Indexed as:
Snucins v. Conquest Tours (Toronto) Ltd.

Snucins v. Conquest Tours (Toronto) Ltd. and Peter's Travel and Tours; Hamilton v. Conquest Tours (Toronto) Ltd. and Goliger's Travel; Snucins v. Conquest Tours (Toronto) Ltd. and Peter's Travel and Tours; Hamilton v. Conquest Tours (Toronto) Ltd. and Goliger's Travel; Van Der Linde v. Conquest Tours (Toronto) Ltd. and Premier Travel Systems Inc.; Huber v. Conquest Tours (Toronto) Ltd. and Premier Travel Systems Inc.

[1990] O.J. No. 1623

Action No. 420/89, 421/89, 422/89, 423/89, 424/89, 425/89

74 O.R. (2d) 781

Ontario
High Court of Justice, Divisional Court

Reid J.

September 10, 1990.

Counsel:

S.D. Goldberg and Deborah L. Wilkins, for Conquest Tours (Toronto) Ltd., defendant (appellant).

David Zarek and Penny Georgoudis, for plaintiffs (respondents).

Mark B. Harrington, for Goliger's Travel, defendant (respondent).

P. Dekoulos, appearing in person for Peter's Travel and Tours, defendant (respondent).

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1 REID J.:-- These six appeals were heard together and dismissed from the bench. The cross-appeals were abandoned before hearing.

2 Some 54 other claims are awaiting the outcome of these appeals and will undoubtedly be affected. Because of that I told counsel that I would issue reasons and stayed my order until they were released.

3 On December 28, 1985, the plaintiffs [respondents] and others from the Toronto area took an ill-fated holiday trip to the Dominican Republic. This "package tour" was arranged by the defendant [appellant] Conquest Tours (Toronto) Ltd. (Conquest) and sold through travel agents. Conquest glowingly described it in a flyer: Rider A to these reasons.

4 On arrival, the plaintiffs found their hotel, the Porto Laguna Hotel and Yacht Club, still under construction.

5 After their return to Ontario some 60 members of the group launched individual damage claims against Conquest and some of the agents. From these six were selected as representative and tried by Judge Godfrey in the North York Small Claims Court on November 1, 1988, and February 27 and 28, 1989. I was given no explanation for the delay in bringing these claims to trial.

6 Judge Godfrey gave his decision in reasons released on April 4, 1989 [now printed as Rider B, infra]. He found in favour of all claimants and awarded damages. Except for one, who failed to appear, all claims against travel agents either failed or were settled. I am not concerned with them.

7 As a result of the arrangement to try the representative cases at the same time Judge Godfrey was in a position to make general findings of fact about the trip. Given the variation in the testimony that was not an easy task. The judge was aware of the difficulty. He said, at p. 4 of his reasons [p. 792 infra],

> All of the plaintiffs took the same essential position as to the quality of the vacation package. Many of their expressed concerns were common, although there were certain inconsistencies in the recollection of those concerns. Some of the discrepancies probably resulted from failing memory due to the fact that the vacation itself was some 38 months ago. Certain discrepancies, however, were likely a result of exaggeration of the experienced events.

8 In a careful and lengthy review of the evidence he found that the common experience of the group included both good things and bad. Concerning the latter, he said at pp. 4-6 [of his reasons; pp. 792-93 infra]:

> As a minimum, it appeared to the court that all the Plaintiffs suffered the following common experiences.
>
> (1) Upon arrival there was mass confusion in the allocation of the rooms due to the fact that the staff spoke little English and did not know where all the proper rooms were. This resulted in a significant delay in being able to settle in.
>
> (2) The initial rooms allocated to each of the Plaintiffs had no front door, concrete dust, shutters which were painted open, intermittent or non-

existent electricity, no water, unfinished bathrooms, a lack of furniture and incomplete wiring.

(He then detailed the experiences of the six individuals occasioned by the unfinished construction and in the course of that observed that "The lack of hot water for the entire period was experienced by all the plaintiffs".)

(3) No availability to public telephones within the hotel.

(4) Dirty swimming pool. The complaints registered by the plaintiffs under this heading ranged from one day to the whole of the trip.

(5) No water sports available.

(6) Construction noise starting from approximately 6:30 a.m. until noon hour or later.

(7) Inconvenience of carrying valuables.

(This was clearly the consequence of the absence of doors or locks which forced the claimants to carry their valuables with them. Thus, when a couple went to the beach to swim together, they could not do so. One had to wait on the beach to watch over the handbags.)

9 Judge Godfrey did not overlook the good things. He said at p. 7 [of his reasons; p. 793 infra]:

Notwithstanding the list of complaints, there were some positive aspects of the vacation experienced by all Plaintiffs which included: (1) satisfactory flights; (2) a beautiful beach and ocean; (3) one night in Panama; (4) free dinners and breakfasts.

