

# PACKAGES, THE SALE OF SEPARATE COMPONENTS AND THE ADMINISTRATIVE COURT

## *Civil Aviation Authority v Travel Republic Limited* [2010] EWHC 1151 (Admin)

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### Introduction

I suppose it was inevitable that *CAA v ABTA* (the *ABTA Litigation*) [2006] EWCA Civ 1356 would not be the final answer to the vexed question: what is a regulated package holiday? On this topic the recent activism of the Civil Aviation Authority and other industry bodies has now provided us with the combined thoughts of Goldring J (*ABTA Litigation* at first instance), Chadwick LJ (*ABTA Litigation* on appeal) and, more recently, as a result of *CAA v Travel Republic Limited*, Elias LJ. We now have, in aggregate, 317 paragraphs of closely-typed judgment in which the finest judicial minds grapple with the proper meaning of *package*. Confronted with this weight of material even the most passionate travel lawyer could feel his or her interest start to wane. Whether we are now any closer to definitive guidance on what constitutes a package might be regarded as moot. In *CAA v Travel Republic Limited* Elias LJ said this:

*I accept, as did Chadwick LJ [in the ABTA Litigation when it reached the Court of Appeal], that the distinction between cases caught by the regulation and those falling outside it can on the particular facts be a fine one; to that extent each transaction is fact sensitive.*

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**The finest judicial minds have grappled with the proper meaning of *package***

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It is, perhaps, sobering to reflect upon the time, effort and expense that has been invested in pursuit of the answer: *It's all a question of fact.*

### Background

Regulation 1(2) of the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995 (as amended) is drafted in like terms to regulation 2(1) of the Package Travel, Package Holidays and Package Tours Regulations 1992. Regulation 1(2) provides as follows (as amended by the 2003 delegated legislation):

*"package" means the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when*

*the service covers a period of more than twenty-four hours or includes overnight accommodation:—*

- (a) transport;*
- (b) accommodation;*
- (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package, and*
  - (i) the submission of separate accounts for different components shall not cause the*

*arrangements to be other than a package;*  
*(ii) the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions (whether modified or not) shall not of itself cause it to be treated as other than pre-arranged.*

Paragraph (c)(ii) – ‘the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions (whether modified or not) shall not of itself cause it to be treated as other than pre-arranged’ – addresses the decision of the European Court of Justice in *Club-Tour v Garrido* [2002] ECR I-4051: a quality complaints case arising out of an infestation of wasps at a Greek holiday village. In *Garrido* the European Court of Justice was asked two questions. First, whether a holiday organised by a travel agency at the request of and according to the requirements of the consumer would constitute a regulated *package*. Second, whether the requirement – within the definition of *package* – for a *pre-arranged combination* of holiday components was capable of embracing combinations of tourist services put together at the time when the contract was concluded between the travel agency and the consumer. The European Court gave affirmative answers to both questions.

Travel Republic Limited, the Defendant and then Respondent to the action brought by the CAA, is a well known travel agent incorporated in the United Kingdom. It does not publish a paper brochure; instead, it offers services by means of a website and a telephone line. As Elias LJ observed (paras. 20 and 21):

*Typically, it will be accessed on the internet either directly through its own*

*website or by following up links on a major search engine such as Google. Once on the website, a customer is offered a choice of flights, hotels and apartments, car hire and other related services. Some web links specifically refer to what are described as ‘tailor made holidays.’ The various components which make up a holiday are ostensibly all sold separately but they can be linked together by a customer to provide all the necessary elements of a holiday, and indeed the system consciously facilitates their ability to do this. The total cost of the combined services will be the same as the aggregate cost of each component priced separately. In other words there is no price discount for booking more than one element of the holiday.*

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***Garrido is a quality complaints case arising out of an infestation of wasps at a Greek holiday village***

