SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 51

PN3126-17

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the cause

ROSEMARY O'DONNELL

Pursuer

against

(FIRST) ON THE BEACH LIMITED
(SECOND) ROMANCE CLUB HOTEL

Defenders

Pursuer: Wilson, advocate; Digby Brown LLP
First Defenders: Murray, advocate; Plexus Law

Edinburgh, 14 October 2020

The sheriff, having resumed consideration of the cause, finds in fact as follows:

[1] The parties are as designed in the instance.

[2] The first defenders are travel agents. They operate most of their business on line via a website.

[3] This court has jurisdiction.

[4] In 2016 the pursuer wanted to go on holiday in Turkey.

[5] The pursuer intended to go on holiday with her partner and her mother.

[6] The pursuer's mother uses a wheelchair.

[7] The pursuer had gone to Turkey on holiday before. She was aware of the Kibele Hotel. The surrounding location was flat. It was attractive to her because of her mother's use of a wheelchair.

[8] The pursuer was familiar with booking holidays on the internet. She had previously booked holidays with the first defenders.

[9] The first defenders operate a website which enables potential customers to book holidays with them.

[10] The website offers the customer the facility to book a range of holiday services such as flights, hotels, hotel transfers, insurance and car parking.

[11] The customer identifies the location of the proposed holiday, the number in the party and the relevant dates. The first defenders' website then provides information as to the choice of services available.

[12] JB32 to JB35 contain an example of the first defenders' website as completed by a putative customer. That information would, with minor changes, have been the same in 2016. The first defenders no longer have a record of the pursuer's first inquiry on their website.

[13] The first defenders' website draws attention to the first defenders' terms and conditions of contract. They are available to read by clicking a link.

[14] The pursuer did not open the link on the first defenders' website to the first defenders' terms and conditions. She did not read them. Had she read them, she would have had difficulty in understanding them.

[15] The first defenders' website states that the first defenders: do not sell package holidays; act as an agent; and that if the customer proceeds, the customer contracts with the individual service providers (JB34 and JB35).

[16] At a date in early March 2016, the pursuer booked a holiday in Turkey with the first defenders. The pursuer did so using the website of the first defenders. There was no interaction with a person either directly or by phone.

[17] The pursuer selected dates for the holiday (5 July to 19 July 2016), number in the party and destination. The website gave the pursuer a range of options to choose from as to flights and hotels. The pursuer selected flights, a hotel and transfers to and from the airport. The website gave the pursuer a price for her holiday showing the cost of the individual components of the holiday. The website would also have stated any discount attributable to the price. The pursuer could select whatever she wanted from the combination of services offered on the website.

[18] On the final webpage, before making payment, it is stated that by clicking to confirm the booking the customer is agreeing to each third party supplier's booking conditions and the first defenders' terms of business. The pursuer did not view either material. The pursuer supplied her bank details to the first defenders.

[19] By order request email dated and timed 10.22 on 5 March 2016 ("order request email"), the first defenders' acknowledged the booking from the pursuer (JB50).

[20] The reference for the transaction was MYB4972873B.

[21] The order request email gave the following details of the holiday: from Glasgow to Dalaman, Turkey for 14 nights. The passenger summary included the pursuer, her partner and her mother. The flight summary contained details of flights with "Thomas Cook Tour Operations Ltd" both outgoing and returning. The hotel was specified as the "Kibele Hotel (Magic Rooms)". The transfer shuttle service was with Atik Tours DLM Shuttles. The total flight price was £964.68; the total hotel price £453.51; the total transfer price £52.62 and the transaction fee of £4.95. The sum of £37.93 was deducted from the cost by way of discount.

The initial payment required from the pursuer was £330.22 to include surcharges and transactions. The balance was £1,432.88. The order request email provided the following statement as a footnote to the discount namely "Please note that all discounts will first be allocated against surcharges and service fees and then finally against the other costs" (JB50). The information in the order request information was provisional pending confirmation by the first defenders of information as to prices of the selected services. That information was sought by the first defenders from the service providers. The information was obtained automatically. The pursuer had no involvement with the discount. It was applied by the first defenders.

[22] The first defenders sent to the pursuer by email an "order confirmation email". It was sent at 10.23 on 5 March 2016 ("the order confirmation email"). The order confirmation email confirmed the booking. The reference number was MYB4972873B.

[23] The order confirmation email contained the following:

> "Each travel product you book (flight, hotel, transfer or insurance) is a separate and individual booking. Each booking creates a separate contract between you and the relevant supplier. The price for each booking is specific to that booking and independent of any other booking made during the same period of time".

[24] The order confirmation email also provided that "Your flights have been reserved for you with Thomas Cook Tour Operations Ltd"; "This hotel has been reserved for you through Magic Rooms"; "Transfer has been reserved for you through Atik Tours DLM Shuttles".

[25] The booking cost summary (JB55) stated as follows:

Total flight price	£964.68
Total hotel price	£453.51

Total transfer price	£52.62
Card surcharges	£0.00
Transaction fee	£4.95
Accommodation extra discount	-£20.84
Accommodation special offer discount	-£17.09
Total discount	-£37.93
Total cost	£1,437.83
Deposit paid	£325.27
Total paid inc surcharges and transaction fee	£330.22
Balance	£1,107.61

[26] On the same page as the booking cost summary was written: "The above prices include a service fee". The booking cost summary page also included "About our Discounts please note that all discounts will first be allocated against our surcharges, service and transaction fees and then finally against the other costs." The first defenders have a small mark up on price of the services.

[27] The order confirmation email contained an attachment being vouchers for flights, hotel and transfer. The first two contained the names of the service providers and did not mention the first defenders. The third voucher had the name of the service provider and mentioned the first defenders as travel agent.

[28] The pursuer was also issued with an ATOL Certificate detailing the extent of the protection afforded to her in the event of insolvency (JB61). The first defenders are named

as the body protecting the trip. The providers for flight accommodation and transfer are "flythomascook; Magic Rooms; Atik Tours DLM Shuttles".

[29] The first defenders operate a low deposit scheme, which enables a customer to pay for their holiday by instalments. The pursuer opted to pay by instalments. The first defenders levy a transaction fee of £4.95 towards the administration cost thereof.

[30] The first instalment of £330.22 was paid to the first defenders at or about the time of the order confirmation email.

[31] The pursuer paid a further instalment of £642.41 on 5 April 2016 (JB63).

[32] The remaining balance of £465.20 was paid on an unspecified date.

[33] JB20 to JB31 contains the first defenders' terms of business.