10 Again he considered the consequences of these for each individual traveller. Again, they varied.

11 Judge Godfrey not only made findings of fact common to the group, he considered the experience of each claimant individually and the effect on each of the existence or absence of various facilities. Thus, the lack of water sports was of more significance to those who had eagerly expected them. He mentioned such things as one couple having stayed two nights in the "much better" condominium part of the hotel. He considered these variations in experience in assessing damages.

12 Having weighed the good against the bad, he concluded at pp. 8-9 [of his reasons; p. 794 infra]:

Although there were some positive aspects in the vacations of the plaintiffs, the court finds that the lack of such basics as privacy, security, hot water, furniture and electricity lead to a significant interference with the expectations of a relaxing holiday.

13 The trial judge's findings of fact were vigorously attacked on appeal. The attack raised many points, but rested mainly on the variation in the claimants' testimony. Mr. Goldberg submitted that because of that variation the trial judge should have made findings of credibility and erred fatally in not doing so.

14 I think it goes almost without saying that a mere variance in witnesses' recollections of events occurring some 38 months ago is not proof that someone was lying. As Judge Godfrey noted, some variation is expected in the recollections of witnesses of events so far in the past. Indeed, in my opinion, the reverse might be true: the absence of some variation might suggest that evidence was contrived.

15 There is nothing on the record to suggest that any witness was guilty of deliberate fabrication, or that the issue of credibility arose (apart from the possible exaggeration Judge Godfrey noted). Like all trial judges, he was obliged to make findings of fact, however difficult the task. There was ample evidence to support his findings. The appellant has failed to demonstrate blatant or overriding error. There is no basis for this court's intervention on the "credibility" ground or, for that matter, in any other respect concerning the way the judge dealt with the evidence.

16 Turning to the law, Judge Godfrey held that Conquest had been negligent in failing to make adequate inquiries about the state of readiness of the hotel. The consequence was a fundamental breach of the contract between the plaintiffs and Conquest.

17 He then held that the exculpatory provision or disclaimer, by which Conquest sought to escape responsibility, was ineffective even against those aware of it (in accordance with Tilden Rent- A-Car Co. v. Clendenning (1978), 18 O.R. (2d) 601, 4 B.L.R. 50, 83 D.L.R. (3d) 400 (C.A.) and Craven v. Strand Holidays (Canada) Ltd. (1982), 40 O.R. (2d) 186, 142 D.L.R. (3d) 31 (C.A.) [leave to appeal to S.C.C. refused (1983), 48 N.R. 320n]. In an obvious reference to Lord Upjohn's reasons in Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 All E.R. 61, [1966] 1 Lloyd's Rep. 529 (H.L.), at p. 89 All E.R., he held that Conquest had failed to rebut the presumption that the disclaimer was not intended to prevail against a fundamental breach of contract. (See also Viscount Dilhorne in Suisse Atlantique, at p. 68 All E.R.; Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, [1980] 1 All E.R. 556, [1980] 1 Lloyd's Rep. 545 (H.L.) at p. 850 A.C., per Lord Diplock; Cathcart Inspection Services Ltd. v. Purolator Courier Ltd. (1981), 34 O.R. (2d) 187, 128 D.L.R. (3d) 227 (H.C.J.) [affd (1982), 39 O.R. (2d) 656, 139 D.L.R. (3d) 371 (C.A.)], at pp. 191-92 O.R., per Trainor J.)

18 In my opinion there was a proper basis for his findings of negligence and fundamental breach. I agree that Conquest should not have relied on the assurances of hotel staff who had already shown themselves to be unreliable. I agree that the breach was fundamental. The essential component of the vacation trip plaintiffs purchased was habitable living accommodation. That they did not get. One might be able to make do without non-essential facilities, such as water sports, but I do not accept that one can enjoy such frills in the absence of reasonably comfortable living accommodation. The provision of other promised amenities, such as a "satisfactory flight" and a "beautiful beach and ocean", did not make up for the lack of proper accommodation. Judge Godfrey's findings of the common experience of the travellers make it clear that not only was the accommodation unacceptable, but that it spoiled the trip. Conquest not only failed "to provide a holiday of the contracted quality" (see Lacourciere J.A. quoting Jarvis v. Swans Tours Ltd., [1973] Q.B. 233, [1973] 1 All E.R. 71 (C.A.), in Craven, supra, at p. 192 O.R.), it failed to provide the sine qua non for one.

