Neutral citation no. [2018] EWHC 82 (Admlty)
Claim no. AD-2016-000129

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
BEFORE ADMIRALTY REGISTRAR JERVIS KAY QC

BETWEEN:

PHILIP JENNINGS

Claimant

-and-

TUI UK LIMITED (t/a THOMSON CRUISES)

Defendant

Appearances:

For the Claimant: Daniel Clarke instructed by Simpson Millar

For the Defendant: Alex Carington instructed by Miles Fanning Legal

Hearing date: 14th November 2017

JUDGMENT

(Handed down 22nd Janaury 2018)

Introduction

1. This claim arises out of an incident which occurred on 27th November 2014 in the port of Malaga. The Claimant began proceedings which were issued on 27th October 2016. On 9th May 2017 costs budgeting took place and directions were given. The claim was initially listed the matter for a liability and quantum trial commencing on 13th November 2017 however, on 29th September 2017 it was agreed that the hearing would be limited to being a liability only trial with quantum to be reserved. No provision for expert evidence on liability has been made.

2. At the time of the incident the Claimant was aged 57. He is now 60. He and his wife had been passengers on an "Iberian Escapade Cruise" for 7 days on board the M.V

THOMSON DREAM ("the Vessel"). She is a cruise ship 243 metres in length and 29 metres in beam. She was built in 1986 and is registered in Malta.

3. Malaga is a port in Spain and was the last port in the cruise and the port at which the Claimant and his wife were to disembark from the Vessel. The weather at the material time was rain. For these purposes the wind direction, its force and the visibility are not relevant. Neither was the direction and force of any current material to this case.

4. It is common ground that the vessel entered the harbour and docked alongside a quay. On the quay there was a 'structure' which allowed passengers to disembark from the Vessel and walk to the terminal building which was situated on the quay itself but set back from the face of the quay so as to make space for the structure and other equipment related to the mooring of vessels such as mooring bollards etc.

5. I was provided with photographs and a video which show the structure and the route to be taken by a passenger disembarking from a ship lying at the quay in the vicinity of the terminal building. The witnesses have also described the disembarkation route. From the ship to the terminal the structure and the route to be followed can be explained as follows:
    a. Disembarking passengers, with only their hand luggage, would assemble in a passage way leading to a 'flat' or open area close to the 'port' or door in the ship's side;
    b. Once they reached the port or door there was then a short gangway which extended from a covered walkway. The purpose of the short gangway was to bridge the gap from the ship's side to the walkway. The photographs show the short gangway as having handrails and being uncovered but it is apparent that the walkway was fitted with an extendable cover which could be fitted to lie flush with the side of the ship. The cover provided shelter both above and to each side of the walkway. The evidence was that, at the material time, such a cover was fitted and was providing adequate shelter from the rain which was falling.
    c. Having crossed the short gangway the passenger would then be on the longer walkway which was positioned at a right angle from the ship's side. The walkway was supported at each end by steel legs attached to railway bogeys running on railway type lines set in the top of the quay. These allow the walkway to be

moved along the quay and this allows it to be positioned so that it can be connected to the accommodation ports or doors of different ships.

d. The walkway extends over some distance from the face of the quay towards the terminal building and at its shore end there is another short gangway leading onto a lateral 'fixed walkway'. The lateral 'fixed walkway' is supported on fixed concrete pillars running along the length of and parallel to the quayside. That walkway is covered by a roof but appears to be open to the elements at its sides and ends.

e. On the terminal or inland side of the long fixed walkway, and apparently in about the middle of the berth, there is a further walkway supported on steel legs set at right angles to the lateral fixed walkway. This part of the walkway stands on fixed steel legs and is immovable. It is either flat or if it slopes at all the slope is downwards and very gentle. After a short distance that part of the walkway turns abruptly to the right and then there is a more pronounced but still gently sloping decline or ramp which leads directly to the doors into the terminal.

f. Once inside the terminal there are areas where passengers are reunited with their cabin luggage and where immigration formalities take place before the passengers are taken by bus to the airport for return travel to their original points of departure.

g. It remains to be added that the flooring through most of the walkway system described (except apparently the long lateral fixed walkway) appears to be rubber or a similar material with inverted studs which appear to be of the type of design intended to reduce the risk of slipping.

