provide and, in particular, whether guidance from one part of the hotel to another was a part of the "holiday arrangements". That is governed by the contract between Mr and Mrs X and Kuoni and not by the contract between the hotel and its employee, N. In any event, it appears that under N's contract of employment with the hotel he was expected to act in conformity with the hotel's house rules which had been provided to N when he started his employment. These house rules provided that the principal objective of employees should be to look after guests, serve them courteously and make them comfortable. Staff were instructed to "answer … their questions about … the Hotel or any other subject that will make their stay more enjoyable." They were instructed that "each one of you should take on the responsibility of being a Salesman of our Hotel. Learn all details of the various facilities available at the Hotel so that you may guide the Guests."

34. Similarly, Kuoni objects that N was not providing a service within the package travel contract but pursuing a criminal enterprise when he raped and assaulted Mrs X. It seems to me, however, that the correct focus here should be the provision of the service of guiding a guest. This fell within the "holiday arrangements" which Kuoni undertook would be provided. N was able to assault Mrs X only as a result of purporting to act as her guide. Furthermore, the assault was a failure to provide that guiding service with due care. Contrary to the submission of Kuoni, the fact that N's conduct was so grossly egregious does not alter the fact that this was a breach of the package travel contract between Mr and Mrs X and Kuoni.

35. For these reasons I consider that the majority in the Court of Appeal were wrong to accept that N's guidance was not part of the "holiday arrangements". Being accompanied to reception by a member of the hotel staff was a service falling within the scope of the holiday arrangements which Kuoni contracted to provide and the rape and assault committed by N on Mrs X was improper performance of that contract.

36. I am fortified in this conclusion by certain observations of the CJEU in the present proceedings. Although the first issue was not included in the reference, that court made clear in the following passages of its judgment that a broad approach should be adopted when seeking to identify the scope of ancillary obligations undertaken under a package travel contract.

> "45. However, in view of the objective pursued by Directive 90/314 recalled in para 40 above, which consists, inter alia, in ensuring a high level of consumer protection, the obligations arising from a package travel contract, the improper performance or non-performance of which renders the organiser liable, cannot be interpreted restrictively. Those obligations comprise all the obligations associated with the provision of transport, accommodation and tourism services arising from the purpose of the package travel contract, irrespective of whether those obligations are to be performed by the organiser itself or by suppliers of services.
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> …
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> 47. In the second place, it should be borne in mind that the obligations arising from a package travel contract covered by Directive 90/314, such as those set out in para 45 above, may be performed by suppliers of services who may themselves act through their employees, who are under their control. The performance or failure to perform certain actions by those employees may, therefore, constitute non-performance or improper performance of the obligations arising from the package travel contract.
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> 48. Consequently, that non-performance or improper performance, although caused by acts committed by employees under the control of a supplier of services, is such as to render the organiser liable, in accordance with article 5(1) of Directive 90/314."

Issue 2: If Issue 1 is decided in the affirmative, 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?

37. The question referred by the Supreme Court to the CJEU falls into two parts.

(a) Is an employee of a supplier of services himself a supplier of services for the purposes of article 5(2) of the Directive?

38. The CJEU addressed first whether, where non-performance or improper performance of obligations under the package travel contract arises from the actions of an employee of a supplier of services performing the contract, that employee must be regarded as a supplier of services for the purposes of applying article 5(2) of the Directive. The court noted that in order to achieve the harmonisation of the laws of member states article 5(1) of the Directive provided that member states were to take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from that contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services. The only exemptions were those exhaustively set out in article 5(2) (at para 34). Although that liability extended to the proper performance of the obligations arising under the package travel contract by suppliers of services, the Directive neither defined the concept of "supplier of services" nor referred expressly to the law of the member states in that regard (at para 35). In these circumstances, the need for a uniform application of EU law and the principle of equal treatment required that the wording of a provision of EU law must normally be given an independent and uniform interpretation throughout the European Union (at para 36).

39. The CJEU considered that the usual meaning of the phrase "supplier of services" referred to a natural or legal person who provides services for remuneration, a meaning shared by the various language versions of that provision and confirmed by the context of the provision and the objectives of the Directive (at paras 38-40). However, the court considered that an employee of a supplier of services cannot himself or herself be classified as a supplier of services within article 5 of the Directive, in so far as he or she has not concluded any agreement with the package travel organiser for the purposes of providing services to the latter, but merely performs work on behalf of a supplier of services which has concluded such an agreement with that organiser, with the result that the employee's actions, when performing that work, are, in most cases, intended to contribute to the performance of the obligations which fall to the supplier of services employing that employee (at para 41). Furthermore, it considered that the word "employee" refers to a person who performs his or her work in the context of a relationship of subordination with his or her employer and therefore under the latter's control. By definition, a supplier of services is not subject to any relationship of subordination when he or she provides his or her services, with the result that an employee cannot be regarded as a supplier of services for the purposes of applying article 5 of the Directive (at para 42).

