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## FOIL UPDATE 2<sup>nd</sup> August 2021



### *Kuoni* – resolved at last

#### *X v Kuoni Travel Ltd (2021) UKSC 34*

When we last reported on this case in August 2019, it had been referred to the CJEU. Following the CJEU's decision, the UKSC has now handed down its final judgment.

On or about 1 April 2010, the appellant ("Mrs X") and her husband entered into a contract with the respondent tour operator ("Kuoni") for 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 ("the Contract").

In the early hours of 17 July 2010, Mrs X was making her way through the grounds of the Hotel, when she came upon N, who was employed by the Hotel as an electrician. Under the pretence of showing her a shortcut to reception, N lured Mrs X into the engineering room, where he raped and assaulted her.

Mrs X brought a claim for damages against Kuoni. She claimed that the rape and assault were a breach of the Contract and/or gave rise to liability under the Contract and the Travel, Package Holidays and Package Tours Regulations 1992 ("the Regulations").

The High Court dismissed Mrs X's claim. The Court of Appeal then dismissed her appeal. Mrs X now appeals to the Supreme Court.

#### **IN BRIEF**

Reversing the decisions at first instance and in the Court of Appeal, and after referring the matter to the CJEU, the UKSC has found the tour operator liable for the rape of the claimant by an employee of the hotel in which she was staying under a package holiday agreement.

Mrs X's appeal raised a number of questions concerning Directive 90/314/EEC on package travel, package holidays and package tours ("the Directive"), which is the EU instrument that the Regulations implement. At the hearing of her appeal, the Supreme Court decided to refer those questions to the Court of Justice of the European Union ("the CJEU"). The CJEU answered the Supreme Court's questions in a judgment delivered on 18 March 2021.

The Supreme Court unanimously allowed the appeal.

The Supreme Court took a broad view of the obligations owed by tour operators to consumers under package holiday contracts. The court decided that those obligations include not only the provision of transport, accommodation and meals, but also a range of ancillary services which are necessary for the provision of a holiday of a reasonable standard. The precise content of those services might vary from one contract to another.

In the present case, Kuoni undertook to provide a package holiday at a four-star hotel. The court considered it to be an integral part of 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. This included guiding guests from one part of the hotel to another. The rape and assault of Mrs X amounted to a failure to provide that service with proper care. Mrs X therefore had a claim against Kuoni under clause 5.10(b) of the Contract for injury suffered as a result of the breach of that obligation, and under regulation 15(2) of the Regulations for "damage caused to [her] by [Kuoni's] failure to perform the contract or the improper performance of the contract".

Regulation 15(2)(c) of the Regulations would provide Kuoni with a defence to Mrs X's claim if the rape and assault were events which, "even with all due care", Kuoni could not have "foresee[n] or forestall[ed]". This defence is replicated in clause 5.10(b) of the Contract, and itself replicates the defence in article 5 of the Directive.

In its judgment of 18 March 2021, the CJEU decided that the defence in article 5(2) of the Directive did not apply where a failure of performance of obligations under a package travel contract was the result of acts or omissions of employees of suppliers of services performing those obligations. The CJEU's decision is binding on domestic courts in the United Kingdom.

On that basis, the Supreme Court decided that Kuoni did not have a defence to Mrs X's claim under clause 5.10(b) of the Contract or under regulation 15(2)(c) of the Regulations. The relevant acts were committed by an employee of another supplier of services, namely the Hotel.

Accordingly, the Court concluded that Kuoni was liable to Mrs X both for breach of contract and under the Regulations.

The full case report may be found at: <https://www.bailii.org/uk/cases/UKSC/2021/34.html>

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