19 In assessing damages Judge Godfrey considered the "experiences and expectations of the individual plaintiffs". In light of Craven and Jarvis, supra, that was the correct way to go about it. He appropriately declined to break down Conquest's cost of the package into its components and calculate damages on that basis. The plaintiffs bought a package, not individual parts. Conquest's costs are not a measure of the plaintiffs' damages: they are irrelevant. It would be inconsistent with a finding of fundamental breach to award damages as if the breach had been only partial. Unlike the poor vicar's egg, a contract fundamentally breached cannot be "good in parts".

20 Mr. Goldberg submits that the basis for the trial judge's assessment of damages cannot be perceived, yet it seems to me to be plain enough. Judge Godfrey obviously thought that in light of the fundamental breach of contract, all the plaintiffs were entitled to the return of their money and something more for the disappointment of individual expectations. That is exactly what Jarvis prescribes. I have no criticism to offer. On the contrary, in my opinion, the amounts awarded might justifiably have been higher. In Jarvis there was no physical discomfort resulting from unsatisfactory living accommodation, yet for disappointments far less severe the English Court of Appeal awarded double the plaintiff's cost of the trip.

21 Judge Godfrey's decision would be unappealable if simply "just and agreeable to equity and good conscience". That is the traditional basis for the exercise of jurisdiction in his court: see the Small Claims Courts Act, R.S.O. 1980, c. 476, s. 57, the Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 78(3), and the Courts of Justice Amendment Act, 1989 (No. 1), S.O. 1989, c. 55, s. 2 [enacting new s. 24 of the Courts of Justice Act, 1984, to come into force on proclamation]. In my opinion, his decision satisfies a stricter test: he correctly found the facts and correctly applied the law. I agree with his disposition of the cases. That is sufficient to dispose of the appeals. For the benefit of interested persons who are not parties to these cases I have added Judge Godfrey's reasons as Rider B.

22 There is, however, another ground on which these cases might have been disposed. That involves the interpretation of the disclaimer. In my opinion, it simply failed to cover the breach. Alternatively, it is ambiguous. In either case, it failed to protect Conquest against liability.

23 The disclaimer provision is not set out in Judge Godfrey's reasons for it was unnecessary to his disposition of the case. I have attached a photostatic copy of it as Rider C to these reasons. It reads:

24 RESPONSIBILITY:

> Conquest Tours (Toronto) Ltd. the operator of the tour and its suppliers of services act only as agent for the passenger in regards to travel, whether by railroad, motorcar, ship or plane, shall not be responsible for any act, omission or fault of such carrier arising out of any cause whatsoever. Conquest Tours (Toronto) Ltd. shall not be responsible or liable to the customer or any other persons for any claims, losses, damages, cost of expenses arising out of injuries, death, accidents, delays, inconveniences or irregularity which may be occasioned either by reason of defect of any vehicle or for any reason whatsoever or through the acts or default of any Company of persons engaged in conveying the passengers or in carrying out the arrangements of the tour whether any such claim or cause of action shall be caused by or arise from any wilful act, default or out of the negligent act or

> omission of Conquest Tours (Toronto) Ltd. Conquest Tours (Toronto) Ltd. can accept no responsibility for losses or other expenses due to delay or changes in air or other services, missed connections, sickness, weather, strike, war, quarantine or other causes. All such losses or expenses will have to be taken care of by the member of the tour as the rates provided are for any arrangements only at the time stated. Conquest Tours (Toronto) Ltd. will not be responsible or liable for any inconveniences whether physical or mental including, in particular, mental distress. The right is reserved to decline to accept or to retain any person as a member of the tour. Baggage is at owner's risk. No representative of the Company has authority to modify or waive any provision of the contract. Each deposit or monies paid, including verbal or written authorization to charge such monies to your credit card, will represent the passenger's acceptance of the above mentioned conditions.

25 This provision is found on p. 62 at the back of Conquest's brochure. It is in small print and difficult to read. It is plagued with grammatical and typographical errors, repetition, and convoluted syntax. Compared to the flyer and the descriptions of tours in the rest of the brochure, it is difficult to comprehend, if it can be comprehended at all.

26 Its general thrust seems to be transit. There are repeated references to carriers and conveyance -- by rail, bus, motorcar, ship and plane -- and repeated disclaimers of responsibility for failure to provide promised transit services.

27 Phrases taken out of context might be construed to reach beyond transit. One is "any Company or person engaged in ... carrying out the arrangements of the tour". Yet that is set in the context of "conveying the passengers". Another is for "any reason whatsoever", but that again is set in the context of transit services.

28 It is a legal truism that individual words must be read in the context of the whole. Because of the complexity of the disclaimer the context is especially important. The context seems to me to confine it to failures of transit or the occurrence of the specifically named hazards of strike, war and quarantine. I am reasonably confident that a lay person reading the disclaimer would likely read it that way. Thus, the disclaimer fails to shield Conquest from liability, for there were no transit problems and none of the named hazards occurred.