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A similar process is followed with respect to bookings made by telephone with Travel Republic Limited’s agents making use of a script which emphasises that the company acts only as agent, that holiday components are provided separately and that Travel Republic does not sell regulated packages. The CAA’s prosecution of Travel Republic was based on regulations 3(1A) and 15 of the Civil Aviation (Air Travel Organisers’ Licensing) Regulations 1995. The combined effect of these provisions is that a criminal offence is committed where different elements of the package holiday are provided under different contracts with different suppliers. The holder of the Air Travel Organisers Licence (the ATOL):

*... must provide all the relevant services in a single contract and is accordingly liable for any failing with respect to any of the services provided. (per Elias LJ at paragraph 11 of the judgment)*

In its prosecution of Travel Republic the CAA laid 20 Informations which itemised breaches of regulation 3(1A) and, therefore, the commission of criminal offences. The prosecution was based on the premise that Travel Republic was selling package holidays:

*...the customer is simply putting together a combination made available by the agent; to all intents and purposes the parties are agreeing a package by the time of sale. (per Elias LJ at para. 24)*

In other words, Travel Republic was doing just what the European Court envisaged in *Garrido*; it was selling a package holiday proposed by the consumer and tailored to the consumer's requirement. The fact that the initiative for the purchase of this holiday came from the consumer did not mean that a package holiday was not being sold.

The case was tried by a District Judge in the City of Westminster Magistrates' Court. Travel Republic was acquitted. There was an appeal by way of case stated to the Administrative Court (as an alternative to appeal by way of judicial review). Both parties relied heavily on the judgment of the Court of Appeal in the *ABTA Litigation* and the Administrative Court stated that it regarded itself as bound by the reasoning of the Court of Appeal in that case. It is, therefore, appropriate to regard the Administrative Court's decision in *CAA v Travel Republic* as simply an addendum to the Court of Appeal's more detailed consideration of the same issues in the *ABTA Litigation*.

## The ABTA Litigation: A Recapitulation

The following passage of Chadwick LJ's judgment in the Court of Appeal was the subject of discus-

sion in the Administrative Court:

*Now suppose that the agent has informed the customer that the cost of flights will be £X, the cost of accommodation will be £Y and the cost of transfers will be £Z; and has explained to the customer that he can purchase any one or more of those services, as he chooses, without any need to purchase the others. He has explained, in effect, that the customer can choose to purchase the other services elsewhere; or to make other arrangements. In that case as it seems to me there would be little doubt that the services are not offered for sale as a pre-arranged combination and at an inclusive price." (per Chadwick LJ at para. 28)*

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**There would be little doubt that the services are not offered for sale as a pre-arranged combination and at an inclusive price**

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This was, in essence, precisely what Travel Republic said it was doing when it sold holiday components to consumers. As Elias LJ observed in the course of his judgment in the Administrative Court, Chadwick LJ qualified this rather bold assertion by stating as follows in a later passage of his judgment (dealing with *Garrido*-type cases where the initiative for the holiday comes from the consumer):

*Returning to the second of the examples which I have set out, difficult questions of fact are likely to arise if the customer chooses and contracts for two or more of the services on the same occasion. The principle is not in doubt. If the services are sold or offered for sale as components of a combination, there is a package: if they are sold or offered for sale separately but at the same time, there is no package. The question whether they are sold as components of a combination – or separately but at the same time – is a question of fact. That*

*question may not be easy to resolve in the particular case. (per Chadwick LJ at para. 31)*

As indicated in the introduction to this article, the comment that the *Garrido*-type cases will, ultimately, all turn on their own facts was picked up by Elias LJ when *CAA v Travel Republic* reached the Administrative Court.