[34] The pursuer believed she had bought a package holiday from the first defenders.

[35] The pursuer had no dealings with the service providers by way of payment or otherwise prior to going on holiday.

[36] The pursuer proceeded to go on holiday.

Finds in fact and in law

[1] The pursuer entered into a contract with the first defenders in relation to the foregoing holiday.

[2] The pursuer did not enter into separate contracts in relation to the foregoing holiday with any of the service providers.

[3] The 1992 regulations apply to the transaction which the pursuer entered into with the first defenders.

THEREFORE

Puts the matter out by order on a date to be afterwards fixed in order to determine further procedure, such hearing to be conducted by remote means; reserves meantime all questions of expenses.

Note

[1] This is an action of reparation in which the pursuer seeks damages following an injury she suffered whilst on holiday in Turkey. The injury occurred on or about 19 July 2016. The pursuer raised the present action against the first defenders, a company carrying on the business of travel agents, and the second defenders, the operators of the hotel where she was staying and on whose premises the accident occurred.

[2] The pursuer invokes this court's jurisdiction upon the basis that it is a consumer contract in terms of article 3 of Schedule 8 of the Civil Jurisdiction and Judgments Act 1982. Jurisdiction is admitted. The first defenders (not the second defenders) have compeared.

[3] The pursuer's case against the first defenders is founded upon the Package Travel, Package Holidays and Package Tour Regulations 1992 ("the 1992 regulations"). If the 1992 regulations do apply then, in terms of regulation 15, the first defenders would be liable for the proper performance of the relevant contractual obligations. The first defenders deny that the 1992 regulations apply to this matter. A preliminary proof was ordered to determine whether the 1992 regulations do apply. I have limited my findings to that issue.

[4] The proof took place during the Covid19 emergency. Evidence was taken by video link. The parties agreed a joint bundle of documents to which the witnesses were referred. In my findings in fact and in this judgement I shall refer to the documents in the joint bundle ("e.g. JB1") rather than by process number. I heard evidence from the pursuer, from

Ms Laura Dews, a paralegal in the employment of the first defenders and Mr William Allan, a chief supply officer in the employment of the first defenders. There are no issues as to credibility and reliability. I am quite satisfied that all of the witnesses were doing their best to give honest answers to the questions put to them. There is little dispute, if any, between the parties as to the material facts. With no disrespect to him, Mr Allen was not in a position to add much to the evidence.

[5] The pursuer lives in Clydebank and is employed as a carer by Glasgow City Council. It is her practice to take a holiday abroad once a year. She has done this for some time and is familiar with the process of booking such holidays on line. She has used the first defenders on more than one occasion. She has used others.

[6] The first defenders have been in business since 2004. They are travel agents selling flights and other services such as hotels. Approximately 90% of their business is conducted on line; the remaining 10% is conducted by phone.

[7] In 2016, the pursuer resolved to go on holiday in Turkey, a destination which she had previously visited. She was to be one of a party of three, the other two being her partner and her mother. Her mother uses a wheelchair. The pursuer was familiar with the Kibele Hotel. The pursuer wanted that particular hotel because it was situated on flat land making matters easier for wheelchair use. In summary, on or about March 2016 the pursuer booked her holiday through the agency of the first defenders for 14 nights from 5 to 19 July 2016. The holiday comprised flights to and from Turkey, hotel accommodation and transfers to and from the hotel. The entire transaction was conducted online. There was no human interaction. It is necessary to examine more closely how the booking was made. The pursuer knew what she wanted when she went to the website. I have used the word

"booking" which is the terminology used in the material. I do not regard it as a term of art nor do I propose to attempt to fit it into conventional contractual analysis.

[8] The first defenders operate a website. The first defenders' website receives thousands of enquiries. Unsurprisingly, the first defenders have not been able to find the particular enquiry of the pursuer relating to this transaction. That the pursuer did complete a booking is not in doubt. It cannot now be found. In all probability it was sent very shortly before 5 March 2016. However, Ms Dews was able to recreate an example of what the pursuer would have seen when she accessed the site. With some minor, unspecified exceptions, JB32 to 35 comprise what the pursuer would have seen in 2016 when she visited the first defenders' website. (There is one minor error in the numbering in that that JB35 should precede JB34.) The customer is invited to insert details of the dates for the proposed holiday, location and size of the party. The site asks the customer to select flight only or flight with hotel or indeed other combinations. The customer can create an account with the first defenders. Creating an account enables information to be stored. The pursuer's evidence is that she had an account with the first defenders. That she did click on the facility to create such an account is borne out by JB49. Whatever use may have been made of this facility it is not of significance.

[9] In my findings in fact I have referred to what seem to me to be the relevant parts of the material which the pursuer would have seen and completed. JB34 contains the following:

> "On the Beach act as an agent providing a web search interface between you and various third party suppliers of travel products (e.g. flight, hotel or transfer). For flights, we act as your agent in processing your booking with the airline: we are not the airline's agent. Each product you choose has its own price independent of other products booked at the same time and creates a separate contract between you and the supplier of that product.

On JB35, the text reads:-

> "As an online travel agent, we don't sell package holidays, we let you build your own by giving you access to a wide range of cheap flights, hotels and transfer suppliers, saving you money…"

[10] The website responds to the customer's enquiry by providing details of what is sought, for example, flights and hotels. In the example created by Ms Dews 41 flights and 418 hotels were identified as satisfying the customers' request for the particular dates. There is a facility to look for a particular hotel. Whether that was actually done by the pursuer at the time, and how it was done, is less clear but nothing turns on that. The customer can select the airline; there may be two different airlines for the respective journeys to and from the destination. Further down the webpage (JB38) is further relevant text:

> "On the Beach act as an agent providing a web search interface between you and various third party suppliers of travel products…."

[11] A customer is able to add additional services including, but not limited to, transfer from the airport to the hotel, insurance and parking. These are not part of the service unless the customer asks for them. The customer is free to assemble whatever services from the site she may want. There is no obligation to make any particular combination or indeed to select more than one element. Whether a customer could deselect a choice was not clear. In cross examination Ms Dews thought that it might be possible to do so, using the "back" function on a computer but in fairness to her she was not certain. Another option would have been to come out of the website altogether and start again. The evidence on this is not clear and I make no finding in connection therewith. In any event I do not consider it material.