29 I accept that others might read it differently. They might interpret it to be the untrammelled disclaimer against every failure that Conquest says it is. But the mere fact that the words are open to more than one interpretation would render them ineffectual. It is well established that the onus of proving an exemption lies on one who claims it and that an ambiguous disclaimer is ineffective. As Trainor J. said in Cathcart (supra, at p. 191 O.R.), an exclusionary provision will be interpreted contra proferentem and any ambiguity will be held against the party asserting it.

30 The application of these rules of interpretation is amply justified by the circumstances of this case. I have read the words many times and pondered at length on their meaning and in the end have come up with an interpretation that I concede might not be shared by all. Yet in a case of this type the readers of the fine print are unlikely to be assisted by lawyers, or to ponder over the words at great length. Surely the law should not be used to contrive a trap for the unwary. Surely it is reason-

able to require that the language of a disclaimer be clear enough for an ordinary person to understand without having to guess at its meaning.

31 The claim Conquest makes is startlingly broad. It claims total absolution from any and all failures to live up to its promises, whether the failure is caused by its own default or neglect or that of others. That would reduce the flyer on which the contract was based to a virtually meaningless piece of paper, for what Conquest promises in the flyer it withdraws in the fine print. In my opinion, that could be accomplished, if it can be accomplished at all in circumstances like these, only by clear and unambiguous language.

32 Conquest was successful in inducing travellers to sign up for package tours described in glowing, and more importantly, clear and simple words. There was nothing obscure about the flyer, as a glance at Rider A will reveal. Should the law permit Conquest to negate the promise of the flyer by resort to gobbledegook? I do not think so. Nor do I think it is asking too much to require disclaimers to be set out in clear and simple language. Conquest can write in readable language when it wishes. A quick reading of the descriptions of holiday packages in the rest of the brochure proves that.

33 If the point were before me for decision, rather than comment, I would require that a disclaimer be written in language as clear as that used to promote and sell the holidays, be in equally readable print and be given equal prominence rather than hidden in the back of the book. Nothing less is fair.

34 The appeals were dismissed with costs. Mr. Goldberg asked me to confine costs to one set but I see no basis for that. It is true that the appeals were heard together, yet the way in which they were presented demanded consideration of each case individually. That added greatly to the time involved. Almost two days were consumed by the appellants' submissions. That is an unprecedented length of time for a small claims appeal. I did not call on the plaintiffs' counsel to respond save on one very narrow point. To confine costs to one set would virtually deprive the plaintiffs of the small spoils of a severely delayed victory, given the limited amount that can be allowed for costs in the Small Claims Court.

35 I therefore direct that costs of the appeal be to the respondents individually.

Appeals dismissed.

RIDER A
RIDER B

36 The reasons for judgment of Godfrey Prov. Ct. J. of the Provincial Court (Civil Division) in the Municipality of Metropolitan Toronto in the North York Small Claims Court, in Huber v. Conquest Tours (Toronto) Ltd.; Van Der Linde v. Conquest Tours (Toronto) Ltd.; Snucins v. Conquest Tours (Toronto) Ltd.; Snucins v. Conquest Tours (Toronto) Ltd.; Hamilton v. Conquest Tours (Toronto) Ltd.; Hamilton v. Conquest Tours (Toronto) Ltd., were delivered April 4, 1989, as follows:

Counsel:

K.E. Kroeber, for plaintiffs.

[para37] S.D. Goldberg and Deborah L. Wilkins, for Conquest Tours (Toronto) Ltd.

[para38] Mark B. Harrington, student-at-law, for Goliger's.

[para39] P. Dekoulos, appearing in person for Peter's Travel and Tours.

[para40] No one appearing for Premier Travel Systems Inc.

41 The plaintiffs in Action Nos. 9995/86, 10013/86, 10014/86, 10035/86, 10036/86 and 10103/86 all within a few days of December 28, 1985, being the departure date, booked a last minute vacation with the defendant Conquest Tours (Toronto) Limited (hereinafter referred to as Conquest) to the Puerto Laguna Hotel and Yacht Club in the Dominican Republic. The plaintiffs arranged their vacation through different travel agents. Ella Huber and her husband Robert Van Der Linde arranged their holiday with Premier Travel Systems Inc., who as a party defendant did not file a defence. The plaintiffs Deborah Snucins and Peter Snucins booked through the defendant Peter's Travel and Tours while the plaintiffs Paul and Celia Hamilton booked through the defendant Goliger's as operated by 631731 Ontario Inc.

