

Rechtspraak

Bijzonderheden van de zaak

Nationaal ID: Court of Appeal, The Hague, Judgement 200.234.315/01

Lidstaat: Nederland

Gangbare benaming: N/A

Soort beslissing: Rechterlijke beslissing in beroep

Datum beslissing: 21/05/2019

Gerecht: Gerechtshof Den Haag

Onderwerp:

Eiser:

Verweerder:

Trefwoorden: Package travel contract, duty to notify, lack of conformity, misleading omission

Richtlijnartikelen

Unfair Contract Terms Directive, [Article 3, 1](#). Package Travel Directive, [Article 5, 4](#). Package Travel Directive, [Article 13, 2](#). Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 7](#)

Koptekst

ECLI:NL:GHDHA:2019:1131

A consumer booked a package holiday. During the stay at the resort, she experienced nuisance due to the mowing of the grass. She complained about this to the resort on several occasions, but not directly to the tour operator. After her return, she claimed compensation for breach of contract because the trip did not proceed in accordance with her expectations. The tour operator invoked several clauses in its standard contract terms, under which (1) the consumer was required to instigate legal proceedings within 1 year after the tour operator has dismissed the consumer's claim, and (2) the consumer was required to issue a complaint during the execution of the package travel contract not only with the hotel management but also with the tour operator itself. The Court of Appeal finds both terms not to be unfair. The inaction of the consumer for almost 2 years and five months after the tour operator's reply letter is such conduct (omission) as to justify the lapse of the right of action, therefore the presumption of unfairness under Art. 6:237(h) Civil Code does not apply. Similarly, a duty to notify the lack of conformity to the tour operator itself is in line with Art. 6:89 Civil Code and Art. 5(4) of the Package Travel Directive 1990 (Art. 13(2) Package Travel and Linked Travel Arrangements Directive 2015). It serves the tour operator's reasonable interest to learn of a complaint during the consumer's stay at the location to seek solutions locally in order to comply with the agreement.

Feiten

A consumer booked a package holiday for two adults and a child on 7 January 2014 via the travel organisation's website. The package trip included a return flight to Crete, transfer to and from the airport, and a stay at a resort from 21 July to 4 August 2014. In May 2014, the consumer added two more children for the week ending August 4. The total travel sum was € 11,024. The travel organisation advertises the resort using words such as "rest" and "time for feelings". During the stay at the resort, the consumer experienced nuisance due to the mowing of the grass. She complained about this to the resort management on 24, 25 and 26 July 2014.

On 21 August 2014, the representative of the consumer and her husband informed the tour operator that his clients avoided the contract on the grounds of mistake and, subsidiarily, claimed compensation for breach of contract because the trip did not meet the expectations that the consumer was entitled to on the basis of the travel contract and the information on both the brochures and the Internet. The tour operator was requested to refund the travel sum. In response, the tour operator offered to pay €100 per person for the inconvenience and wrote that it regretted that the traveller had not contacted them as a result of which the traveller had not given the tour operator the opportunity to immediately investigate their comment and offer a solution as desired.

Juridische kwestie

The tour operator invokes several clauses in its standard contract terms, under which (1) the consumer is required to instigate legal proceedings within 1 year after the tour operator has dismissed the consumer's claim, and (2) the consumer is required to issue a complaint during the execution of the package travel contract not only with the hotel management but also with the tour operator itself. Are these standard contract terms unfair? (3) Can the fact that the travel organisation advertised the resort with language such as 'rest' and 'time for feelings', but did not mention the potential noise nuisance, constitute an unfair commercial practice?

Uitspraak

The clause requiring the consumer to instigate legal proceedings within 1 year after the tour operator has dismissed the consumer's claim is presumed to be unfair under art. 6:237(h) Civil Code. This implies that the tour operator bears the burden of proving that the term is not unfair. The Court is of the opinion that the tour operator has met this burden. The inaction of consumer for almost 2 years and five months after the tour operator's reply letter of 30 September 2014, is such conduct (omission) as to justify the lapse of the right of action. Moreover, the clause in question forms part of standard contract terms that are used throughout the travel industry and that have been drawn up in consultation with the Consumentenbond, the largest consumers association in The Netherlands. Taking all this into consideration, the clause is also not unfair under art. 6:233(a) Civil Code.

The clause requiring the consumer to complain during the performance of the contract to not only the hotel management but also to the tour operator itself in the case the non-conformity is not remedied by the hotel management, is not unfair either. A duty to notify the lack of conformity is in line with art. 6:89 Civil Code and art. 5(4) of the Package Travel Directive 1990 (Art. 13(2) Package Travel and Linked Travel Arrangements Directive 2015). It serves the tour operator's reasonable interest in learning of a complaint such as the present one during the consumer's stay at the location to be given the opportunity to seek solutions locally in order to comply with the agreement.

Lawn mowing is part of normal resort lawn maintenance and passengers should bear in mind that this maintenance is carried out and may be accompanied by (subjectively perceived) noise nuisance. Both a claim on the basis of mistake and on the basis of a lack of conformity would therefore be rejected as a consumer could not reasonably expect not to experience any noise from lawn mowing. In doing so, the word 'reasonably' implies a certain objectification, and is not decisive as to what the consumer subjectively expects. Moreover, the tour operator need not mention the lawn maintenance separately. For the same reasons, there is no omission within the meaning of the Unfair Commercial Practices Directive.

URL: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2019:1131>

Integrale tekst: [Integrale tekst](#)

Verwante zaken

Geen resultaten

Rechtsleer

Geen resultaten

Resultaat

The disputed standard contract terms are not unfair. The District Court's decision is therefore confirmed and the consumer's claim dismissed.