[12] When the customer has made her selection, the website automatically calculates the price. In the worked example created by Ms Dews there is a discount on the price, described as "hotel early booking discount" and "hotel extra discount" (JB43). From the evidence of

Ms Dews, the first defenders deal with what were described as bed banks. These are companies which sell accommodation. From the first defenders' perspective the discount is applied by the bed bank company for early booking. At various points on the site (JB43 and JB47) the customer is encouraged to book without delay ("hurry"). This is not entirely an invocation to secure commercial advantage: the prices charged by the ultimate service providers can vary within very short periods of time.

[13] Towards the end of the webpage (JB48) is the following text:

> "Important information for deposit payments. By clicking to confirm your booking, you are agreeing to each separate third party suppliers **booking conditions** and our **agency terms of business**".

[14] The highlighted words, if clicked, lead the customer to the respective terms of conditions referred to. The pursuer acknowledged that she had not done so and was doubtful whether, even if she had, the terms and conditions would have meant much to her. Even if she had read them she said she would "not have understood the half of it". The first defenders' terms and conditions are JB20 to JB31.

[15] Before booking, the website shows the customer the total price for the services selected. The first defenders operate a scheme which allows the customer to pay a low deposit and then to pay the balance by instalments. It was Ms Dews' evidence that the transaction fee (£4.95), contained in the summary of costs, comprised an administration fee charged by the first defenders towards the cost of operating this scheme.

[16] The pursuer chose to proceed with flights, hotel and hotel transfers for her chosen destination. After she clicked on the option to book, the first defenders sent to her an "order request email" with a reference number (MYB4972873B). The email is timed at 10.22 on 5 March 2016 (JB50). The order request email makes clear that, although it gives details of the booking, the information is provisional and subject to change prior to the final booking

summary email. The order request email contains details as to the flights, hotel and transfers together with the price therefor. It also contains details as to discount. I have summarised the relevant details in my findings in fact at paragraph [21]. The reason for the email being provisional is that the first defenders required to check with the suppliers of the services to ensure that the prices quoted remained correct and had not been altered in the intervening time. The verification process is done automatically. In this case, it appears to have taken less than a minute. An "order confirmation email" was sent at 10.23 on the same date (JB52). The document is lengthy and includes an attachment which contains vouchers relating to the services the customer has purchased; the customer prints off the vouchers to use when using the services. The vouchers for the flights and the hotel mention the service providers but not the first defenders. The first defenders are mentioned as travel agent in the transfer voucher; the service provider is named. The order confirmation email confirms the booking. It also contains final details of the holiday. The document provides as follows:

> "Each travel product you book (flight, hotel, transfer or insurance) is a separate and individual booking. Each booking creates a separate contract between you and the relevant supplier. The price for each such booking is specific to that booking and independent of any other booking made during the same period of time".

[17] The document narrates that flights have been reserved with Thomas Cook Tour Operations Limited, the hotel with Magic Rooms and the transfers with Atik Tours DLM Shuttles. Under the heading of "Booking Cost Summary" the following figures are set out (JB55):

Total flight price	£964.68
Total hotel price	£453.51
Total transfer price	£52.62

Card surcharges	£0.00
Transaction fee	£4.95
Accommodation extra discount	-£20.84
Accommodation special offer discount	-£17.09
Total discount	-£37.93
Total cost	£1,437.83
Deposit paid	£325.27
Total paid in inc surcharges and transaction fee	£330.22
Balance	£1,107.61

[18] Alongside booking cost summary is text which provides that "all discounts will first be allocated against our surcharges, service and transaction fees and then finally against the other costs". There is further text on the same page: "The above prices include our service fees".

[19] As I understand the evidence the first instalment of the total price was paid at the point of the order confirmation email. The pursuer had given her bank details which enabled the first defenders to collect the funds. She paid a further instalment on 5 April 2016 amounting to £642.41 (JB63). The balance of £465.20 was paid at a later stage, probably 21 June 2016. The email confirmation in relation to the date of the final payment could not be found but there is no doubt that the instalment was paid.

[20] The pursuer was also issued with an ATOL Certificate (JB61). ATOL coverage extends protection to a holiday maker in the event of insolvency affecting the holiday. Exactly how the system works was not relevant to this case. It confirmed coverage for the

holiday. The providers are described as "flythomascook"; Magic Rooms and Atik Tours DLM Shuttles.

[21] The pursuer's evidence is that, as far as she was concerned, she wanted a package holiday. She did not view herself as having entered into three separate contracts with the airline, hotel and transfer companies respectively. Payment for the deposit had been taken from her account by the first defenders, the details of which she gave via the website provided by the first defenders. She knew nothing of the discount arrangements: that was something arrangement exclusively by the first defenders. It simply appeared on the website under the list of charges. She had no part in it.

[22] It was Ms Dews' understanding that discount was applied only to accommodation charges. She had no knowledge as to how these were calculated. In cross-examination, Ms Dews quite properly accepted that the text of the passage which I quoted above (allocation of discount) was not clear. The text suggests that the discount applied to more than accommodation charges and primarily to sums relevant to the first defenders. Ms Dews was asked in cross examination how the instalment monies were allocated amongst the service providers. Although there was some reference made to the first defenders' terms and conditions, and a suggestion that the instalment monies might be allocated to the cost of the flights, at the end of the day it was not entirely clear. I consider counsel for the pursuer is correct when he said that the issue was a matter between the first defenders and the service provider.

[23] The key issue in this case is the application of the 1992 regulations to the facts of this case. In addition to the 1992 regulations, I was referred to the following authorities:

1. *Civil Aviation Authority* v *Travel Republic Ltd* [2010] EWHC 1151 (Admin);

2. *Titshall* v *Qwerty Travel Ltd* [2011] EWCA Civ 1569;

3. *R (on the application of The Association of British Travel Agents Ltd (ABTA)* v *Civil Aviation Authority* [2006] EWCA Civ 1356;

4. *Club-Tour Viagens e Turismo SA* v *Alberto Carlos Lobo Goncalves Garrido* C-400/00, ECR 2002, Page I-04051;

5. *Opinion of Advocate General Tizzano in respect of Club-Tour Viagens e Turismo SA* v *Alberto Carlos Lobo Goncalves Garrido* C-400/00, ECR 2002, Page I-04051;

6. *Walter Rechberger Renate Greindl Hermann Hofmeister* v *Republik Osterreich* Case C-140/97 ECR 1999 Page I-03499;

7. *R (On the Application of The Association of British Travel Agents Limited (ABTA)* v *Aviation Authority* [2006] EWHC 13 (Admin);

8. Holiday Law: The Law Relating to Travel and Tourism by *Grant and Mason* 5th Edition Pages 28-45;

9. Accidents Abroad, International Personal Injury Claims, *Bernard Docherty* 2nd Edition Pages 573-582;

10. Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on Package Travel and Linked Travel Arrangements;

11. Package Travel and Linked Travel Arrangements Regulations 2018/634 ("the 2018 regulations").

Submissions for the pursuer

[24] Counsel lodged detailed written submissions which are lodged in process. I shall summarise them.

