Neutral Citation Number: [2022] EWHC 386 (Ch)

Case No: FS-2021-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL SERVICES AND REGULATORY LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

28 February 2022

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

- -

Between :

COMPETITION AND MARKETS AUTHORITY	**Claimant**
- and -	
TRULY HOLDINGS LTD (1) **TRULY TRAVEL LTD (2)** **ALPHA HOLIDAYS LTD (3)** **(all in liquidation)**	**Defendants**

- -
- -

Toby Riley-Smith QC and Alexander Cook
(instructed by **The Competition and Markets Authority**) for the **claimant**
The **defendants** did not appear and were not represented

The matter was determined by reference to written evidence and written submissions with the consent of the parties

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 28 February 2022.

Judge Jonathan Richards:

1. This is the trial of a Part 8 claim brought by the Claimant (the "CMA") against associated travel companies, now in liquidation. The First Defendant is a holding company. The Second and Third Defendants (to whom I will refer together as the "Operating Defendants") sold package holidays online to consumers under the names "Teletext Holidays" and "alpharooms.com" respectively.

2. The trial raises the following issues:

    i) whether the court should exercise its discretion to grant relief consisting purely of a declaration to the effect that the Operating Defendants breached their obligations under The Package Travel and Linked Travel Arrangements Regulations 2018 (the "PTRs"); and

    ii) if so, whether such a declaration should be made.

3. The CMA's standing to bring these proceedings is derived from the Enterprise Act 2002 ("EA 2002"). Under EA 2002, the CMA is a general enforcer of consumer protection legislation. It has power to bring enforcement proceedings to stop or prevent infringements of consumer protection law that harm the collective interests of consumers. If the Operating Defendants breached their obligations under the PTRs, that would be a "Schedule 13 Infringement" for the purposes of EA 2002, engaging the CMA's power under s215 of EA 2002 to seek an "enforcement order".

PROCEDURAL BACKGROUND

4. The CMA had received significant numbers of complaints from customers of the Operating Defendants that they had not received refunds on package holidays cancelled for reasons related to the COVID-19 pandemic. By letter dated 28 January 2021, the CMA asked for information on the extent to which the Operating Defendants had provided full cash refunds, as required by the PTRs, to customers whose holidays were cancelled because of the pandemic. Later in this judgment, I will make factual findings as to whether the Operating Defendants were in breach of their obligations under the PTRs. However, for present purposes it suffices to say that the CMA was concerned that the response to its letter revealed that the Operating Defendants were in material breach of their obligations.

5. The CMA was required to, and did, commence statutory consultation pursuant to s214 of EA 2002 before taking enforcement action. After some discussion, the Operating Defendants gave statutory voluntary undertakings pursuant to s219 of EA 2002 on 25 May 2021 (the "Undertakings").

6. The CMA was dissatisfied with the Defendants' compliance with the Undertakings. On 18 October 2021, it commenced Part 8 proceedings seeking both (i) a declaration that the Defendants were in breach of their obligations under the PTRs and (ii) enforcement orders requiring the Defendants to pay refunds due and take various other future steps to safeguard travellers' interests.

7. On 18 November 2021, the Defendants filed an acknowledgment of service contesting the claim. They requested until 2 December 2021 to file their evidence,

an extension to which the CMA agreed and which Fancourt J approved by order of 19 November 2021.

8. The Defendants did not file any evidence by the extended deadline of 2 December 2021. Rather, on 3 December 2021, their solicitors wrote to the court to explain that:

   i) The Defendants had all been placed into creditors' voluntary liquidation on 1 December 2021 and joint liquidators had been appointed.

   ii) The joint liquidators thought that the Defendants' customers would be entitled to compensation from the Travel Trust Association (the "TTA") to the extent that the Defendants' assets available in the liquidation were insufficient to meet those customers' claims.

   iii) Therefore, since customers could ultimately expect to obtain the refunds due to them, the CMA's Part 8 proceedings "no longer served any purpose" and there was no reason for them to continue.