The following passage of Chadwick LJ's judgment was also the subject of close scrutiny by the Administrative Court:

*The fact that the agent has selected the travel components is likely to point to the conclusion that the components are offered for sale as a pre-arranged combination. The position may be less clear where the agent has 'offered for sale travel facilities including a flight'. As I have explained, an offer to sell two or more separate travel services at the same time does not necessarily lead to the conclusion that the services are being sold or offered for sale as components in a pre-arranged combination and at an inclusive price; but, on the facts of the particular case, it may do so. ... If the customer approaches an agent 'to buy a holiday', it is likely that what will be sold or offered for sale will be a pre-arranged combination of services at an inclusive price: that is to say, 'a package'. If the customer wants to buy 'a flight and accommodation and/or other services', then (as I have explained) it will not necessarily follow that the services sold or offered for sale will be sold or offered as a package: but they may be.*

Notwithstanding the importance apparently attached to the views and intentions of the consumer at the time of purchase, Chadwick LJ

also pointed out in the course of his judgment in the *ABTA Litigation* that the test was not subjective; the fact that the consumer thought he was purchasing a package was not determinative, although it '*may be a powerful evidential pointer to the true nature of the transaction*'.

## Conclusions of the Administrative Court

As indicated above, the decision of the Administrative Court in *CAA v Travel Republic* is best regarded as a modest and fact-sensitive extension to the reasoning of the Court of Appeal in the *ABTA Litigation*, rather than as new law. Certainly, this conservative reading of the

judgment would appear to be consistent with what the Administrative Court was seeking to do:

*The solution to this case involves applying the principles adopted in the ABTA case to the facts. (per*

Elias LJ at para. 48)

The basis for the Administrative Court's dismissal of the appeal by the CAA can be found in the following passage from the judgment of Elias LJ (at paragraphs 49–50):

*... the regulation will almost certainly bite in a case where the customer specifically tells the agent that he wishes to buy a holiday and the component services are either offered or suggested to him as part of a proposed single holiday package. The combination is then put together by the agent for the customer. Whilst that may well have happened on occasions with this agent, particularly where holidays were booked by telephone, that is not the typical situation which we are required to address in this test case. ... Essentially we*

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**The decision of the Administrative Court is best regarded as a modest and fact-sensitive extension to the reasoning of the Court of Appeal**

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are dealing with a situation where the customer chooses his or her own combination of services from a wide range of options, in circumstances where TRL does not know whether a customer will select only a single service or a combination. The customer is putting together his own combination for himself. Of course, TRL will wish to sell as many services as it can, and it will know that the majority, and perhaps an overwhelming majority, of its customers are seeking to combine the services to make a holiday. Their website recognises that fact when it advertises that holiday packages are available. But, in my judgment, that does not necessarily mean that they are selling the services or otherwise making them available at the point of sale as component elements of a pre-arranged combination.

Unsurprisingly, the Administrative Court did not believe that the decision reached by the District Judge had no evidential foundation or was otherwise perverse. Indeed, Elias LJ felt that the District Judge's decision properly reflected the reasoning of the Court of Appeal in the *ABTA Litigation*.

It must, however, remain open to question whether any meaningful distinction can be drawn between *Garrido*-type cases 'where the customer specifically tells the agent that he

wishes to buy a holiday and the component services are either offered or suggested to him as part of a proposed single holiday package' and those 'where the customer chooses his or her own combination of services from a wide range of options, in circumstances where TRL does not know whether a customer will select only a single service or a combination'. It appears to be the case that the particular fact-sensitivities of the individual case (including, where appropriate,

the evidential assistance available from the subjective intentions of the parties) will be used to distinguish these two categories of case. It may be that the contortions of the English courts in recent years in respect of these issues signals the pressing need for

legislative reform and this was clearly anticipated by Elias LJ at the conclusion of his judgment (refusing a reference to the European Court of Justice):

*... the European Commission has finished consultations on a possible redrafting of the Directive to take account of selling patterns of this kind, and so has the Department for Transport with respect to changing the Regulations. Given that the purpose of these proceedings is to provide a test case to determine the current state of the law, that objective may well be undermined by a reference [to the ECJ] at this stage.*

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