[25] The issue to be determined in this preliminary proof is whether what the first defenders sold or offered for sale to the pursuer was a prearranged combination of flights,

accommodation and transport at an inclusive price. The pursuer's position is what she booked was a package holiday. It was a 14-night stay at the second defenders' premises. The total cost included flights, transfers, accommodation, transaction fees and service fees. The components were sold as a pre-arranged combination at an inclusive price. The holiday was therefore a "package" in terms of regulation 2(1) of the 1992 regulations. To fall within the 1992 regulations a contract must be for a package. It must be a pre-arranged combination at an inclusive price of at least two of the relevant components. It can be not only what one might describe as a traditional "package holiday", put together and advertised by the organiser, but also a combination tailored to a consumer's specific requirements. That is so is clear from regulation 2(1) and as long as the constituent parts are in place at the time of the conclusion of the contract the requirement that it was pre-arranged is satisfied.

[26] Reference was made to the *Garrido* case, including the opinion of the Advocate General, and the case of *Rechberger*. The issues in the *Garrido* case were considered in England in *ABTA* v *CAA*. Reference was made to the decision at first instance and on appeal to the Court of Appeal. In the *ABTA* case Chadwick LJ discussed what constituted a package at some length. The matter was again considered in *CAA* v *Travel Republic Ltd* and in particular by Elias LJ. They key question is not how the components are put together but whether the pre-arrangement is in place at the time the contract is concluded and that the components are sold together at an inclusive price. Each case is fact specific. It is submitted that in the present case all parts were in place when the contract was concluded and that it was at an inclusive price. It might be argued that the prices are all separately set out however in answer the following applies:

(1) The terms of regulation 2(c)(i);

(2) Here the discount was applied at a stage when a "package" already existed namely when both a flight and accommodation had been selected. It is only then that the discount appeared on the first defenders' website. The pursuer had selected her options and the price she was willing to pay for them; this was then discounted to a new global price by the first defenders;

(3) It was a "package" when the "final price" is an aggregate of all the elements. The fact that that price is time limited at that point is also of relevance;

(4) Service fees: the total cost of the holiday was £1,437 including not only a specified transaction fee but also the first defenders' service fee;

(5) Once the package was formed, on the first defenders' website the pursuer was unable to deselect either the flight or the hotel option. Reference was made to the case of *Titshall*, particularly at paragraph [23].

[27] There is no suggestion that there were separate payments made to each service provider; rather payments were made to the website for all of the services. The pursuer did not pay any of the third party providers but entered into a payment plan with the first defenders whereby she paid in instalments. The pursuer had no contract with the third party providers to pay in instalments. Her contract for payment was entirely with the first defenders. There is nothing within the first defenders' terms and conditions of contract setting out how the instalments are allocated. Evidence was given that flights were paid immediately by the first defenders but that is irrelevant to the pursuer as it merely represents how the first defenders conduct their business with third party suppliers. It was suggested that the first instalment covered low cost flights but in this instance, the cost of the flights was far in excess of the initial instalment.

[28] In relation to the defenders' reference to the 2018 regulations and the relevant directive they are irrelevant given that the contract predates these regulations. Secondly, it is important to observe what the purposes of the directive were, particularly paragraphs 1 and 9. Thirdly, in any event, the fact that the issue of a "linked travel arrangement" was specifically addressed in these regulations does not mean that the contract in question could not have been a package. In short, what was contracted for in the present case meets the necessary requirements of regulation 2(1) of the 1992 regulations.

[29] In his oral submissions counsel confirmed it is not necessary to identify how the contract was formed in terms of national law. The issue is whether the 1992 regulations apply and in particular, whether it is "an arrangement" which satisfies the regulation. The issue is largely *sui generis*. However, from the pursuer's perspective, the contract was entered into when the pursuer clicked the "deposit" entry on the website. By the time, the order request email was sent the contract had already been formed. By then there was already an agreement linking the pursuer to the first defenders.

Submissions for the first defenders

[30] Counsel for the first defenders also lodged written submissions which I summarise as follows.

[31] Although the pursuer said that she did not read the booking conditions or the terms and conditions of the first defenders business the contract was subject thereto. The terms of business were incorporated into the parties' contract. That document set out in detail the role of the first defenders. In counsel's submission, the discount applied only to accommodation. He submitted it was the evidence of Ms Dews that discount would be applied, first to any surcharges or service fees levied by the first defenders in relation to the

accommodation, then against the other costs of the accommodation. The order confirmation email made clear that there were separate contracts between the pursuer and the relevant suppliers. The order confirmation email contained vouchers not tickets. They were not issued by the first defenders. The flight voucher and hotel vouchers contained no mention of the first defenders at all. The transfer voucher named the first defenders as "travel agent" and separately specified the supplier as "Atik Tours DLM Shuttles". The ATOL protection is given because, according to Ms Dews, the pursuer booked a "flight plus sale". There is no suggestion that either of the documents constituted a package nor that the ATOL protection was in respect of a package. The insolvency of one of the suppliers does not affect the remaining suppliers.

[32] Turning to the 1992 regulations the material question in this case is whether the flights, accommodation and transfers were offered for sale as a "pre-arranged combination" and "at an inclusive price". A pre-arranged combination may occur where the components of a holiday are put together by the organiser in accordance with the specifications of the consumer, typically a "customised holiday". Reference was made to the *Garrido* case. "Inclusive price" is more than simply adding up the various prices of the different services to arrive at a total price (the *ABTA* case both at first instance and on appeal).

[33] The question whether elements of the holiday were sold at an inclusive price arose in *Titshall*. In that case, there were two important features namely there was no explicit suggestion that the flights and accommodation were available separately and secondly the service costs were applied to the transaction as a whole and must have represented the cost of putting the package together. Neither of these factors apply in the present case. The flights and accommodation were available separately. Had the pursuer first booked the hotel she wished to stay in and then accepted flights there might be a semblance of a

package. However, the pursuer booked the separate components quite separately. Secondly, there were no service costs applied to the transaction as a whole, apart from the modest fee for payment by instalments. The discounts were applied to one component, independently of other components.