6. I heard evidence from the Claimant and his wife and from Ms Sarich, who, as 'Hotel Manager', was the senior employee of the shipowners in charge of the housekeeping or hotel side of the ship's operation. The Claimant's case is that he had passed through the "port" or door in the ship's side and had crossed to the lateral fixed walkway, had entered the walkway from leading to the terminal and had reached the corner where there was a right angle turn to the tight into the part of the walkway which ran down to the terminal building. When he was at the corner he slipped on a wet surface, fell over and suffered injury. The Claim is brought pursuant to the Athens Convention. Alternatively it is pursued under the Package Travel Regulations 1992 ("PTR 1992").

7. Prior to the hearing there had been correspondence between the parties as to the admissibility of some evidence which was produced at a late stage, namely some photographs and the video recording showing a disembarkation route similar to that actually taken by the Claimant and some medical records relating to the Claimant. In the event the parties sensibly agreed that the court should be shown the video recording and the additional photographs. The medical evidence was considered to be unnecessary at this stage.

The issues before the court

8. These are:
    a. What were the circumstances surrounding the fall, where did the Claimant fall and what caused him to fall?
    b. Did the Claimant's fall occur during the course of carriage and does the Athens Convention apply?
    c. If so, was the accident caused by the fault or neglect of the Defendant or its servants or agents acting within the scope of their employment?
    d. Do the Package Travel, Package Holidays and Package Tours Regulations 1992 (the "Regulations") apply to the fall?
    e. If the Regulations apply:
        i. What is the consequence of the Claimant's failure to adduce evidence of local standards?
        ii. Did the Defendant fail to exercise reasonable skill and care in all the circumstances?
    f. Did the Claimant's negligence contribute to the accident and, if so, in what proportion?

The circumstances surrounding the fall.

9. Having heard the evidence of the Claimant and his wife I am satisfied that:
    a. The fall occurred in the position described above, namely on the corner of the walkway at the turn just before the decline to the terminal building. That was on the part of the fixed walkway leading from the ship to the terminal building.
    b. There was water on the surface of the walkway in the area where the Claimant slipped. It was common ground between the parties that water was present. What

was not common ground was how the water came to be on the surface in that area.

10. The Claimant argued that the water was in the relevant area because crew members had walked it into that area when transferring the cabin luggage from the ship to the terminal. In his witness statement the Claimant said: "*While the walkway provided to disembark the ship was a covered walkway, Thomson Cruise members who were using the walkway to travel back onto the ship tracking rain water with them onto the ramp. The floor was wet which is what caused me to slip and fall. There were staff members using this walkway and they made no attempts to clear up the excess water on the floor and there was nothing to warn of the wet floor.*"

11. In his oral evidence it became apparent that he and his wife were waiting in the passage outside their cabin that his view of the area near the exit port was restricted and he did not see crewmembers using it at that time. He said that he had assumed that the water in the area was caused by crew seen taking luggage off the ramp. Except that he said that he saw a cabin crew member dressed in overalls who was carrying luggage in the area, he was unconvincingly vague about how many crew he saw carrying luggage down the walkway. In her evidence Mrs Jennings said that she was ahead of her husband and did not see him fall. She did not see the water on the floor before the Claimant fell but did see it after he had fallen. She did not know where the water had come from.

12. Ms Sarich explained in clear terms that the cabin luggage was taken ashore through a different port which was at the level of the quay itself and that no crew passed or carried cabin luggage through the passenger disembarkation port. The only crew to leave through the passenger disembarkation port were those who went to the terminal to assist in identifying passenger's luggage. They would have been dressed in uniform overalls and be carrying computers. They would not go out into the rain and would remain in the terminal.