42 The plaintiffs Huber and Van Der Linde made all of their arrangements for the booking of their trip over the telephone. After being advised by their travel agent that a great new property was available in the Dominican Republic, Ms. Huber booked the trip for herself, her husband and their one-year-old infant for the sum of $2,024.85. Upon arrival at the airport, these plaintiffs were provided with a copy of Exhibit 1 [Rider 1, supra], being Conquest's only flyer on Puerto Laguna. It was not until after the vacation that Ms. Huber and Mr. Van Der Linde saw a copy of Conquest's brochure which appears as Exhibit 4 [not reproduced, except for the disclaimer in Rider C]. The Snucins, on the other hand, arranged their vacation at a cost of $1,920 by attending at the premises of their travel agent. They received Exhibit 1 and specifically advised their agent that they were interested in a variety of water sports. The Snucins claimed that Mr. Dekoulos, their agent, confirmed with Conquest by telephone that water sports were available as advertised. Mr. Dekoulos in his evidence contended that upon calling Conquest he was advised and passed on to the Snucins that water sports existed in the area and not at the hotel. In any event, water sports were unavailable at the hotel or in the immediate area. Mrs. Snucins in her evidence indicated that she didn't recall seeing the reference to "terms and conditions" at the bottom right hand corner of Exhibit 1 and that she never received a copy of Exhibit 4. Mr. Snucins, on the other hand, stated that he must have read the reference to "terms and conditions" on the flyer but didn't ask about them. He also claims not having received a copy of Conquest's brochure.

43 With respect to the Hamiltons, Mrs. Hamilton attended Goliger's and brought home Conquest's flyer. The Hamiltons decided to book at a cost of $2,048 based on the representations in the flyer and the fact that the hotel was classified as a three-star hotel. The Hamiltons had a number of Conquest's brochures at home. Mr. Hamilton claimed he didn't read the exclusionary clauses on p. 62 and limited himself to those parts of the brochure that interested him. Mrs. Hamilton admitted she saw the Box headed "IMPORTANT" on p. 26 of Exhibit 4 and that she probably looked at p. 62 containing the exclusionary clauses.

44 All of the plaintiffs took the same essential position as to the quality of the vacation package. Many of their expressed concerns were common, although there were certain inconsistencies in the recollection of those concerns. Some of the discrepancies probably resulted from failing memory due to the fact that the vacation itself was some 38 months ago. Certain discrepancies, however, were likely a result of exaggeration of the experienced events.

45 As a minimum, it appeared to the court that all the plaintiffs suffered the following common experiences.

> (1) Upon arrival there was mass confusion in the allocation of the rooms due to the fact that the staff spoke little English and did not know where all the proper rooms were. This resulted in a significant delay in being able to settle in.
>
> (2) The initial rooms allocated to each of the plaintiffs had no front door, concrete dust, shutters which were painted open, intermittent or non-existent electricity, no water, unfinished bathrooms, a lack of furniture and incomplete wiring. Ms. Huber and Mr. Van Der Linde were moved to two other rooms which also had intermittent electrical and water problems as well as a lack of security as no locks were on the doors. Their final two nights were spent in the condominium portion of the complex which they claimed was much better in general, although as I understand it, they had to share the unit with the Hamiltons who resided on the second floor. The Snucins were moved on the Tuesday morning to a finished room in the condominium complex which they were quite pleased with. Within hours, however, they discovered that they had been evicted by the owner of the unit. Their bags were taken to the common laundry room on the floor which they were required to use until a new room was obtained late in the afternoon. This room had no key, intermittent electricity, and running water but none of it hot. The lack of hot water for the entire period was experienced by all the plaintiffs. The Hamiltons spent four nights in a second room which was, for all intents and purposes, the same as their initial room except that this room had a door but no key. On Wednesday, they were moved to a condominium unit shared with Ms. Huber and Mr. Van Der Linde and their child. Their portion of the unit lacked furniture, had no key, and had intermittent electricity. In addition, Mr. Hamilton complained that the infant disturbed him by crying from time to time.
>
> (3) No availability to public telephones within the hotel.
>
> (4) Dirty swimming pool. The complaints registered by the plaintiffs under this heading ranged from one day to the whole of the trip.
>
> (5) No water sports available.
>
> (6) Construction noise starting from approximately 6:30 a.m. until noon hour or later.
>
> (7) Inconvenience of carrying valuables.

46 In addition to the common complaints, Ms. Huber and Mr. Van Der Linde had the following complaints.

(1) A crib was not available for their infant child until the third night.

(2) Mr. Van Der Linde claimed he had diarrhea and a fever as a result of eating the food. The court was not satisfied on the evidence that the food was the cause of Mr. Van Der Linde's problem. Furthermore, food was not part of the tour package and thus did not form part of Conquest's obligation.