[34] The first defenders' website made clear to the pursuer that it was an interface through which the pursuer could book separate components of a holiday. This was done by the requirement that at each stage for the pursuer to select the travel services she wished to search for. The pursuer was at liberty to select either flight or hotel only. The other travel services offered (transfers, insurance, etc.) were, by default, not offered but had to be selected. The website made no assumption the pursuer wished any particular travel service to be offered. She was free to choose what services or indeed no services. Secondly, the explanation as to the role of the first defenders was in simple and straightforward terms and intelligible to a person of ordinary intelligence who chooses to read it. That explanation was repeated. Thirdly, the express reference to the names of third party suppliers of travel services when the services were offered in response to a search. Fourthly, the detail of explanation given in the terms of business.

[35] The first defenders' terms of business are incorporated into the parties' contract because:

(1) The first defenders' website makes express reference to the terms of business;

(2) The terms of business relied upon are summarised and repeated in the explanation given prominently on the web pages during the booking process;

(3) There is nothing novel, unusual or surprising about the terms of business. It is reasonable to expect the terms of business relied upon to have contractual effect.

[36] The following factual conclusions ought to be drawn from the evidence:

(1) Each component of the holiday was booked with a separate provider;

(2) The pursuer entered into three separate contracts with suppliers for flights, accommodation and transfers;

(3) The existence of separate terms and conditions for each of the three suppliers points firmly towards the existence of three separate contracts and away from the proposition of a single package contract;

(4) No component of the holiday was contingent on or connected with any other component;

(5) The pursuer was at liberty not to book any of the three components through the website;

(6) The price was the arithmetical total of the price of the separate components together with a transaction fee to the first defenders for use of an instalment payment option;

(7) The discount was calculated exclusively in relation to accommodation and applied only in respect of accommodation charges;

(8) The order in which the pursuer selected travel services tends to point away from the arrangement of a package holiday.

[37] There was no evidence that the first defenders provided tickets for any travel services, luggage tags, meetings with representatives whilst abroad or any other liveried or similar services which might suggest it was a package holiday. All the pursuer received from the first defenders were three vouchers for travel services. Each specified the name of the supplier. The flight and accommodation made no mention of the first defenders at all.

[38] The 2018 regulations broadened the concept of a "package" and introduced a new concept of "linked travel arrangements" based on the way in which travel services are

presented or purchased. The difference between a package under the 2018 regulations and a "linked travel arrangement" is that the latter results in the conclusion of separate contracts without individual travel service providers (see recital 9 of the 2015 Directive). It might be said that this is precisely the arrangement entered into by the pursuer in March 2016. Had the concept of a "package" under the 1992 regulations included such arrangement, the 2018 regulations would be otiose.

[39] In the first defenders' submission, the correct contractual analysis of the matter was that the pursuer made a selection of certain services and offered to buy the services at a specific price. It was not until the confirmation email was issued that there was acceptance of the pursuer's offer and the conclusion of a contract. The order request email makes reference to "provisional" information. The first defenders had yet to submit the information to the third party providers. If the contract had already been concluded none of this would be necessary. The pursuer seems to suggest that if the matter is *sui generis* one should ignore domestic law. That was not the approach of the Court of Appeal in the *ABTA* case (see paragraph [161]).

[40] The contract between the pursuer and the first defenders was one of agency. The first defenders were agents of the pursuer. As I have him noted, counsel for the first defenders submitted that it was not necessary to analyse the matter in terms of a contract and then apply the regulations. Similar to counsel for the pursuer, he submitted that it was a question of looking at the facts and then applying the regulations. In relation to the 2018 regulations, these were principally designed to address ambiguities and also an evolving market.

Decision

[41] The 1992 regulations implement the obligations of the United Kingdom to implement Council Directive 90/314/EEC. The pursuer's case against the first defenders is based upon regulation 15 of the 1992 regulations. There are several defined terms in the 1992 regulations which derive from the directive. Regulation 2 and regulation 15, so far as material provide as follows:

> Regulation 2(1) …
> "contract" means the agreement linking the consumer to the organiser or to the retailer, or to both, as the case may be; …
> "offer" includes an invitation to treat whether by means of advertising or otherwise, and cognate expressions shall be construed accordingly;
> "organiser" means the person who, otherwise and occasionally, organises packages and sells or offers them for sale whether directly or through a retailer;
> "the other party to the contract" means the party, other than the consumer, to the contract, that is, the organiser or the retailer, or both, as may be;
> "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 24 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;
>
> Regulation 15
> (1)The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.
> …"

[42] The focus of the argument before me is whether the transaction between the pursuer and the first defenders was a "package" within the meaning of the 1992 regulations. There

are two key phrases within the definition of "package": "pre-arranged combination" and "inclusive price".

[43] No doubt when the directive was first made there was a simple model of a package holiday, selected by a customer from a brochure, comprising a flight to a congenial destination with accommodation to match, organised by a visit to the local travel agent. The use of the internet was much less prevalent. As the authors of Holiday Law comment (page 132 of the Joint Bundle of Authorities), that model has diminished in the light of what the authors describe as "contract splitting" or "dynamic packaging" (the expressions are interchangeable and are not terms of art). The essence of such an arrangement is that although, at the end of the day, the customer ends up with flights, accommodation and sometimes other services, the provider of the services is keen to establish that the customer has made, not one contract with the travel agent or tour operator, but individual contracts with the service providers. Furthermore, almost all of the trading is done online with no human intervention.

[44] In relation to the authorities there appears to be no Scottish authority on the interpretation of the 1992 regulations. The authorities to which I was referred comprise two judgments of the European Court of Justice (*Garrido* and *Rechberger*) and three English cases (*ABTA* v *CAA*; *CAA* v *TRL*; *Titshall* v *Qwerty Travel Limited*). In my opinion, it is important to start with the decisions of the European Court of Justice. The 1992 regulations were enacted to implement the terms of the directive and the key definitions in the 1992 regulations follow almost exactly the wording contained in the directive.