13. Having heard the witnesses I accept the evidence given by Ms Sarich. In my judgment there is no satisfactory evidence which supports the assertion made by the Claimant that the water was present because of the actions of the crew. The evidence is that cabin luggage was taken off the ship by a different route, that with the exception of a very few

members of the crew who went to the terminal to assist with the luggage the crew were not using the same entry port or the walkways to the terminal. Even if the Claimant's assertion was correct there is no logical reason why crew using the same walkways as the passengers to reach the terminal would need to go out into the elements and wet weather which was occurring on the quay. In my judgment there was no opportunity for the crew to have been the cause of spreading water onto the relevant part of the walkway. It follows that the Claimant was mistaken as to his assertion that the crew were responsible for bringing water into the area where he slipped. In my view that part of the Claimant's case is based upon an assumption which has arisen from unsupported speculation and it cannot be accepted.

14. It is possible that the long lateral fixed walkway referred to above which appeared to be more open to the elements had become wet as a result of the rain and that water was walked down to the area of the incident by departing passengers but there is no direct evidence that was the case. It is also possible that there was another source of water such as a dropped water bottle or from a defect in the cover or sides of the walkway near to where the incident occurred. However, there is simply no evidence which explains how water can have reached the area where the Claimant fell and there is no evidence which supports the proposition that the wet area on the floor where the Claimant fell was caused or contributed to by the Defendant or its servants in the form of the vessel's crew.

The Athens Convention

15. The parties dispute whether the terms of the Athens Convention apply to the present case. The Athens Convention on Carriage of Passengers and their luggage by seas (1974) is incorporated into English law by section 183 of the Merchant Shipping Act 1995. Art. 3(1) of the Convention provides:

> "*The carrier shall be liable for the damage suffered as a result of death or personal injury to a passenger . . . . if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.*"

16. For the Claimant, Mr Daniel Clarke argued that the incident occurred during the course of the carriage as defined by Art. 1 of the Convention upon the premise that Art.1(8) of

the Convention provides that injury caused during the carriage includes what happens whilst the passenger is in the *course of embarkation or disembarkation.*

17. Mr. Clarke also contended that the disembarkation is not completed until the passenger is safely established ashore. In support of that submission Mr Clarke relied upon the decision of HHJ Simpkiss in *Collins v Lawrence* [2017] 1 Lloyds Rep 13. In that case the passenger, whilst disembarking from a grounded fishing vessel, was injured because he fell from a platform at the top of freestanding steps which had been provided by the vessels owners and which led onto the beach. The judge held that disembarkation was not completed until the passenger was safely on the shingle beach and as he was still disembarking from the boat at the time of the injury, the Athens Convention applied so that the claim was time barred.

18. Mr. Carington, for the Defendant, drew attention to the full wording of Art.1(8) of the Convention which provides that carriage covers "*with regard to the passenger and his cabin luggage, the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice-versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. <u>However, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation</u>"* (emphasis added)

19. Relying upon the wording of the Convention Mr Carington submitted that, because of the exception provided by Art.1(8)(a), carriage does not include a period during which Claimant was in the marine terminal or in/on any other port installation. He argued that although '*Port installation*' is not defined in the Athens Convention the meaning of a phrase in a statute is to be given its natural or ordinary meaning in its context in the statute - see <u>*Pinner v Everett* </u>[1969] 1 W.L.R. 1266, that 'installation' is defined in the Shorter Oxford English Dictionary (6th ed.) as "*an apparatus, system etc that has been installed for service or use*", and therefore the relevant walkway falls within this definition, the walkways are installed in the Port and are not part of the ship and the Claimant's fall did not occur during 'carriage' within the meaning of the Athens

Convention. Therefore Athens Convention does not apply and the claim under it should be dismissed.

