***The Claimant's Burden: the decision of the Court of Appeal in***

**Lougheed v On the Beach Limited [2014] EWCA Civ**

The Facts

The claim arose out of a holiday booked by the Claimant's daughter on 3rd August 2009. She, her daughter and Mrs Lougheed were accommodated throughout the holiday (between 14th and 21st August 2009) at the H Top Royal Star hotel in Lloret de Mar in Spain.

During the course of the holiday, on 16th August 2009, Mrs Lougheed slipped and fell on a flight of granite steps at the hotel. She said that the steps were wet, and that it was this which caused her to fall. As a result of the accident she sustained personal injuries. The value of her claim was agreed between the parties in the sum of £30,000.

The Claimant contended that the Defendant was liable to her for the accident pursuant to Regulation 15(1) of the Package Travel, Package Holiday and Package Tours Regulations 1992 (SI 1992/3288, 'the Package Travel Regulations'), which states:

*"The [Defendant] 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 [the Defendant] or by other suppliers of services."*

The Defendant denied liability on a number of grounds, including the contention that the hotelier had not breached local standards in the supply of the accommodation.

In its Allocation Questionnaire the Defendant indicated its wish to rely on the evidence of an engineer. This was thought to be necessary in order to bring evidence of local standards before the court. At a case management conference on 8th February 2013 the Defendant sought permission to adduce evidence as to local standards, but was refused on the basis that it was for the Claimant to bring such evidence as she needed to prove her case. It was not until 6th August 2013 that the Claimant's solicitors applied for permission to rely upon evidence as to local standards; the application was refused on 29th August 2013 because the trial was listed for 10th and 11th October 2013, and granting the application would have rendered it necessary to vacate the trial. The trial therefore proceeded in the absence of any evidence as to local standards.

At trial the Defendant accepted that if the hotelier had not performed its obligations under the holiday contract properly, it, the Defendant, would be liable for any such

failure. However, it was said, the Claimant could not show a breach of local standards, because there was no evidence of what those standards were.

The Trial

At trial the hotel manager was cross-examined as to the prevalent local standards. His evidence was as follows:

*Q. There are no specific standards in Spain as to how regularly floors have to be cleaned?*

*A. Not as far as I know.*

*Q. But you do have a responsibility to clean spillages when they are identified?*

*A. Yes, once they have been identified, then you have to clean for the safety of the guests.*

*Q. And if your staff simply left the floor in a wet state, you would be critical of them?*

*A. Of course. Not just with themselves but with their head of department.*

*Q. Yes, it is an important thing that needs to be done, to keep the hotel safe?*

*A. Yes, indeed.*

The Claimant relied upon this evidence as showing that there was no divergence between English and Spanish standards. She contended that there was an evidential burden on those made responsible for the hotel's performance of the obligations under the contract to adduce evidence of the steps taken by the hotel to avoid the stairs becoming or remaining wet. She relied in support of this submission on the decisions in *Ward v Tesco Stores Ltd [1976] 1 WLR 810* and *Dawkins v Carnival Plc [2012] 1 Lloyd's Rep 1*.

The Defendant did not accept that the decisions in *Ward* or *Dawkins* were of any application in cases of this nature, and therefore submitted that it was for the Claimant to prove a failure to perform the accommodation contract properly by reference to proven local standards.

The Judgment at First Instance

At first instance the judge gave judgment for the Claimant. He found that:

*"…ultimately it will always be for the claimant to satisfy the court that want of reasonable care judged against local standards has caused his or her injury…*

He commented further:

*"…The problem in this case, and it is not an easy one to resolve, is whether the circumstances are such that the claimant has adduced sufficient evidence to satisfy the court on the balance of probabilities that the hotel was negligent. In my judgment the Tesco principle would be engaged were this a hotel in England. The staircase was under the control of the hotel or its servants and the accident is such as in the ordinary course of things does not happen if those who have the management of the hotel use proper care…"*

*"…Standards of care may be different in Spain; so on the same facts there will be some cases where the Tesco principle will not be engaged because the court is unable to draw an inference of want of care without sufficient evidence of Spanish standards. In this case I have clear evidence from the General Manager of the hotel, having 33 years of experience in the hotel business, that there were no specific standards in Spain relevant to the case and agreement with the proposition that it is not acceptable to leave floors wet…"*

The Appeal

The Appellant appealed on the basis that the trial judge was wrong as a matter of law to find that the hotelier was in breach of local standards, because the Claimant had failed to adduce evidence of local standards, and:

- the judge wrongly relied on the evidence of the hotelier as evidence of local standards;
- the judge was wrong as a matter of law to find that the Defendant bears any evidential burden of proof in cases of this nature.