[45] The *Rechberger* case is the earlier of the two decisions of the European Court of Justice. In that case, a daily newspaper offered to its subscribers a gift of a 4 to 7 day trip to one of four European destinations; the only cost to the customer was airport taxes. Persons

travelling with the subscribers had to pay the price set out in the brochure and if a subscriber travelled alone he was required to pay a single room supplement. Perhaps unsurprisingly, the offer proved more successful than the travel organiser expected which led to its bankruptcy. The case raised a number of issues, one of which was the alleged failure of the Austrian Government to obtemper its obligations to implement the directive. For present purposes, the relevant questions which the European Court of Justice was asked to answer was whether the directive applied to the facts of this particular case. The European Court of Justice held that it did. It is its reasoning for so concluding which I consider to be important rather than the facts of the particular case. In paragraph 27, the European Court stated that the purpose of the relevant provisions of that part of the directive is to protect consumers against the risks from the insolvency of the organiser of a travel package. It noted the risks inherent in the contract concluded between the purchaser and the organiser as stemming from the payment in advance of the price of the package and from the spread of responsibilities between the travel organiser and the various providers of the services which, in combination, make up the package. That is exactly what happened in this particular case. As to the application of the directive itself the European Court of Justice said, at paragraphs 29 and 30:

> "29. It must also be borne in mind that, according to Article 2(1) of the directive, **all that is needed to constitute a package** (my emphasis) is the pre-arranged combination of at least two of the three components mentioned in that paragraph, when sold or offered for sale at an inclusive price.
> 30. Taking into account the objective of Article 7, and having regard to that definition of package, it must be held that Article 7 applies even if the consideration the purchaser is required to pay does not correspond to the total value of the package or relates only to a single component of it".

[46] Article 2(1) of the directive contains almost exactly the same wording as regulation 2 of the 1992 regulations. Article 7 is designed to provide security for refund of money in the event of insolvency. Again, this is transposed into the 1992 regulations.

[47] In the case of *Garrido* the customer bought a holiday comprising flights and accommodation in Greece. The customer (Mr Garrido) purchased his holiday from Club-Tour. Club-Tour in turn bought the holiday from Club Med who undertook to make the necessary reservations and fixed the overall price. When Mr Garrido and his family arrived at their destination they discovered that it was infested by thousands of wasps. No alternative accommodation was available. On his return from holiday, Mr Garrido refused to pay the price of the holiday. Club-Tour then raised proceedings against Mr Garrido in Portugal for payment of the price. The Portuguese Court referred the matter to the European Court of Justice.

[48] The joint bundle of authorities contains the opinion of the Advocate General Tizzano, which includes what I consider to be a number of observations relevant to this matter. At paragraph 12, the Advocate General noted that the recitals of the directive provide that the intention is to "protect the consumer of tourism services by making operators and travel agents responsible for losses due to improper performance of the contractual obligations". At paragraph 15, the Advocate General commented that the definition of a package is set out in broad terms. It is sufficient, firstly that the combination of tourist services sold by a travel agency at an inclusive price includes two of three components and secondly that the service exceeds 24 hours or includes an overnight stay. The Advocate General commented on the *Rechberger* case which confirmed the limited requirements needed to satisfy the definition of a package. Looking at the history of the directive (at paragraph 18), the Community legislature intentionally chose to move from the concept of a service designed and offered

for sale without any intervention from the consumer to a concept which does not allow the exclusion of a customised service that is sold in accordance with the particular needs of a given consumer. The Advocate General went on to say (at paragraph 19):

> "…it would be difficult to argue that [article 2(1)] does not also include customised packages, given that the requirements to protect the consumer are the same for the customised holidays and holidays prepared in advance by the organiser."

If there is any ambiguity in the directive "its interpretation must be inspired by criteria which is not restrictive in any way, in order to ensure that the consumer has the broadest protection possible" (paragraph 21).

[49] The questions posed for the opinion of the court were:

> "(1) Does a package organised by the agency, at the request and on the initiative of the consumer…in accordance with their wishes, including transport and accommodation through a tourism undertaking, at an inclusive price, for a period of more than 24 hours… fall within the scope of the concept of "package travel" as defined in article 2(1)" and "(2) May the expression "pre-arranged" which appears in the directive be interpreted as referring to the moment when the contract is entered into between the agency and the customer".

[50] The Advocate General recommended that the questions be answered in the affirmative. It is I think important also to note the observations of the Advocate General at paragraph 26. There he records that, when the measure was being considered, the Commission had suggested the removal of the term "pre-arranged" which was thought to be ambiguous and a source of uncertainty. The Advocate General went on to say that if one considers, as he did, that the directive includes customised holidays, that is those whose details can be finalised close to or on the occasion of the contract being entered into, then "pre-arranged" "does indeed appear to be superfluous". I mention this because the expression "pre-arranged" appears to be of significance in the English cases.

[51] In a short opinion, the European Court of Justice agreed with the Advocate General. The relevant passages of the opinion are contained in paragraphs 13 and 14. The court again commented upon what I would describe as a fairly straightforward analysis of article 2, namely that it is enough for a service to qualify as a package if, firstly, the combination of tourist services sold by the agency at an inclusive price includes two of the three services referred to, and secondly covers a period of more than 24 hours. The court also emphasised the importance of the directive in protecting consumers. It went on to say that there was nothing in the definition to suggest that holidays organised at the request of, and in accordance with, the specifications of a consumer cannot be considered as a package holiday within the meaning of the directive. Finally, in paragraph 19 the term "pre-arranged combination" necessarily covers cases where the combination of tourist services is the result of the wishes expressed by the consumer up to the moment when the parties reach an agreement and conclude the contract.

[52] In my opinion, there are two significant points to take from these judgments. Firstly, the relative simplicity of the definition of "package" in regulation 2 which, with the exception of paragraph (c) (i), is cast in exactly the same terms as Article 2 of the directive. Secondly, the importance of consumer protection when interpreting the directive especially in the event of doubt or ambiguity.

[53] The English authorities to which I was referred are not binding but are persuasive.

[54] Chronologically the *ABTA* case is the first of these. ABTA sought judicial review of guidance issued by the Civil Aviation Authority relating to, amongst other things, whether travel agents required to comply with ATOL regulations. ABTA successfully contended that some of the guidance given was wrong in law and misleading. In the Court of Appeal the only judgment was issued by Chadwick LJ. It was common ground before the Court of

Appeal that "package", which was intrinsic to the resolution of a number of the issues, was to be given a meaning for the purposes of the domestic regulations consistent with the meaning that it bears in community law in the context of the directive (paragraph [9]). His Lordship analysed the definition of package at some length including the words "inclusive price" but at the end of the day held that essentially the matter was one of fact: whether the services are being sold or offered for sale as components of the combination; or whether they have been offered for sale separately but at the same time (paragraph [26]). His Lordship proceeded to give a number of examples, picked up in later cases, which served to highlight a dividing line which may be difficult to determine in particular cases. The Civil Aviation Authority attached some significance to what the consumer thought he was getting when approaching the agent or travel organiser. Chadwick LJ held that the test is not subjective, however, the fact that the customer thinks that he is buying two or more separate services at the same time rather than a combination of services at an inclusive price may be a powerful evidential pointer to the true nature of the transaction (paragraph [45]). Before the trial judge and the Court of Appeal, a number of ABTAs challenges were upheld.