20. In my judgment the Defendant's arguments must prevail. It is clear that the scope and context of the Athens Convention and the wording of Article 1(8) indicate that whilst it is generally intended to include disembarkation this does not apply once the passenger has left the ship to the extent of reaching spaces or equipment which are clearly not under the control of the ship. In many cases passengers may disembark down gangways or companion ways which are part of the ship's equipment or apparel or may disembark using ship's boats or, as in *Lawrence v NCL* [2016] EWHC (Admlty), by way of boats which are put at the disposal of the passengers by the shipowner. In all such cases the disembarkation takes place within the period of carriage as understood by the Convention. However the Convention also makes it clear that once the passenger is in a position where he or she has reached the port terminal or is on the quay or in or on any other port installation the period of carriage will have ceased.

21. In my judgment it is clear that, in this case, once the Claimant had passed through the port in the ship's side and stepped onto the walkway leading to the terminal the period of carriage was over and the Athens Convention no longer applied. In my view that is clearly demonstrated by the photographs of the various parts of the walkway and as described earlier. The first part was a moving walkway situated on and over the quay itself. The later parts of the walkway and particularly the area where the Claimant fell were fixed on pillars rising out of the quay. They were all structures on the quay. In my judgment there can be no doubt whatever that, at the time of the incident, the Claimant was on a quay or in or on a port installation as referred to as part of the exception in Art.1(8). In the circumstances the incident occurred at a time which was not included within the period of "carriage" with which the Arhens Convention is concerned.

22. Insofar as Mr Clarke relied upon the decision in *Collins v Lawrence* it can be distinguished on the facts as the incident in that case occurred whilst the claimant was still on or in the area of disembarkation equipment provided by the vessel. Clearly there was no question of the claimant being in or on a 'port installation' nor do I think that the

word ‘quay’ can cover disembarkation onto a shingle beach as occurred in that case. Insofar as Mr Clarke sought to rely upon the judgment of HHJ Simpkiss as supporting the proposition that the period of disembarkation, and therefore the carriage, is extended in all cases until the passenger has reached a place of safety I cannot accept that proposition. There is no suggestion in Art.1(8) of the Convention that such a conclusion can be drawn and, in my view, the wording of the Convention does not support the importation of such a concept. On the contrary the Convention clearly envisages the period of carriage as coming to an end the moment the passenger has passed onto the quay or into or onto a port installation. It seems to me that the distinction is quite clear and needs no embellishment as suggested. Further I do not consider that the decision of HJJ Simpkiss supports the proposition put forward however, even if it did, the County Court has not had an Admiralty jurisdiction since the Civil Courts (Amendment) (No.2) Order 1999 and I would not be bound nor persuaded by it.

Was the accident caused by the fault or neglect of the Defendant or its servants or agents acting within the scope of their employment?

23. As I have decided that the injury did not occur during the course of the carriage of the Claimant it follows that a claim made under the Athens Convention cannot be entertained. That being so the issue of whether the injury occurred as a result of the fault or neglect of the Defendant is irrelevant for these purposes. However it should be noted that the Claimant failed to establish that the water came into the area where the Claimant slipped as a result of any fault of the Defendant.

24. It was suggested by Mr. Clarke, Claimant’s counsel, that the Defendant should have taken steps to warn the Claimant of the hazard formed by the water. Mr Clarkes submitted that reliance could be placed on the decision in *Lawrence v NCL*. In my view that decision is of no assistance to the Claimant. The circumstances of that case were different from the present case because the passenger was boarding a tender which had been ‘provided’ by the shipowners for the purpose of disembarking its passengers at Santorini. It clearly related to a period when the Athens Convention applied because it was held that the disembarkation was by way of tenders placed at the disposal of the passenger by the carrier as provided by the penultimate sentence Art. 1.8(a). In those circumstances the Athens Convention was held to apply and it was in those

circumstances that it was considered the shipowners had a responsibility to inspect the boats and provide warnings where necessary.

