THE GO-BETWEEN

Peter Stewart

"The past is a different country: they do things differently there". For the travel industry, the past is not the 40 odd years with which Leo is concerned but a much shorter period – the period during which the internet has transformed how travel can be described and sold.

That transformation has brought the need for new legislation to reflect the reality of the industry – hence the changes to the ATOL regime, through Flight-Plus, and the new draft Package Travel Directive.

Some things, however, do not change. What has not changed is that travel companies which do not own hotels or airlines are intermediaries or agents for the hotels and airlines whose products they sell. They are go-betweens. Strangely there has been, particularly over the past 10 years, a seemingly indefatigable and ineluctable inability of regulators from the CAA to HMRC to Trading Standards to understand or accept exactly what the legal position of intermediaries/agents is; or perhaps more accurately the reluctance is a reluctance to accept that travel companies can actually be agents.

This reluctance is, of course, reflected in the high profile litigation in which the CAA has found itself – the ABTA and Travel Republic litigation – and HMRC's equally unsuccessful litigation with Secret Hotels2 Ltd. All this litigation had in common a refusal by regulators to accept that travel companies were acting as, or could act as, agents.

In the 1990s, and, for those readers who can remember, the 1980s and the 1970s, regulators did not have that difficulty in accepting that travel companies did act as, and could act as, agents. It was commonly accepted that there was a clear distinction between agents and principals.

The attitude of regulators post 2000 has, in the author's view, been nourished by the industry itself. Indeed, the industry has been to a large extent the author of its own misfortune. Why is this?

There are two reasons. One is the supine approach adopted by many travel companies to the ATOL Regulations themselves; and the other is the use of the term 'dynamic packaging' – a term which single-handedly has done more to confuse, bewilder and impose obligations than any legislation could possibly have done.

In May 2001, the Court of Appeal delivered its judgment in *CAA v Jet Services Limited* QBD (Administrative Court) 6 December, 2000. This case concerned the CAA's view that Jet Services needed an ATOL, a view with which Jet disagreed. It was also the case in which the Court of Appeal analysed the language used in the ATOL Regulations (at the time the 1995 Regulations but for our purposes the relevant wording is the same). The Court of Appeal particularly looked at "make available flight accommodation".

"We start with the language of the 1995 Regulations. It is not in dispute that the words 'make available flight accommodation' should be given their natural and ordinary meaning in their context, having regard to the obvious legislative purpose of providing protection for passengers who have paid for flight accommodation. But that purpose was capable of being effected in a number of different ways. The particular method chosen was to require the licensing of those who 'make available flight accommodation'. The CAA was empowered by regs. 6 and 7 to refuse or revoke licences, having regard to the resources of the person concerned and the adequacy of the financial arrangements made by him for discharging his obligations. What was not done was to define those who needed licences by reference to their participation in the handling of money paid for flight accommodation, whether that money was paid directly by the end user or by a tour operator who purchases flight accommodation and makes it available to the end user. If a person who participates in the handling of such money is required to have a licence, it has to be because such person makes available flight accommodation rather than because he handles such money. To put it another way, the 1995 Regulations are not drafted in such a manner as to regulate those who handle such money but to regulate those who make available flight accommodation.

"We turn to the ordinary and natural meaning of 'make available flight accommodation'. We accept that the language is wide and general and is not limited to, for example, a sale. Its width was no doubt deliberate to bring within its ambit tour operators who supply package holidays involving air travel when the airline actually supplies the flight accommodation involved. 'Make available flight accommodation' means to put that accommodation at the disposal of the person to whom it is made available. But to our minds one cannot make flight accommodation available, in its ordinary connotation, without having the ability to provide it or the right to dispose of it. The airline which has the accommodation on its aircraft can by selling that accommodation make it available to a purchaser. The tour operator who buys the accommodation can then make it available to its customers through the package holiday it sells. There is nothing in the 1982 Act or the 1995 Regulations which suggests that a different connotation should be given to the words."

It is obvious from the above that there will be many circumstances in which an agent will not 'make available flight accommodation' and will not therefore need to have an ATOL. However, the travel industry has shown a complete reluctance to engage with the CAA on this, and this reluctance can, arguably properly, only have been interpreted by the CAA as an acceptance by the travel industry that 'make available flight accommodation' has a wider application than that determined by the Court of Appeal.

At the same time as the travel industry was being offered by the Court of Appeal the means to limit regulatory impact and at the same time as the travel industry appears to have decided not to accept that offer, it also seems to have concluded that it could only sell travel if it portrayed itself as the actual provider of the holiday. This led to the terms 'dynamic packages/dynamic packaging'.

Dynamic Packages have gained such currency that there is extensive commentary in Wikipedia, for example as follows:

> "Dynamic packaging *is a method used in package holiday bookings to enable consumers to build their own package of flights, accommodation, and car rental instead of purchasing a pre-defined package. Dynamic packages differ from*

> *traditional package tours in that the pricing is always based on current availability, escorted group tours are rarely included, and trip-specific add-ons such as airport parking and show tickets are often available ... Dynamic packages are primarily sold online, but online travel agencies will also sell by phone owing to the strong margins and high sale price of the product.*
>
> *Dynamic packaging is dynamic at several levels ... inventory is sourced dynamically, meaning the dynamic packaging solution will source flights, accommodation and car rental components for the package in real-time."*

Dynamic packaging was intended to be unbundling or unpackaging. However, the travel industry could not bring itself to be specific about what was actually involved in this type of sale, and effectively wanted to have its cake and eat it. By this I mean that the industry wanted to pretend that packages were being sold while at the same time seeking legally not to sell packages. The use of the word 'package' created immediate difficulties in seeking legally to avoid the consequences of contemporaneous multiple products sales being regarded as packages.

The infection caused by the use of the word 'package' went further. It poisoned, in the author's view, the CAA's approach to online sales and created a predetermined judgment within the CAA that online sales contemporaneously of more than one product would never be anything other than packages and by implication sales by principals, not by agents. The poison seeped into other government departments and hence HMRC's approach to agency.

A new dawn does, however, approach. It approaches in the form of the new Package Travel Directive which will, hopefully, be implemented in the UK in one consolidating piece of legislation which will also contain new ATOL Regulations. This consolidated legislation is unlikely to use 'make available flight accommodation'.

The new dawn is not one which will see travel companies having less regulation, but rather will see in real terms all contemporaneous sales of travel products however made and by whomever made being legally regarded as packages with consequential liabilities. The new legislation will impose obligations upon agents and will render obsolete the distinction between tour operators and travel agents and, in real terms, between principal and agent for the purposes of obligations and liabilities in respect of the sales of more than one travel product at or around the same time.

Agents will only remain and will only be able to distinguish themselves in terms of obligations and liabilities for single travel product sales – provided, of course, that the new legislation does not seek to go further than package legislation. The era of agents being able to avoid liability will be, like Joseph Losey's heroine, an image of iconic beauty rooted in the past.

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Editorial Note

It would be remiss of me, in this, the final issue of the TLQ, to allow Peter's article to pass without comment.

He talks of the 'indefatigable and ineluctable inability of regulators from the CAA to HMRC to Trading Standards to understand ... that travel companies can actually be agents'. Perhaps the regulators applied the 'Duck Test' to their activities i.e. 'If it walks like a duck, swims like a duck and quacks like a duck then maybe it is a duck.' To them and to me Med Hotels looked very much like a duck, as it did to the Court of Appeal.

And as for an agent being 'an image of iconic beauty rooted in the past' there are those that might prefer the words from a more famous film – 'Ding Dong the witch is dead'.