[55] *CAA* v *TRL* was a criminal prosecution. Again the key point in the case was whether what was sold by *TRL* was a "package" which, although defined by different regulations, in substance, contained exactly the same definition as the 1992 regulations. The district judge acquitted *TRL* of the charges; the Civil Aviation Authority appealed. Elias LJ gave the only judgement. The appeal was dismissed. This was a case in which *TRL* operated both via the internet and also by telephone. When on the website a customer was offered a choice of flights, hotels and apartments, car hire and other related services. Some web links specifically referred to as what was described as "tailor made holidays". The various components, which made up the holiday were ostensibly all sold separately but they could

be linked together by a customer to provide all the necessary elements of a holiday. Elias LJ commented that the system consciously facilitated the customer's ability to do this. The total cost of the combined services would be the same as the aggregate cost of each component priced separately. In other words, there was no price discount for booking more than one element of the holiday. The Civil Aviation Authority argued that this was a package within the meaning of the regulation. Both parties sought support from the ABTA case. Elias LJ followed Chadwick LJ in holding that the subjective perception of the customer is not conclusive. He also commented that the distinction between the cases caught by the regulation and those falling outside it can on its particular facts be a fine one. Each case is fact sensitive. There are three paragraphs worth quoting:

> "[50] Essentially we are dealing with a situation where the customer choses his or her 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 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 their 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.
> …
> [53] [Counsel] submitted that this situation [services might be sold separately at the same time] would arise in only two situations; the first is where wholly unconnected services are required, such as a ticket to France one week and a hotel accommodation in Germany for some other time. The second is where it is made absolutely plain to the customer that the services are being made available to him separately and distinctly.
> [54] The former is uncontroversial but does not exhaust what Chadwick LJ had in mind. His Lordship plainly envisaged that even linked services might be sold separately and fall outside the definition of a package. As to the latter example, I am not persuaded that the agents' insistence as to the nature of the transaction would suffice to deny the status of a package to something that would otherwise be so treated in law. EU Law focuses on substance and not form, and I do not think that the assertion by the agent that when the services are being separately provided can define the nature of the transaction".

[56] At the end of the day, the decision in *TRL* was reached on fairly narrow grounds namely whether there was no evidence to sustain the decision of the district judge or that he had reached a perverse conclusion. On the facts, he had reached the view that what was on offer was not a package and that this was a decision which was open to him to reach.

[57] The case of *Titshall* involved a holiday organised, very much at the last minute, by a telephone call between the claimant and the holiday company. The holiday company argued that the claimant had entered into two separate contracts (one for the supply of return flights with one supplier and another in relation to accommodation). Whilst on holiday the claimant suffered an injury, and he invoked regulation 15 of the 1992 regulations as a basis for establishing liability against the travel agent. Again, the question was whether what was provided was a package holiday within the meaning of the 1992 regulations. The trial judge held that it was not; the Court of Appeal (Tomlinson LJ giving the only judgment) held that it was. There was very little documentation available as to the particular transaction. Much of the argument proceeded upon the basis of the documents which the respondent's system would have generated. What was described as a customer statement gave details of flights, service fee supplements and accommodation. It was not clear to what the service fees related. The documentation said on more than one occasion that the travel agent acted only as agent for the third party suppliers and that the customer was subject to the terms and conditions of the supplier. The judge held that the claimant had purchased two services at the same time but did so separately. The composite price was not an inclusive price but an aggregate price. No package was sold. Before the Court of Appeal, the parties agreed that what was sold was a pre-arranged combination. The issue was whether it was sold at an inclusive price. Agreeing with Chadwick LJ, the court held that

the matter was a factual question to be resolved on a case-by-case basis. The key passages in the judgment are as follows:

> "[23] The key to the resolution of the factual enquiry whether the service were here offered for sale as the components of a combination or whether they were being sold or offered for sale separately – whether Mr Titshall was buying and paying for them as a whole – lies in my judgement in two features of the transaction. The first is that it is plain that no explicit suggestion was made to Mr Titshall that either the flights or the accommodation were available for separate purchase, the one without the other. The second is that the treatment of the service costs, however precisely that was dealt with in the elementary and simple breakdown, seems to be on the facts of this case at any rate to supply a clear unifying feature connecting the provision of the one service with the provision of the other. The service costs, or at any rate the greater part thereof, must in some way have been presented as in part the price for putting together the package, not as the cost of some separate service available in its own right, which would have been an incoherent suggestion. It is inherently unlikely to the point of being inconceivable that, in so far as it was presented as a freestanding cost, as the judge found that it was, it was put forward on the basis that the costs would be X if the flights alone were bought or Y if accommodation alone was bought.
>
> [24] Whilst therefore I can see that the transaction had the potential to develop into an offer for sale and a sale of separate services, it did not develop in that way. [The defendant] offered a package which inevitably had component parts – there would not otherwise have been a package – but where these parts were presented for sale as a whole for an inclusive price which comprehended the cost of putting them together as well as the cost of sourcing them. [Counsel's] principal argument in refutation of this conclusion was that it was implicit in Mr Titshall being given a breakdown of the cost of the flights and of the accommodation that he could purchase the one rather than the other. He submitted that the statement that [the defendant] acted only as agents for the third party suppliers who were then named served to reinforce that what was offered was two separate albeit simultaneous sales. I do not agree that these considerations, whether taken singly or in combination, are sufficient to achieve that result. In my judgment the argument ignores the context of the teletext advertisement, which was of a last minute getaway at an inclusive price (notwithstanding that that may apparently have been expressed as "from" whatever may have been the figure quoted). In my view it ignores the service costs, the greater part of which, without further breakdown or elucidation, necessarily represented the indivisible cost but making available the two component parts which made up the package.
>
> [25] It follows that in my judgment the judge was in error in characterising his findings of fact as amounting to Mr Titshall purchasing two services at the same time but separately. He did not purchase them separately. They were sold to him as the component parts of the combination package. The judge's further finding that the price was not an inclusive price was, I think, simply the corollary of his conclusion that there had been two separate purchases. In any event, it was I think a wrong analysis. It leaves unresolved the status of the service costs or at any rate a part

> thereof. There is no principled basis upon which one can conclude that any particular proportion of the service costs should be attributable to the sale of the flights or to the sale of the accommodation, and thus whilst the sale of two services may have been identified, there is no way of ascertaining what is the total cost of either of them".