(3) Arguments between Ms. Huber and Mr. Van Der Linde due to irritability created by their living conditions.

47 Notwithstanding the list of complaints, there were some positive aspects of the vacation experienced by all plaintiffs which included: (1) satisfactory flights; (2) a beautiful beach and ocean; (3) one night in Panama; (4) free dinners and breakfasts.

48 With respect to Item 2, most plaintiffs felt inhibited in their use of the beach and ocean as a result of having to carry their valuables with them. With respect to the free dinners and breakfasts, Mr. Snucins took the position that breakfasts were included as part of the package. There does not appear to be any other evidence to confirm Mr. Snucins' assumption, other than Exhibit 1, which suggests breakfasts and dinners were included. The court finds in all probability that the Snucins' holiday package did not contain a meal plan. The Hamiltons, on the other hand, claimed that their package included the Modified American Meal Plan as per Exhibit 1. On the cross- examination of Terri Coleman, however, it became apparent to the court on a balance of probabilities that the Hamiltons could not have purchased the Modified American Meal Plan. In particular, the notes of Ms. Coleman appearing as Exhibit 15 and her related comments led to the court's conclusion. In addition to the free meals enjoyed by the Hamiltons, Mr. Hamilton acknowledged a free bar bill of $150.

49 Other positive aspects for Ms. Huber and Mr. Van Der Linde included two nights in the condominium portion of Puerto Laguna. The Snucins took the opportunity to go to other hotels for dinner and dancing. The Snucins were also able to do some snorkelling by borrowing a snorkel and fins.

50 The Hamiltons stayed at the Puerto Laguna for the entire visit. Mr. Hamilton indicated his preference to relax in one location. Mrs. Hamilton contradicted her husband in this regard. She stated that they would have ventured out somewhat if transportation existed. The consensus of the evidence showed one van was available after a few days as well as some sporadic taxi service.

51 Although there were some positive aspects in the vacations of the plaintiffs, the court finds that the lack of such basics as privacy, security, hot water, furniture and electricity led to a significant interference with the expectations of a relaxing holiday.

52 The question that the court must answer is whether the named defendants are liable for the aforementioned deficiencies, and if so, what damages should be awarded the plaintiffs. Turning firstly to the defendant travel agents, the court finds that Goliger's, and Peter's Travel and Tours exercised proper skill and diligence towards their respective clients. There was no evidence to suggest that either of those travel agents made any misrepresentations. The representations that they made concerning Puerto Laguna were those given to them by Conquest. The property in question was a new property and they knew nothing other than what was supplied to them by Conquest. Furthermore, there was no evidence to establish that they, as agents, were certifying or guaranteeing the

quality of the trip. The plaintiffs clearly understood that the representations made were those of the tour operator.

53 The defendant Conquest relies heavily on the case of Craven v. Strand Holidays (Canada) Ltd. (1982), 40 O.R. (2d) 186, 142 D.L.R. (3d) 31, a decision of the Ontario Court of Appeal [leave to appeal to S.C.C. refused (1983), 48 N.R. 320n]. In particular, Conquest relies on the effect of the exclusionary clauses set out on p. 62 of Exhibit 4 under the heading "RESPONSIBILITY". For the exclusionary clauses to apply the court must determine that the plaintiffs had either read the said provisions or that reasonable measures were taken to draw the limitations and conditions of the contract to the attention of the plaintiffs.

54 Without doubt neither of the above conditions could apply with respect to Ms. Huber and Mr. Van Der Linde since they booked by telephone and did not see Exhibit 1 until after the contract was formed when they picked up their tickets at the airport on December 28. They never saw Exhibit 4 until after they returned on January 4. In the absence of such notice, the defendant Conquest cannot take advantage of the exclusionary clauses vis-a-vis those plaintiffs. With respect to the Snucins, Mrs. Snucins indicated that she didn't recall seeing the reference to terms and conditions at the bottom right of Exhibit 1. The sentence in question, although not in small type, is not highlighted in any way. Furthermore, it is written on the side of the page opposite the description of Puerto Laguna. The court is satisfied that no reasonable measures were taken to draw the reference to Mrs. Snucins' attention and is further satisfied that Mrs. Snucins in all probability did not actually read the reference. Mr. Snucins indicated that in all probability he read the reference to "terms and conditions" but that he didn't ask about them. Since Mr. Snucins ought to have been familiar with the terms and conditions, as the notation makes reference to the Conquest brochure, the court finds that Mr. Snucins is in fact subject to the exclusionary clauses set out on p. 62 of Exhibit 4. The court also finds the Hamiltons subject to the same clauses. Mrs. Hamilton indicated that she probably read p. 62. Although Mr. Hamilton claims not to have read the fine legal print, the evidence shows that the Hamiltons reviewed a number of Conquest's brochures at their leisure at home. There appears to be sufficient references throughout Exhibit 4 referring to p. 62. Those references are in fairly significant print size headed by the word "IMPORTANT" in red. The court finds that Mr. Hamilton, as well as Mrs. Hamilton, was aware of the exclusionary clauses or ought to have been aware of the said clauses. This position is reinforced by the evidence of Terri Coleman who indicated she was fairly sure that she gave the Hamiltons a copy of Exhibit 4, and that it was her practice to refer her clients to the provisions on p. 62 concerning liability and insurance.

