[2019] TLQ 22

ARTICLE 22 AND THE RIGHT OF REDRESS

David Grant[1]

> *"In cases where an organiser or, in accordance with the second subparagraph of Article 13(1) or Article 20, a retailer pays compensation, grants price reduction or meets the other obligations incumbent on him under this Directive, Member States shall ensure that the organiser or retailer has the right to seek redress from any third parties which contributed to the event triggering compensation, price reduction or other obligations."*[2]

1. Introduction

When a package holiday goes wrong it is most often a fault with one of the components of the holiday rather than the fault of the tour operator or the travel agent who was the organiser of the package. A good example of this is the case of *Japp v Virgin Holidays Limited* [2013] EWCA Civ 1371[3] where the claimant suffered injury when she walked through a glass balcony door at the hotel in which she was staying which did not comply with the relevant local standards.

In such circumstances the traveller has recourse against the organiser that put the package together by virtue of Art. 13 of the Package Travel Directive (PTD)[4] even though the organiser may not have been personally at fault. Thus the organiser may find themselves having to pay compensation to the traveller for the defaults of their suppliers:

> "Article 13.1
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> Member States shall ensure that the organiser is responsible for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers."

[1] The assistance of Stephen Mason of Travlaw in the preparation of this article is gratefully acknowledged.
[2] Art. 22 of the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements.
3 This was a case under Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 which transposes Art. 5 of Council Directive on Package Travel, Package Holidays and Package Tours (90/314/EEC) - now superseded by the 2015 Directive but which, on this point, is not significantly different.
4 Transposed into UK law by the Package Travel and Linked Travel Arrangements Regulations S.I. 634 2018 (PTR)

The question arises as to how the organiser can seek redress from the supplier of the component of the package that was defective. The PTD provides for this but before we examine the relevant provisions it would be useful to look at how an organiser could protect themselves without having direct resort to the Directive.

2. Contractual Protection

Looking first at what could be called a conventional organiser – a tour operator who contracts with suppliers and puts the components of the package together before offering them to travellers, either online or in a brochure, the first thing they need to do is to ensure that their contracts with their suppliers spell out in sufficient detail what their obligations are so that it can be easily determined whether a breach has occurred which has led to the liability of the organiser to the traveller.

This should be accompanied by an indemnity clause which can be triggered in the event of the organiser having to pay compensation to a traveller. The indemnity should be drafted so that it also includes a term that the organiser will be compensated in circumstances where they settle the traveller's case out of court (See *MISR Travel & Shipping Cairo Ltd v Conference And Reunion Organisers Ltd*[5]).

The contract with the supplier should also provide for which law and which jurisdiction should apply in the case of litigation. This may very well be down to the bargaining power of the organiser but ideally the choice of law and jurisdiction will be the organiser's own domestic law and domestic courts.

A term of the contract should also provide that the supplier has insurance in place to cover any liability they may incur. The level of insurance should be agreed and the contract should require the supplier to provide copies of the insurance policies, translated if necessary.

Finally the tour operator should also have their own insurance in place in case all else fails.

If we turn now to what might be called dynamic packages i.e. packages which are not pre-prepared or available off the shelf but put together at the request of the traveller either over the internet or the telephone or in person at a travel agency.

[5] Court of Appeal, 1 February, 1983

Here the legal relationships between the suppliers and the organiser are more complicated. At one end of the spectrum the organiser may be a large tour operator who already has direct contracts with suppliers in place, much like those discussed above. In which case the traveller will be choosing from a menu of package components that the tour operator already has in its inventory of travel services. At the other end of the spectrum are travel agents who may, at best, only have agency agreements with intermediaries such as the big bedbanks where the terms of the agency agreement may very well be skewed in favour of the supplier – disclaiming all liability and imposing a foreign jurisdiction and foreign law.

In these circumstances the travel agent/organiser may very well not have any contract with the hotel providing the accommodation for the traveller for whom the travel agent has put the package together. So when things go wrong there is no obvious avenue to redress open to them. It is here where the provisions of the PTD relating to redress may come into their own.

3. Protection under Art. 22

Article 22 provides:

> "In cases where an organiser or, in accordance with the second subparagraph of Article 13(1) or Article 20, a retailer pays compensation, grants price reduction or meets the other obligations incumbent on him under this Directive, Member States shall ensure that the organiser or retailer has the right to seek redress from any third parties which contributed to the event triggering compensation, price reduction or other obligations."

