Local Standards Not Necessarily Determinative of the Standard of Care in Package Holiday Claims: TUI v Morgan

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In *TUI v Morgan* [2021] PIQR P12, the Respondent, Mrs Morgan, sustained injury whilst on a package holiday to Mauritius, which she purchased from the Appellant, TUI. She was walking along an outdoor, unlit sun terrace at the hotel where she was staying when she collided with a heavy wooden sunbed, fell and sustained injuries as a result.

Mrs Morgan brought proceedings for damages against TUI, alleging a breach of an implied contractual term that the services to be provided by TUI would be provided with reasonable care and skill, including with regard to the provision of lighting at the accident location. Mrs Morgan relied on regulation 15 of the Package Travel, Package Holidays and Package Tour Regulations 1992 (SI 1992/3288) ("the Regulations"), which provided that:

> *"Liability of other party to the contract for proper performance of obligations under contract*
>
> *(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."*

(The Regulations have since been revoked and replaced with the Package Travel and Linked Travel Arrangements Regulations 2018, as to which see here, but continue to apply to contracts concluded before 1 July 2018).

The Decision at First Instance

At first instance, HHJ Jarman QC gave judgment for Mrs Morgan.

HHJ Jarman found that the lighting in the accident spot was likely to have been a little less than 0.24 lux and that the lack of lighting caused the accident. Upon considering the expert evidence adduced by both parties, he preferred the evidence of Mrs Morgan's expert, who asserted that the International Standards Organisation's ("ISO") standard on emergency lighting prescribed a minimum luminosity for emergency lighting of 0.5 lux and, that this should have been the minimum level of lighting in the accident spot. The expert further asserted that this minimum luminosity was one of the few universal principles and that where, as in Mauritius, there was no specific local standard, this is what was used.

HHJ Jarman found that there was limited evidence of what the prevailing local standard was in Mauritius in relation to lighting and thus he needed to determine what the standard was likely to be. In this regard, he accepted the evidence of Mrs Morgan's expert that the standard relating to the provision of lighting on the sun terrace was likely to be the minimum set by the ISO standard. Accordingly, he found that TUI was liable to Mrs Morgan under the Regulations for the poor lighting where her accident occurred.

The Decision on Appeal

TUI was granted permission to appeal and the appeal was heard by Marcus Smith J.

In its grounds of appeal, TUI sought to attack HHJ Jarman's findings in relation to the applicable contractual standard. TUI also raised a causation argument, which failed.

In considering the appeal, Marcus Smith J confirmed the position under English law that an organiser of a package holiday has an obligation to provide the services under the contract with reasonable care and skill regardless of the party

to whom the organiser delegates performance of those obligations. Accordingly, the obligation was on TUI to exercise reasonable care and skill in the provision of services to Mrs Morgan.

The question for the court was therefore, what informed the standard of the obligation on the organiser.

Marcus Smith J referred to the widely approved decision in *Wilson v Best Travel Ltd* [1993] 1 All ER 353. In *Wilson*, Philips J stated at p. 358 that:

> "*Save where uniform international regulations apply... the duty of care of a tour operator is likely to extend to checking that local safety regulations are complied with. Provided that they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature, which would be found in an English hotel, unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question*."

Marcus Smith J stressed however that the obligation on the organiser to exercise reasonable skill and care is an obligation arising under English law and it is English law that applies to establish whether the obligation has been breached.

Marcus Smith J set out a number of propositions which have emerged from case law, including the following at [17]:

- That the court would regard the local prevailing standards as a "*very important signpost*" in determining the content of the organiser's obligation.
- If the local standards are breached the organiser's English law obligation to exercise reasonable skill and care will almost inevitably also be breached.
- Even if local standards have been complied with, it does not necessarily follow that the organiser will escape liability. Those standards may, for no justifiable reason, fall so far below either internationally accepted or English standards that the organiser assumes an obligation to exercise reasonable skill and care that is informed not by the local standards, but by other standards.

What however is the position in cases where it is unclear what the local standards actually are?

Marcus Smith J recognised that a claimant is not necessarily obliged to demonstrate what the locally applicable standards are in order to succeed in their claim. He stated at [17]:

> *"In particular, where the local standards are unclear, the court is not going to require the claimant to incur and waste time and expense in seeking to prove that which is vague, nebulous or non-existent. In such a case, the claimant is perfectly entitled to have resort to other material in order to establish that the obligation to exercise reasonable skill and care has been breached."*

Marcus Smith J thus found that HHJ Jarman was both entitled and right to look for material that he could use to inform TUI's obligation to exercise reasonable skill and care, in the absence of definitively applicable rules. He held that HHJ Jarman was entitled to find, on the evidence, that the ISO standard was the appropriate standard to use to determine the factual question of whether TUI had breached the contractual duty that it owed to Mrs Morgan.

Accordingly, TUI's appeal was dismissed.

Comment

This decision helpfully draws together a number of threads that have emerged from case law surrounding foreign package holiday claims. It confirms that whilst it is clear that evidence of local standards will be a very important consideration in the court's determination of whether a tour operator has breached its implied contractual obligation to its customer, compliance with those local standards will not necessarily be last word where those standards fall far below internationally accepted or English standards. Furthermore, where there is unclear evidence of the prevailing local standards, the court is entitled to consider other evidence in order to establish the requisite standard that a tour operator was required to meet – the burden resting with the Claimant to adduce such evidence.