55 It should be noted, however, that being subject to the exclusionary clauses does not in itself free Conquest from liability. Conquest essentially takes the same position as the defendant Strand in the Craven case. It claims that its contract is only to provide or arrange for the performance of services and that it has fulfilled its obligation if it has exercised due care in the arrangement of a holiday package. Mr. Bill Herbertson testified for the defendant Conquest in this regard.

56 Mr. Herbertson indicated that on October 24, 1985 he personally flew to the Dominican Republic to view the property in question. Although the hotel was under construction, on the assurances given to him by hotel management and Mr. Herbertson's personal opinion that the property looked like it should be completed in a short period of time, an agreement was entered into by which Conquest would have 50 rooms per week allocated commencing December 21, 1985. On November 23, 1985 Conquest's destination representative, Alma Nall was dispatched to the Dominican Republic. As a result of being advised by Ms. Nall that things were not progressing as they

should, Mr. Herbertson returned to the Dominican Republic on December 14, 1985. After reviewing the situation, Mr. Herbertson came to the conclusion that it was unlikely the property would be ready within seven days. As a result, he arranged for the passengers scheduled to leave on the flight of December 21 to stay at the Bavaro Beach Hotel instead of Puerto Laguna. On December 23, 1985 a telex was received by Conquest from management at Puerto Laguna indicating that they had opened on December 21 and had been operating on a limited basis serving Multitours' guests, being another tour operator. The telex also indicated final touches were being given to the hotel in preparation for Conquest's first guests. Mr. Herbertson indicated that he confirmed with Ms. Nall and Multitours that Multitours were in fact at the hotel. He also spoke to Puerto Laguna management who advised him that the hotel was functioning and that the Multitours' guests were enjoying themselves. Based upon this information, he decided that it was not necessary to return to the Dominican Republic and a decision was made to send the trip on December 28. This is the trip that forms the subject-matter of this litigation.

57 The court is of the opinion that Conquest, in the circumstances, was negligent in allowing the trip to continue. The fact that Multitours was in the hotel should in itself have been no consolation to Conquest. Although the Multitours' rooms may have been ready, that was no basis to assume that Conquest's rooms were ready. Obviously, Ms. Nall made no effort to check the rooms allocated to Conquest. Furthermore, Mr. Herbertson should not have relied on the self-serving statements made by hotel management. He had already experienced one problem with them, necessitating his trip on December 14. After viewing the pictures appearing as Exhibit 2, Mr. Herbertson concluded that he would not have sent passengers to the hotel based on the unfinished portions of the hotel as depicted in the said pictures. These pictures represented the property during the week of December 28, and such state of incompleteness would have been evident had Mr. Herbertson travelled to the Dominican Republic. Surely it was evident to Ms. Nall, the destination representative. It appears to the court that the decision to send the passengers on December 28 was quite likely affected by the fact that Conquest had non- refundable seats on its chartered flight to the Dominican Republic which would have resulted in a significant loss to Conquest had the trip been cancelled. Conquest's negligence in deciding to send its passengers without properly confirming the state of the hotel was the cause of the injuries to the plaintiffs.

58 In addition to the above, the court refers to pp. 192-93 O.R. of the Craven case wherein Mr. Justice Lacourciere states as follows:

> In the cases relied upon by the appellant, the contracts included specific representations or warranties as to the quality of the holiday. Strand's brochure also promised a "superb new holiday experience" in reference to the sunshine of the Caribbean region, its historic sites, beautiful hotels, green mountains, beaches etc. I have no doubt that if the Colombia tour package had failed to supply these promised features, the common law would have provided a remedy against the tour operator, based on the breach of its contract. The claim advanced by the respondents, however, had nothing to do with the contracted for quality of the travel arrangements.

59 In looking at Exhibit 1, being Conquest's brochure, it is apparent that Conquest describes Puerto Laguna as one of two "super new properties" and rates it as a three-star hotel which is defined on the inside cover of Exhibit 4. In addition, water sports are stated to be available.