The appeal was allowed and the case was allowed to proceed.

[58] Returning to this case, the pursuer was familiar with the process of booking holidays on line. She had done so before, both with the first defenders, and with other providers. As is often the case these days, the entire process was undertaken and completed without any human interaction. The first defenders operated a website which invited customers to make bookings for holidays. The initial stage involved the documentation Ms Dews helpfully created which showed what the pursuer would have seen. The pursuer knew what she wanted, where she wanted to go and with whom. In their material the first defenders were stated to be agents, not principals, and that any ensuing services would constitute contracts between the pursuer and the individual providers. From the first defenders' perspective, the only contract the pursuer had with the first defenders was one of agency. The first defenders drew attention to their terms and conditions. In common, I suspect, with the majority of the population, the pursuer did not even attempt to read what she called the small print and quite candidly accepted that, even if she had, she would have been unlikely to have understood it. I do not take that as a disparagement of her intelligence, rather more as a recognition of, to the layman, the specialised vocabulary of the lawyer. As a matter of fact, her state of mind was that she was buying a package holiday from the first defenders which comprised flights, accommodation and transfers to and from her hotel. The monies were taken from her account by the first defenders. They were the only entity she paid. She had no dealings with the service providers in terms of paperwork or payment.

[59] The first defenders enabled the pursuer (and any other prospective customer) to select whatever services she chose from the range available. That included flights, hotels, transfer, car parking and insurance. Some services were available by default; others, the more minor ones, were not and required positive selection by the customer. There was no obligation to take particular services or any particular combination thereof.

[60] There were four stages to the process: the initial selection and booking by the customer; the order request stage; the order confirmation stage; (in this case) payment by instalments. Much of the relevant material such as destination, dates, party numbers, services and cost appears throughout with little variation. The documentation seems more to reflect certain sequential steps than any great changes. The initial booking which the customer submitted is the first contact the first defenders would have had in relation to the transaction. The order request is their first response to the customer. The availability and cost needed to be checked with the service providers. In this case, it appears to have been done with considerable speed – a minute. That then generated the order confirmation which set out the final details. As the pursuer opted to pay by instalments, further procedure over the ensuing weeks was required.

[61] If one compares the figures in the order request email (JB50) with those and the order confirmation (JB52) they are largely the same. The total price in the former is £1,432.88; in the latter £1,107.61. The difference is the amount of the deposit of £325.27. Ms Dews confirmed that the pursuer paid the deposit when she was sent the order confirmation. The booking cost summary contained prices for the flights, hotel and transfer. In addition, there is a transaction fee of £4.95 and two entries for discount: £17.09 and £37.93. The former is attributable to the instalment scheme. The text on JB55 as to service fees and discounts is of some importance. The text in relation to discount suggests that it is not directed to

accommodation only. From the evidence of Ms Dews, as one would expect, the first defenders have what was described as a small mark up on the services. Exactly what that was and how it was calculated was not explored. Exactly how the discount would work in these circumstances is not clear and was also not explored. I assume that it would only become an issue if the customer failed to pay the total price. That did not happen here and I shall not speculate what the consequences may have been had she not done so.

[62] Drawing the various threads together, the ultimate question is the application of the 1992 regulations to the facts of this case. I am not inclined to attach too much weight to the pursuer's state of mind when she said she was buying a package holiday. I respectfully agree with the English cases that the test as to whether a holiday is a package holiday is not subjective. However, on the other hand, that the first defenders described themselves as agents and not principals is an adminicle of evidence but is not and cannot be conclusive either (see Elias LJ at paragraph [54] of *TRL*). The 1992 regulations use the language of contract but their application is not dictated by such an analysis. Neither counsel suggested to me that I needed to analyse the matter in terms of offer and acceptance and in that I think they are correct. The pleadings are not drafted with a contractual analysis in mind. It is sufficient for me to say that between the pursuer first consulting the website (which I would venture to suggest is an invitation to treat on the part of the first defenders) and the order confirmation the parties entered into a contract. Exactly how the model of offer and acceptance might apply is something I do not require to determine. The issue is the application of the 1992 regulations given the guidance from the European Court of Justice. Secondly, and more to the point, the definition of "package" in the directive and the 1992 regulations mandate few conditions to be satisfied. As both European cases show, if the definition of package is satisfied the 1992 regulations apply. On the facts of this case the

conditions are satisfied. The package comprised three qualifying services (two would have been sufficient) namely transport (flights), accommodation exceeding 24 hours and other tourist services (transfers). Regulation 15 creates rights in favour of the consumer. The 1992 regulations need to be interpreted and applied bearing in mind that they are a consumer protection measure. That is what the European cases provide. I have referred to passages from the European cases illustrating the overall approach. That is also the answer to the 2018 regulations. Just because those conditions might be satisfied does not mean that the 1992 regulations fall to be disregarded. Thirdly, the 1992 regulations cover a situation where the combination of tourist services is the result of the choice of the consumer up to the moment when the parties reach an agreement and conclude a contract. It was pre-arranged although, as Advocate General Tizzano commented, given the conclusion in *Garrido* the pre-arranged aspect in the overall analysis is of less significance. In my opinion, the price was inclusive. There was a single sum payable to the first defenders only. On the facts the pursuer did not enter into three separate contracts with the service providers. She entered into a single contract with the first defenders. The price was to be paid by instalments to the first defenders. The instalments were not attributable to different suppliers and management of the payment was left to the first defenders. Put another way, the payments could not be broken down and attributable to the individual suppliers. Some part of the price for the components was attributable to a sum (unspecified) payable to the first defenders as a mark-up. The discount was stated to be attributable to the "surcharges, service and transaction fees" of the first defenders (see paragraph [25] of *Titshall* above). The discount was potentially attributable to sums relating only to the first defenders. The pursuer had no dealings, financial or otherwise, with other service providers until the holiday began and that was more by way of execution of the arrangements rather than their

constitution. Accordingly, for all these reasons, including, at the risk of repetition, the fact that the 1992 regulations fall to be construed as a consumer protection measure, I conclude that the 1992 regulations do apply to this case.

[63] I shall accordingly assign a by-order hearing for the parties to determine further procedure. I shall reserve all questions of expenses to the by-order hearing.