In UK law this is mirrored by Reg. 29 of the UK PTR:

> "29. Where an organiser or, in a case under regulation 27, a retailer—
> (a) pays compensation,
> (b) grants a price reduction, or
> (c) meets the other obligations incumbent on the organiser or the retailer under these Regulations,
> the organiser or retailer may seek redress from any third parties which contributed to the event triggering compensation, a price reduction or other obligations."

On the face of it this statutory provision is clear and has its heart in the right place. It gives the travel agent/organiser the right of redress they need against the supplier but there are

two problems. First, what is meant by saying that Member States 'shall ensure that the organiser or retailer has the right to seek redress from any third parties'? Does it apply regardless of contract provisions (including contrary ones)? Does it impact upon any choice of jurisdiction clause which may adversely affect the prospects of recovery? After all an ineffective right is not really a right at all.

Secondly, in practice when dealing with foreign suppliers there may be procedural obstacles in the way of bringing the supplier to court and even in the event of obtaining a favourable judgment there may be problems of enforcement. Within the EU those matters are regulated by the Judgment Regulation 1215/2012[6] and work reasonably well. Outside the EU service and enforcement can be challenging (see *Noble Caledonia Ltd v Air Nuigini* [2017] EWHC 1095 & 1393).

4. An alternative road to redress

An alternative to suing the supplier might be to sue an intermediary such as a bedbank. This would depend upon the terms of the agency contract between the travel agent/organiser and the bedbank. The case of *HMRC v Secret Hotels2 Limited [2014] UKSC 16*[7] gives a clue as to how this might work. It is a case about the collection of VAT but it has wider implications on how to interpret agency agreements. The defendant in the case argued that they were only an agent whereas HMRC argued they were principals. Although the bedbank had assumed many of the functions of a principal it was ultimately decided by the Supreme Court that they were only agents. However if the HMRC had prevailed then it might have opened the door to imposing liability on self-styled agents who are in fact principals. It is difficult to draw any firm conclusions on this case as it turns on its own facts but it holds open the possibility that if an intermediary like a bedbank overreaches itself it could be classified as a principal and therefore open itself up to being sued by the travel agent/organiser.

However this only opens up other difficulties such as have already been discussed – which law prevails and which courts have jurisdiction.

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[6] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[7] For commentary on this case see '*HMRC v Secret Hotels2 Limited* [2014] UKSC 16' [2014] TLQ 16; 'Principal or Agent. VAT or No VAT. Implications of *Med Hotels Ltd v HMRC'* Richard Venables and Katie Bevan-Jones [2010] TLQ 139 and 'The Medhotels Case – A Heavyweight Battle in Four Titanic Rounds' Stephen Mason [2014] TLQ 95 all available at www.tlq.travel. The decision is also available on this website.

Interestingly being able to sue the bedbank as well as, or instead of the third party supplier is akin to the situation regarding compensation under Reg. 261/2004 on Denied Boarding[8]. In the EU Commission's guidance on the interpretation of Reg. 261[9] it states that if a passenger on a package holiday flight is delayed or the flight is cancelled the passenger could seek redress against either the organiser or the airline. Which of the two would end up paying the compensation would depend on the contractual relationship between them and the application of domestic law:

> 'However, neither the Regulation nor the Directive deals with the question of whether the package organiser or the operating air carrier ultimately has to bear the cost of their overlapping obligations. Resolving such a matter will thus depend on the contractual provisions between organisers and carriers and the applicable national law.'

If the travel agent/organiser failed to establish liability against the bedbank on the basis of their agency contract it is unlikely that Art. 22 could be invoked against the bedbank/agent to override the terms of the agency contract because it only applies to 'third parties which contributed to the event triggering compensation'. It would not be the bedbank that caused the food poisoning or didn't put safety markings around the pool or had low balconies or deficient glass.

5. Conclusion

In many cases it lies within the power of an organiser to have an effective means of redress against third party suppliers by means of appropriately drafted contractual provisions - and this can be achieved without the assistance of Art.22.

However in cases where there are no, or no effective, contracts in place, the organiser in theory can resort to Art. 22 but there are significant practical and procedural hurdles to overcome, particularly when trying to obtain redress from a supplier outside the EU.

Those organisers best placed to enforce their rights against third party suppliers are those that operate rather like traditional tour operators who have contracts in place with their

[8] Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.
[9] Brussels, 10.6.2016 C(2016) 3502 final.

suppliers before offering a package to travellers. Those organisers who act like travel agents are the ones most likely to have difficulty enforcing their rights even with the benefit of Art. 22.

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