60 Further quoting from Craven at p. 192 O.R., the court states:

> To support the implied term, the respondents rely on the dicta contained in the line of cases illustrated by Jarvis v. Swans Tours Ltd., [1973] Q.B. 233, [1973] 1 All E.R. 71 and Jackson v. Horizon Holidays Ltd. [1975] 3 All E.R. 92. As I understand them, these cases, the first of which was relied upon by the trial judge, awarded damages as compensation for loss of entertainment and enjoyment where the facilities glowingly described in the travel agent's brochure were found to be lacking. Where a misrepresentation is made with promissory intent and is a term of the contract, the common law gives a remedy in damages for breach of contract. Jarvis v. Swans Tours Ltd. founded liability on this basis. Damages were awarded because the travel agents "broke their contract and provided ... a holiday lacking in some of the things which they contracted to include in it" (per Stephenson L.J. at p. 77 All E.R.); they failed "to provide a holiday of the contracted quality" (per Edmund Davies L.J. at p. 75).

61 Clearly Conquest in this case failed to provide a holiday as promised in their flyer and as such is liable for breach of contract.

62 Based on the foregoing the court finds that the defendant Conquest is liable to all the plaintiffs. The court further finds that the failure of the defendant to provide the plaintiffs with the basic amenities mentioned earlier is a fundamental breach of the contract by the said defendant. Since there is a presumption against the survival of an exclusionary clause in light of a fundamental breach, the onus is on the party relying on the exclusionary clause to rebut the presumption. The defendant Conquest has not so rebutted the presumption.

63 Turning to the question of damages, the court must consider the individual expectations and experiences of each plaintiff. With respect to Ms. Huber and Mr. Van Der Linde, they booked their holiday with the intention to relax. The failure of the hotel to have any water sports did not seem of much consequence to them. The fact that they were travelling with a one-year-old baby made the living conditions much more intolerable for them. The Snucins, on the other hand, went not only for relaxation but with a view to being actively involved in a variety of water sports which never materialized. This zest for water sports even took the Snucins to inquire unsuccessfully about using the equipment at the hotel next door. The Snucins additionally experienced the insult of being evicted from their own room.

64 With respect to the Hamiltons, although they indicated that they relied on all the representations in the brochure, it was evident that they went essentially to relax. Unlike the Snucins, they indicated no particular interest in water sports nor did they look elsewhere or seemed concerned when it became apparent that their hotel had no such services. The court puts little weight on Exhibit 13, being the statement of Terri Coleman (nee Fenemore) wherein Ms. Coleman alleges that Mrs. Hamilton indicated that there were no major problems with her vacation. Ms. Coleman testified that Mrs. Hamilton never specified the problems she experienced. Apparently Ms. Coleman must have made an assumption she was not entitled to make.

65 Counsel for the defendant Conquest suggested that in assessing damages the court ought to break the vacation package into its component parts and assess damages for those areas which were deficient in nature. Evidence for Conquest suggested that the ground portion of the package repre-

sented approximately 20 per cent of the total purchase price. The court, however, is of the opinion that the plaintiffs paid for a total package and were not concerned with the individual costs to the tour operator that made up the package. The value of the trip to each plaintiff in no way equates the cost of the component parts to the defendant Conquest. In assessing damages for each plaintiff the court prefers to award a sum of general damages for all the breaches involved instead of trying to put a value on the subject-matter of the contract as promised and then as performed and then to include a sum for inconvenience or loss of enjoyment. This manner of assessment is consistent with the position taken by the court in Jarvis v. Swans Tours Ltd., [1973] Q.B. 233, [1973] 1 All E.R. 71 (C.A.). Keeping in mind the aforementioned experiences and expectations of the individual plaintiffs the court assesses damages as follows:

Ella Huber	$1,200
Robert Van Der Linde	$1,200
Deborah Snucins	$1,350
Peter Snucins	$1,350
Celia Hamilton	$1,050
Paul Hamilton	$1,050

66 The court is not prepared to make an award of punitive damages as suggested by counsel for the plaintiffs. Such damages are limited for high-handed and oppressive conduct by a defendant. Conquest in this case did not conduct itself in such a way.

67 The judgments in favour of Ella Huber and Robert Van Der Linde will also be against the defendant Premier Travel Systems Inc. for failing to defend. Each plaintiff is further entitled to court costs, and pre-judgment interest at 10 per cent from May 13, 1986 and a counsel fee of $250. Action Nos. 10035 and 10036 are dismissed against Goliger's with costs including costs of the third party action and a counsel fee $150 for each action. The third party actions are dismissed. Action Nos. 10013 and 10014 are dismissed against Peter's Travel and Tours with costs of $200 pursuant to the Rules of Civil Procedure, O. Reg. 560/84, rule 20.04. The parties may speak to me further regarding costs, if necessary.

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