25. However the facts of the present case clearly fall within the exception set out in the last sentence of Art.1.8(a) and where the Athens Convention does not apply it is clear that the legislature does not consider that is necessary for the shipowner to have responsibility for the safety of the passenger. It is clear that the Convention applies responsibility for the safety of the passenger only whilst he is being carried. Once that period of responsibility has passed there is, in my view, no basis for the shipowner to be held liable for an injury unless liability can be established under the Package Travel Regulations 1992.

The applicability of the Package Travel Regulations 1992

26. In my view there are four aspects which need to be considered:

    a. Do the Regulations apply in this instance?
    b. Did the Defendant itself owe a duty of care, if so what was the duty and was there a failure by the Defendant in that respect?
    c. If there was no such failure by the Defendant was there a failure by a supplier for whom the Defendant is liable?
    d. What is the consequence of the Claimant's failure to adduce evidence of local standards?

27. The relevant provision of the Regulations is Reg. 15 (1) and (2) which provides:

> *"(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.*
> *(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because–*
> *(a) the failures which occur in the performance of the contract are attributable to the consumer;*
> *(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or*
> *(c) such failures are due to–*

> *i unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or*
> *ii an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall."*

28. Mr Clarke has submitted that if the Convention does not apply, the Claimant can equally sue the Defendant for improper performance pursuant to the PTR 1992. In this respect Mr Clarke has submitted:
    a. By art. 14 the Athens Convention regime is exclusive but if the Claimant's accident did not occur in the course of carriage then the Claimant can sue the Defendant pursuant to the PTR 1992. Such a claim is not brought against the Defendant as carrier but as the tour operator or "other party to the contract" under the PTR 1992.
    b. The Claimant purchased a cruise from the Defendant. This was a package holiday within the meaning of r.2 of the PTR 1992.

29. For the Defendant Mr Carington has submitted:
    a. That the Defendant is only liable to the Claimant for the proper performance of the obligations under the contract and that the contract was for the provision of transport by way of the Thomson Cruise Liner from Malaga Spain to Malaga Spain and accommodation on board the ship.
    b. The Claimant's fall occurred after he left the ship. The port terminal and installations were not provided by the Defendant nor was the Claimant's transit through them part of the pre-arranged components of the package which formed the contract between the Claimant and the Defendant.
    c. Although the Claimant would have to use the Port facilities to get to and from the ship nonetheless these amenities, facilities and services do not form part of the contract between the Claimant and the Defendant and the Defendant is not responsible for them.
    d. If, as the Claimant argues, the Defendant is responsible for the Port facilities, which do not form part of the pre-arranged components in the contract and is not part of the ship, that would mean that the Defendant would be responsible for the state of all pavements, roads, and transport systems that the Claimant decides to

use in order to reach the ship from his home and return again. That, he contends, cannot be right.

e. As the accident occurred outside of any of the pre-arranged components forming the contract between Claimant and the Defendant, the Regulations do not apply in this instance.

30. *Conclusion as to the applicability of the Regulations.* The Claimant has, in fact, pleaded the package holiday as being the period from the departure of the vessel at Malaga to its return to Malaga, see paragraph 10 of the Amended Particulars of Claim. It is upon that basis that Mr Carington has submitted that the injury occurred outside the package contracted for. Although I think Mr Carington's submission is technically correct as far as the pleaded case is concerned I consider that it would be wrong to decide this case upon the basis of such a technicality. If consideration is given to the actual booking documents it becomes clear that the contract was for a "package holiday" which included the relevant flights to and from Cardiff airport. In these circumstances I consider that it is clear that the period commenced in Cardiff and finished on return to Cardiff. As the relevant incident occurred in Malaga I consider that it occurred during the period governed by the Package Regulations.