9. The CMA accepted that its claim for enforcement orders in the Part 8 proceedings ran the risk of interfering with the scheme of *pari passu* distribution of assets in the Defendants' liquidation. However, it considered that the claim for a declaration should proceed to a trial. The joint liquidators' counsel confirmed to the court at a directions hearing on 8 December 2021 that the Defendants would not contest the claim for a declaration. Therefore, by order sealed on 8 December 2021, Meade J ordered that (i) with the exception of the claim for a declaration, the Part 8 proceedings would be stayed generally with liberty to restore but that (ii) the claim for a declaration would be listed for trial on the written evidence.

10. The Claimant has prepared a bundle containing the evidence and extensive written submissions. I am grateful to Mr Riley-Smith QC and Mr Cook for the care they took in their written submissions to draw all relevant matters to my attention, not limited to those which advanced their clients' case. Those written submissions were in fact so comprehensive that I asked the parties whether they felt an oral hearing was necessary. In response, the Claimant indicated by counsel that it had nothing to add to its written submissions. The Defendants' liquidators confirmed that they intended to make no submissions, whether written or oral. Therefore, both parties have had the opportunity to make written and oral submissions but, in view of their confirmations, I have decided the matter by reference to the written evidence and the Claimant's written submissions.

THE DISCRETION TO GRANT PURELY DECLARATORY RELIEF

11. This issue comes before the court as part of an application by the CMA for an "enforcement order" under s217 of EA 2002. Section 217 does not provide for purely declaratory relief, though it does not exclude it. Moreover, s217(5)(a) does indicate that, if a court makes an enforcement order, it must "indicate the nature of the conduct" that resulted in the order being made. The CMA is not now asking the court to make an enforcement order for reasons that I have already set out. However, I see nothing in s217 that either (i) ousts the general discretion to grant declaratory relief set out in s19 of the Senior Courts Act 1981 or that (ii) compels

the conclusion that this would not be a suitable case for the court to exercise that discretion.

12. It follows that I have a discretion to exercise and the question is how I should exercise that discretion in the circumstances of this case. I am grateful to the CMA for drawing my attention to a number of authorities dealing with situations where purely declaratory relief has, or has not, been granted. However, I respectfully consider that the editors of *Zamir & Woolf on the Declaratory Judgment* are correct to point out in paragraph 4-06 of the 4th edition of the work:

> *"While principles can be distilled from a number of judgments and can safely be said to provide guidance as to how the courts will exercise their discretion in circumstances of that kind, it is always open to a court in the individual circumstances of a particular case to conclude that special features of that case justify it departing from that guidance".*

13. I will, therefore, approach the discretion judicially, in the light of the overriding objective. I have been guided as to the exercise of my discretion by the judgment of Aikens LJ in *Rolls Royce Plc v Unite the Union* [2010] 1 WLR 318 in which he said, at [120]:

> *"[120] For the purposes of the present case, I think that the principles in the cases can be summarised as follows:*
>
> *(1) The power of the court to grant declaratory relief is discretionary.*
>
> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*
>
> *(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*
>
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue.*
>
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
>
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*

> *(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."*

14. Not all of these considerations are relevant in this case. This is not, for example, a "friendly action" of the kind Aikens LJ was referring to in (5) of the quote. The CMA's status as a "general enforcer" of consumer legislation plainly makes it unnecessary to attach any material weight to the fact that it is not party to a contract with the Operating Defendants or travellers (point (4) of the quote). However, the extract I have quoted offers clear guidance as to how the discretion should be exercised.

15. It is clearly significant that there is relatively little "real and present dispute" between the parties. No practical purpose would be served by making enforcement orders given that the Defendants are in the course of being liquidated. Whether declaratory relief is granted or not, the Defendants' customers appear likely to obtain their refunds from a combination of the assets available in the Defendants' liquidation and the TTA. That is an indication against the exercise of discretion to grant purely declaratory relief.

16. However, as held in *Gas & Electricity Markets Authority v Spark Energy Supply Limited* [2018] EWHC 2522 (Ch), an evaluation of the public interest is relevant. In that case, Snowden J was prepared to grant purely declaratory relief, even in a situation in which there was no "real or present dispute" because to do so would assist a regulatory body to have confidence to act where there would otherwise be some uncertainty as to its power to do so. In *Australian Competition and Consumer Commission v Dataline* [2006] FCA 1427, the Australian Federal Court granted declaratory relief in a case involving breach of consumer protection legislation on the basis that there was a public interest in identifying for the public "what conduct [constitutes] a contravention and to make apparent that it is considered to warrant an order recognising its seriousness". I consider that to be a relevant consideration in this case.

