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# FOIL UPDATE

13 April 2021



## X v Kuoni Travel Ltd and another C-578/19

In July 2019 FOIL published an Update reporting the Supreme Court judgment in this case.

On or about 1 April 2010 the appellant and her husband (“Mr and Mrs X”) entered into a contract with the respondent, under which Kuoni agreed to provide a package holiday in Sri Lanka. 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. The appellant claimed damages against the respondent by reason of the rape and the assault. The claim was brought for breach of contract and/or under the Package Travel, Package Holidays and Package Tours Regulations 1992 (“the 1992 Regulations”) which implemented, in the United Kingdom, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (“the Directive”).

The High Court and Court of Appeal dismissed the claim. On appeal to the Supreme Court there were two main issues: (1) Did the rape and assault of the appellant constitute improper performance of the obligations of Kuoni under the contract? (2) If so, was 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 Supreme Court decided to refer two questions to the Court of Justice of the European Union (CJEU). The terms of the reference set were:

### IN BRIEF

The CJEU has ruled on two points referred to it by the UK Supreme Court, relating to the defendant’s potential liability for the rape of the claimant by a hotel employee.

*For the purposes of this reference, the Court of Justice of the European Union is asked to assume that guidance by a member of the hotel's staff of the appellant to the reception was a service within the "holiday arrangements" which the respondent had contracted to provide and that the rape and assault constituted improper performance of the contract.*

Against that background the questions put were:

*(1) Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organizer or retailer with a consumer to provide a package holiday to which the Directive 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 organizer or retailer enters into a contract with a consumer to provide a package holiday to which the Directive 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?*

The CJEU has now ruled that the third alinea of Article 5(2) of the 1990 Directive, 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.

The case now returns to the UK Supreme Court, which will determine the appellant's appeal and will rule on whether Kuoni is liable to her for the assault carried out by N.

The full ruling may be found at: [Kuoni Travel \(Package travel - Liability of the travel organiser for the proper performance of obligations arising from the contract by other suppliers of services - Judgment\) \[2021\] EUECJ C-578/19 \(18 March 2021\) \(bailii.org\)](#)

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