It was accepted on behalf of the Appellant that it is generally unacceptable to leave floors wet; but it was submitted that the local standard as regards what systems were necessary to guard against this risk was unknown. The only evidence before the court was as to the practice of one particular hotel manager, and this did not amount to evidence of the local practice.

Further, it was submitted, *Ward v Tesco Stores* was inapplicable in cases founded on the Package Travel Regulations. *Ward* was a claim in negligence arising out of a

spillage which had occurred on the Defendant's premises and as a result of matters over which the Defendant's staff had control. Mrs Lougheed's claim was founded on breach of contract and on the application of the Package Travel Regulations. The Regulations impose quasi-vicarious liability upon the Defendant for the actions and omissions of its suppliers; liability which would not (or not necessarily) arise in common law negligence or breach of contract. Therefore, the Appellant contended, the principles of common law negligence did not apply.

The Judgment of the Court of Appeal

The Court of Appeal upheld the appeal. Tomlinson LJ, giving the Court's judgment, said that:

*"...Standards of maintenance and cleanliness vary as between countries and continents and indeed what is reasonably to be expected in a five star hotel in a Western European capital differs from what is reasonably to be expected in a safari lodge, however well-appointed. There may perhaps be certain irreducible standards in relation to life-threatening risks, but to expect uniformity of approach on a matter such as the frequency of inspection and cleaning of floor surfaces is unrealistic..."*
*"...One would not expect to find locally promulgated regulations governing the frequency with which a hotel floor should be either cleaned or inspected for the presence of spillages on which guests might slip. The standards by which the hotel is to be judged in its performance of such tasks as are unregulated, or where regulations are supplemented by local practice or are recognised to be inadequate must necessarily, and on authority, be informed by local standards of care as applied by establishments of similar size and type..."*

The Court of Appeal found that the evidence of the hotelier did not amount to sufficient evidence of the standard in place locally as regards cleanliness. Although it would not be necessary for expert evidence as to local standards to be given in every case, it would generally be preferable for evidence to be provided in this way; and failure to do so might well lead to a claim failing.

The Court of Appeal went on to find that the principle in *Ward v Tesco Stores* did not apply in Mrs Lougheed's case. This was because:

*"…the judge in our present case was not on the basis of the facts found justified in concluding that this was an accident such as in the ordinary course of things does not happen if those who have the management of the hotel use proper care. It was an accident which could have occurred despite the use of proper care, as would have been the case, for example, if the stairs had become wet only very shortly before Mrs Lougheed negotiated them and before the wetness had or ought reasonably have come to the attention of the hotel staff…"*

*"…There was here no evidence that slipping at this place was a known likely risk, with sufficient frequency of occurrence that it required a system to remove it, so that an accident could be inferred to be the result of the absence of a system which ought to have been in place or a failure in the operation of the system…"*

Commentary

The judgment in the Court of Appeal is a yet further reminder that the standard to be applied in cases of this nature is that of the local jurisdiction, and that this standard need not be mandatory, but can consist of local custom and practice (and cf the decision of the Court of Appeal in *Japp v Virgin Holidays Limited [2013] EWCA Civ 1371* in this regard).

The author has previously emphasised, in these pages, the need for both parties to adduce evidence of local standards, whether regulatory or in the form of custom and practice; without it, any claim is likely to fail unless the Defendant's witnesses can be induced to provide such evidence in the clearest possible terms. In his judgment Tomlinson LJ acknowledged the possibility of a claim under the Package Travel Regulations proceeding in the absence of evidence as to local standards, but said that a Claimant who chooses not to adduce such evidence does so 'at his peril'. It is to be hoped that in future evidence of local standards will be obtained and adduced in the form of expert evidence, save in the clearest of cases.

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