17. Mr Myers Lusty, Senior Director for Consumer Protection at the CMA explained in his witness statement that the CMA has received over 23,000 complaints from travellers about failures by package holiday providers generally to give refunds on holidays cancelled because of COVID-19. He considered that some travel companies are giving travellers inaccurate information about their rights. That suggests that making and publishing a declaratory judgment could provide a useful role in informing the public of their rights under Regulation 14. I am reassured to note that Proudman J reached a similar conclusion in an analogous situation in *Financial Services Authority v Watkins (Trading as Consolidated Land UK)* [2011] EWHC 1976 (Ch). I also consider that a declaratory judgment would serve a public interest by showing that the CMA is prepared to exercise its powers by taking court proceedings in appropriate cases.

18. Moreover, there is <u>some</u> dispute between the CMA and the Defendants since, as noted in the next section, in correspondence with the CMA at least, the Defendants suggested that they had some defence to the allegations of breach of Regulation 14. There is some public interest in an examination of the merits of

those defences to the extent that can be fairly done without the active participation of the Defendants.

19. The fact that the Defendants have not made any submissions, or provided any evidence, is a factor that tends to point against granting declaratory relief. However, I consider that consideration to be of relatively little weight in this case. I am not being asked to make a declaration as to the meaning of a statutory provision which is in any respects unclear or susceptible to multiple interpretations. Therefore, a feature that dissuaded Morgan J from granting purely declaratory relief in *Pavilion Property Trustees Limited v Permira Advisers LLP* [2014] EWHC 145 (Ch) is not present in this case. The declaration sought is simply that particular traders have breached the requirements of Regulation 14. That declaration will not have any binding effect on traders other than the Defendants. Moreover, there is little that the Defendants could say to deny the breaches of Regulation 14 which, as will be seen from the next section, was demonstrated by data they themselves provided to the CMA.

20. Having weighed up competing considerations, I have decided that this is an appropriate case for the court to consider exercising discretion to grant purely declaratory relief. In the section that follows, I will consider whether to make the declaration that is sought.

WHETHER TO GRANT DECLARATORY RELIEF

Legal framework

21. The PTRs implemented Directive 2015/2302/EU. They came into force on 24 May 2018.

22. The PTRs, among others, set out rights and obligations applicable to "organisers", defined in Regulation 2 as:

> *"(a) a trader who combines and sells, or offers for sale, packages, either directly or through another trader or together with another trader; or*
>
> *(b) the trader who transmits the traveller's data to another trader in accordance with paragraph (5)(b)(v);"*

The reference to "packages" in the above definition is to what are commonly described as "package holidays". It is not necessary to set out in full the definitions that achieve this.

23. Both Operating Defendants were "organisers" as defined in limb (a) of this definition as made clear by the evidence, which I address below, demonstrating that they had been selling package holidays to customers in the UK. Moreover, the Second Defendant held an ATOL licence permitting it to sell package holidays. The Operating Defendants' own descriptions of their businesses demonstrate that they were selling "package travel contracts" to individuals who were "travellers" for the purposes of the PTRs. The Operating Defendants were,

therefore, obliged to comply with the provisions of the PTRs (and indeed were entitled to take the benefit of aspects of the PTRs).

24. The PTRs conferred both benefits and obligations on "organisers" such as the Operating Defendants. If there are "unavoidable and extraordinary circumstances", they are entitled to terminate a package holiday contract and simply refund the money. The PTRs relieve an organiser from any liability to pay any consequential damages in such a case. As the price of conferring this benefit, the PTRs require any refund to be paid as soon as possible, but in any event within 14 days.

25. By Regulation 2, "unavoidable and extraordinary circumstances" are defined as:

> *"…a situation—*
>
> *(a) beyond the control of the party who seeks to rely on such a situation for the purpose of regulation 12(7), 13(2)(b), 15(14) or (16), 16(4)(c) or 28(3)(b); and*
>
> *(b) the consequences of which could not have been avoided even if all reasonable measures had been taken."*

26. I am quite satisfied that the COVID-19 pandemic falls within this definition. As I have noted, the Defendants have provided little by way of substantive response to the Part 8 proceedings, but they do not appear to be dissenting from this proposition.