40. It follows, therefore, that the submission on behalf of Mrs X that N should be considered a "supplier of services" within article 5 of the Directive and regulation 15 of the Regulations must be rejected.

41. However, the CJEU then went on to consider the liability of an organiser under article 5(2) of the Directive for the acts of an employee of a supplier of services. It emphasised that the fact that an employee of a supplier of services cannot himself or herself be regarded as a supplier of services in the context of the application of the system of contractual liability established by the Directive does not preclude that employee's acts or omissions from being treated, for the purpose of that system, in the same way as those of the supplier of services employing him or her (at para 43). Furthermore, it noted that the liability of the organiser under article 5 of the Directive relates only to the obligations arising from the package travel contract as defined by the Directive and does not affect other liabilities such as criminal liability (at para 44).

42. The court considered that in view of the objective of ensuring a high level of consumer protection, the obligations arising from a package travel contract could not be interpreted restrictively. They comprised all the obligations associated with the provision of transport, accommodation and tourism services arising from the purpose of the package travel contract, irrespective of whether those obligations were to be performed by the organiser itself or by suppliers of services (at para 45, set out at para 36 above). In order for the organiser's liability under article 5(1) to be incurred there must be a link between the act or omission which caused damage to that consumer and the organiser's obligations arising from the package travel contract. Those obligations may be performed by suppliers of services who may themselves act through their employees, who are under their control. The performance or failure to perform certain actions by those employees may, therefore, constitute non-performance or improper performance of the obligations arising from the package travel contract. The court considered that in consequence non-performance or improper performance, although caused by acts committed by employees under the control of a supplier of services, is such as to render the organiser liable in accordance with article 5(1) of the Directive (at paras 46-48). It considered that that interpretation is borne out by the objective of consumer protection pursued by the Directive. Otherwise, an unjustified distinction would be drawn between the liability of organisers for acts committed by their suppliers of services themselves and the liability of organisers for acts committed by employees of those suppliers of services, which would enable an organiser to avoid its liability. The court concluded:

> "50. Accordingly, under article 5(1) of Directive 90/314, the non-performance or improper performance of an obligation, arising from a package travel contract, by an employee of a supplier of services renders the organiser of that package travel

> liable to the consumer with whom that organiser has concluded that contract, where that non-performance or improper performance has caused damage to that consumer.
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> 51. In the present case, as is apparent from the request for a preliminary ruling, the referring court starts from the premiss that X being accompanied to reception by a member of the hotel staff was a service falling within the scope of the holiday arrangements which Kuoni contracted to provide under the contract at issue, and that the rape and assault committed by N on X constituted improper performance of that contract.
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> 52. It follows that, in a situation such as that at issue in the main proceedings, a travel organiser such as Kuoni may be held liable to a consumer such as X for improper performance of the contract between the parties, where that improper performance has its origin in the conduct of an employee of a supplier of services performing the obligations arising from that contract."

(b) The scope of the exemptions from liability under article 5(2) of the Directive

43. The CJEU then turned to consider the other limb of the question referred by the Supreme Court: the scope of the exemptions from liability under article 5(2) of the Directive. Pursuant to that provision, the organiser is liable for damage suffered by the consumer as a result of the failure to perform or improper performance of the package travel contract, unless such failure to perform or improper performance is attributable neither to any fault of the organiser nor to that of another supplier of services because one of the grounds for exemption from liability contained in that provision applies to it. These grounds for exemption include that laid down in the third indent of article 5(2) which refers to situations in which the non-performance or improper performance of the contract is due to an event which the organiser or the supplier of services, even with all due care, could not foresee or forestall (at paras 53-54).