27. Regulation 13 provides a right for an organiser to cancel a package travel contract before the start of the package because of unavoidable and extraordinary circumstances. Regulation 13(3)(b) relieves an organiser exercising this right from any obligation to pay additional compensation. However, by Regulation 13(3)(a), the organiser must provide the traveller with a full refund.

28. The timing of refunds is prescribed by Regulation 14 which provides, so far as material, as follows:

> *"14 Refunds in the event of termination*
>
> *(1) The provisions of this regulation are implied as a term in every package travel contract.*
>
> *…*
>
> *(3) Any—…*
>
> *(b) refund required pursuant to—*
>
> *(i) regulation 12(8), or*
>
> *(ii) a termination under regulation 13(3),*
>
> *must be made to the traveller without undue delay and in any event not later than 14 days after the package travel contract is terminated."*

29. It will be seen that these provisions apply both to refunds due under Regulation 12(8), where a traveller initiates the termination, and refunds due under Regulation 13(3), where the organiser initiates the termination. Moreover, the obligation to provide the full refund within 14 days is strict: the Regulations do not expressly provide for any relaxation of the obligation even where it is difficult, or even impossible, for the organiser to comply with it.

Whether the Operating Defendants breached the requirements of the PTRs

Facts

30. Information that the Operating Defendants provided to the CMA in the course of its investigations demonstrates that the Operating Defendants have not paid significant amounts of refunds, to significant numbers of travellers, within the 14-day period specified in Regulation 14(3).

31. On 19 February 2021, the Operating Defendants provided the CMA with a Powerpoint presentation containing information relevant to their compliance with Regulation 14(3). That presentation contained figures covering what was defined as the "Relevant Period" being the period from 17 March 2020, the date on which the Government advised against non-essential travel in response to the COVID-19 pandemic, to 28 January 2021. The Operating Defendants' own figures demonstrate that in the Relevant Period:

    i) 20,179 bookings ("Affected Bookings") had been cancelled, with a total value of £28.03m. The Operating Defendants were unable to say whether every booking it had referred to was cancelled for reasons relating to the COVID-19 pandemic. However, it considered it "highly unlikely" that bookings in this period would have been cancelled for any other reason and indicated that they did not consider it to be a good use of resources to consult records manually to identify with precision whether there were a few cancellations that were not attributable to COVID-19.

    ii) The Operating Defendants did not record separately whether cancellations were initiated by travellers, or by them.

    iii) 5,759 travellers with Affected Bookings to a total value of £7.35m had agreed to rebook to a new date.

    iv) 6,422 travellers with Affected Bookings, to a total value of £9.43m had received full cash refunds.

    v) 1,180 travellers with Affected Bookings to a total value of £1.53m had not yet requested a refund.

    vi) That left 6,818 travellers with Affected Bookings, to a value of £7.84 million who, as at 28 January 2021, had asked for a full cash refund, but had not received it. Of those 6,626 travellers, with Affected Bookings to a value of approximately £7.64 million, had made claims for refunds that were still outstanding 14 days after the date of termination of their booking. Of these, 5,278 travellers, with Affected Bookings to the value of £6.09m,

had claims outstanding more than 92 days after termination of their bookings.

32. As I have noted, the Defendants eventually agreed to give the Undertakings and the CMA accepted those on 25 May 2021. The Undertakings dealt with both historic cancellations, those made between 17 March 2020 and 24 May 2021, and future cancellations, which took place after the date of the Undertaking. The Defendants undertook to use reasonable endeavours to pay refunds in respect of historic cancellations in accordance with a specified timetable and to pay refunds on future cancellations within 14 days. The Defendants did not meet the deadlines for payment in respect of historic cancellations to a significant extent. Ultimately, they did pay refunds (albeit late) in respect of many historic cancellations. However, by 31 August 2021, the last payment milestone set out in the Undertakings, 932 travellers had between them still not been paid refunds totalling £927,941. Moreover, the Defendants' own figures provided to the CMA indicated that some 4.7% of travellers who faced new cancellations, after the date of the Undertakings, did not receive refunds within 14 days. The Defendants have, in correspondence with the CMA, pointed to extenuating circumstances explaining these breaches of the Undertakings, which I will consider in the section below.

Analysis

33. I have explained in paragraph 23 why the Operating Defendants were obliged to comply with Regulation 14 of the PTRs. It is quite clear that from the facts set out in paragraph 31 that they have not done so. Significant numbers of travellers whose bookings were cancelled because of "unavoidable and extraordinary circumstances" did not receive a full refund within the 14-day maximum period stipulated by Regulation 14. Moreover, that failure continued after the date on which the Defendants gave the Undertakings, since their own figures demonstrate that at least 4.7% of travellers whose contracts were cancelled after 25 May 2021 for COVID-19 reasons did not receive refunds within 14 days.

34. That is a finding that the Operating Defendants did breach the requirements of Regulation 14. I do not need to, and will not, make findings as to why they breached those requirements. I am prepared to accept, without making any findings on specifics, that the COVID-19 pandemic made life difficult both for travellers and for organisers of package holidays and that compliance with Regulation 14 would have been difficult. However, as I have noted, Regulation 14 imposes a strict requirement to make refunds within 14 days at the latest and so difficulty in complying with Regulation 14 does not prevent a breach of that Regulation from occurring. Nor do the following matters, which the Defendants have raised in correspondence, alter the conclusion that the requirements of Regulation 14 were breached:

    i) The Defendants point out that some travellers accepted a voucher or an offer of rebooking. I will not in this judgment embark on analysis of how Regulation 14 operates in circumstances where traveller and organiser agree on something other than a cash refund since I have not heard submissions from both sides on that issue. However, the short point is that, even ignoring customers who had received a voucher or rebooking, 6,626

travellers who had claimed and were entitled to a cash refund, had not received refunds due totalling £7.64m within 14 days (see paragraph 31.vi) above).

ii) The Defendants also suggest that some travellers will have received refunds from third parties. That may be true, though they have not identified any travellers who received full refunds from third parties within 14 days of termination. It may be that some of the 6,626 travellers referred to above were fraudulently claiming refunds from both the Defendants and unspecified "third parties". However, I am not prepared to accept, in the absence of any figures from the Defendants, that this was prevalent. It therefore remains the case that material numbers of travellers, owed significant sums, did not receive refunds due from the Operating Defendants within 14 days.

iii) The Defendants suggested in correspondence with the CMA that historic breaches of Regulation 14 that took place prior to 25 May 2021 were settled by the provision of the Undertakings. That is not correct. Voluntary undertakings and compliance with them are, by s217(4) of EA 2002, relevant to a court's decision whether to make an enforcement order. They do not, however, erase prior breaches of the PTRs.

iv) The Defendants pointed to difficulties that they had in obtaining some travellers' bank details which made it difficult for them to make some refunds within the 14-day maximum period. However, the 14-day limit is absolute. If, in particular cases, the Defendants could not obtain bank details from a traveller that may, though I make no finding, provide a reason for the breach which a court would take into account in deciding whether to make an enforcement order. However, it does not alter the fact that a breach did take place.

v) The Defendants suggested that they may have a defence of "tender before claim" described in *Chitty on Contracts* 34th Edition at paragraph 24-082 as involving a situation where a "promisor made an unconditional offer to perform its promise in terms of the contract but that the promisee refused to accept performance". I am not prepared to accept that any significant numbers of the Operating Defendants' customers "refused to accept" refunds by, for example, declining to provide up to date bank details not least since the Defendants have not given any particulars of customers who did so. Even if a few customers did, that does not, for reasons similar to those set out in paragraph 33 iv) prevent a breach of Regulation 14.

DISPOSITION

35. I will make a declaration in the following terms, as requested by the CMA:

> *"Between 17 March 2020 and 1 December 2021 Truly Travel Limited and Alpha Holidays Limited each failed to pay refunds to travellers following the termination of package travel contracts as required by The Package Travel and Linked Travel Arrangements Regulations (SI 2018/634)."*