44. The court considered that since that ground for exemption from liability derogates from the rule in article 5(1) laying down the liability of organisers it must be interpreted strictly. Moreover, it must be interpreted autonomously and uniformly, taking into account its wording, its context and the object of the Directive (at paras 56-57). The court then made the following observations in relation to this ground of exemption. First, it is apparent from the wording of the provision that the event which cannot be foreseen or forestalled is distinct from the separate ground for exemption in the case of force majeure (at para 58). Secondly, it exempts the

organiser from the obligation to compensate the consumer for damage resulting either from events which cannot be foreseen, irrespective of whether they are usual, or from events which cannot be forestalled, irrespective of whether they are foreseeable or usual. It continued:

> "60. Thirdly, it is apparent from article 5(2) of Directive 90/314 that the grounds for exemption from liability listed in the various indents of that provision expressly set out the specific cases in which non-performance or improper performance of the obligations arising from a package travel contract is not attributable to either the organiser or another supplier of services because no fault can be attributed to them. That absence of fault means that the event which cannot be foreseen or forestalled referred to in the third indent of article 5(2) of Directive 90/314 must be interpreted as referring to a fact or incident which does not fall within the sphere of control of the organiser or the supplier of services.
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> 61. Since, for the reasons set out in para 48 above, the acts or omissions of an employee of a supplier of services, in the performance of obligations arising from a package travel contract, resulting in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer fall within that sphere of control, those acts or omissions cannot be regarded as events which cannot be foreseen or forestalled within the meaning of the third indent of article 5(2) of Directive 90/314.
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> 62. Consequently it must be held that the third indent of article 5(2) of Directive 90/314 cannot be relied on in order to exempt organisers from their obligation to make reparation for the damage suffered by consumers as a result of the non-performance or improper performance of obligations arising from package travel contracts concluded with those organisers, where those failures are the result of acts or omissions of employees of suppliers of services performing those obligations."

45. The effect of this ruling by the CJEU, which is binding on domestic courts within this jurisdiction, is that Kuoni cannot invoke the exemption from liability established by the third indent of article 5(2) of the Directive or the corresponding provision in regulation 15(2)(c)(ii) of the 1992 Regulations, which implement the Directive, as a defence to a claim for improper performance of obligations under the

package travel contract because that improper performance was caused by the acts of N, an employee of the hotel which was a supplier of services performing those obligations. Kuoni is liable to Mrs X under regulation 15 of the 1992 Regulations.

46. Furthermore, it follows that Kuoni is liable to Mrs X for breach of the package travel contract. It is common ground between the parties that clause 5.10(b) was intended to replicate the terms of regulation 15(2)(c) which, in turn, was intended to implement article 5 of the Directive. It was further agreed that liability under regulation 15 cannot be excluded by any contractual term (regulation 15(5)). The defence in contract is coextensive with the statutory defence.

Conclusion

47. The Supreme Court has taken a broad view of the scope of obligations undertaken by an operator under a package travel contract. In particular, those obligations include not merely the provision of transport, accommodation and meals but also other services ancillary thereto which are necessary for the provision of a holiday of a reasonable standard. In the present case, N's guiding Mrs X from one part of the hotel to another clearly fell within the scope of the obligations undertaken by Kuoni under its package travel contract with Mr and Mrs X. In addition, although this first issue was not the subject of a reference to the CJEU, the reasoning of that court on the issue which was referred is strongly supportive of this conclusion.

48. The CJEU has taken a narrow view of the exemption from liability under the third indent of article 5(2) of Directive 90/314. It has no application where a failure of performance of obligations under a package travel contract is the result of acts or omissions of employees of suppliers of services performing those obligations. Accordingly, regulation 15(2)(c)(ii) which implements the Directive provides no defence to Kuoni in the present proceedings.

49. In these circumstances, Kuoni is liable to Mrs X both under the 1992 Regulations and for breach of contract.

50. Finally, I should mention that in arriving at these conclusions it has not been necessary to address issues relating to vicarious liability. In my view vicarious liability is not relevant here. Kuoni is liable both under the Directive as implemented by the 1992 Regulations and in breach of contract because the services it undertook to provide were not provided with care and skill by an employee of the hotel which was a supplier of the services. That liability does not depend on vicarious liability for the acts of an employee. Moreover, to introduce the principle of vicarious liability into the operation of the Directive scheme would defeat its purpose by

rendering the pursuit of claims against tour operators unnecessarily complex and expensive. Questions of vicarious liability of a hotel for the acts of its employees would be likely to be governed by the law of the place where the hotel is situated, with the result that differing systems of national law would apply. Instead, the Directive as interpreted by the CJEU has established a simple rule whereby a tour operator is liable for the non-performance or improper performance of the obligations it has undertaken where those failures are the result of acts or omissions of employees of suppliers of services performing those obligations.

51. For these reasons, I would allow the appeal.