31. *Did the Defendant itself owe a duty of care, if so what was the duty and was there a failure by the Defendant in that respect?*

a. The Claimant has pleaded that there was an express or implied term that the cruise ship "*would be of a reasonable standard, reasonably safe and would comply with all local safety standards and regulations*". Mr Carington has submitted that there was no such express term and no such should be implied. In my judgment he is correct. I have not been shown any provision within the booking form or documents which supports the proposition that there was any express term. As to whether such a term should be implied this will only be permitted if it is necessary to give practical effect to the terms of the contract as a whole and if the term is reasonable. No case has been put forward for the necessity for such a term to be implied and therefore a submission that it should be must be dismissed. No such term is to be implied. It is also to be noted that the suggested term refers only to the state of the ship itself but as the period of carriage is governed by the

provisions of the Athens Convention any further term, such as that suggested, is unnecessary. In any event the suggested term is irrelevant for present purposes because it refers to the state of the ship and it is clear that the injury occurred after the Claimant had left the ship.

b. However even if the incident occurred during the overall period of the package holiday it is still necessary to consider Mr Carington's submission that the injury occurred outside the scope of what can be considered as part of the pre-arranged components.

c. Reference has been made to *Saggerson on Travel Law and Litigation, 6th Ed by Matthew Chapman QC, Sarah Prager and Jack Harding.* The authors consider the scope of the package holiday contract between paragraphs 5.77 to 5.84. They considered the type of hazards and the need to provide a warning of a hazard as referred to in the decisions in *Jones v Sunworld* [2003] EWHC 591 and *Martens v. Thompson Tour Operations Ltd* 1999, MCLCC (unreported). Both those cases involved hazards which were held to be outside the bounds of the hotel provided but were within the area over which the resort owners had control. In the first case the Claimant's husband was drowned in a lagoon. Field J held that it was within the compass of the tour operator's and the resort's duty to warn but it was not part of the tour operator's duty to assess the safety of the lagoon nor issue warnings as to its safety. In the second case it was held that a deep well outside but close to the entrance of the campsite was a hazard of such a serious nature that a warning should have been issued.

d. In paragraph 5.82 of *Saggerson on Travel Law and Litigation* the authors have stated:

> "*The need for such warnings as part of the proper performance of the holiday contract is likely to be limited to circumstances where the hazard is serious and the risk of significant injury is manifest to the hotelier or tour operator but may not be so obvious to the visitor. Based on the facts of Jones v Sunworld and Martens v Thomson, it is very doubtful that the courts would regard as realistic any contention that a hotelier should warn consumers about routine pavement trip hazards on the public road outside the hotel.*"

e. Mr. Carington's submission, that there was no duty on the Defendant as tour operators to issue a warning with respect to the hazard created by water on the

walkway in the present case, needs to be considered in the light of the aforementioned comment. In my judgment the relevant features are:

i. The Claimant's fall occurred after he left the ship and took place in an area which was not provided by the Defendant and over which the Defendant had no control;

ii. The prevailing weather conditions were obvious to all and it must have been equally obvious to anyone, including the Claimant, that there might be water or dampness in the harbour installations leading to the terminal. A warning as to the possibility of damp conditions underfoot would not add to the Claimant's knowledge or safety;

iii. Insofar as provision of warnings by the Defendant is concerned I have considerable doubt as to whether walkways or ramps, being part of the port installation, are facilities which form part of, or are within the scope of, the contract between the Claimant and the Defendant even though the Claimant would have to use them to get from the ship to the terminal and thence onto a bus to the airport. Obviously these are areas which the Defendant cannot be expected to survey or patrol and it is absurd to consider that a tour operator should be expected to warn all of its customers (or consumers) to take care of themselves in conditions which were obvious to everyone.

iv. Even if the use of the walkways was within the scope of the contract the hazard itself was not obvious nor did it constitute a serious risk. There is no evidence that the Defendant was aware that water had collected in the walkway and, given that the water was seen by neither the Claimant nor his wife, there is no basis for considering that the Defendant should have been aware of it either. Further the evidence was that a large number of passengers had negotiated the walkway safely.

v. In my view the area in which this incident occurred falls squarely within the comment made in paragraph 5.82 of *Saggerson* referred to above and the Defendant cannot be held responsible for the state of all walkways and harbour installations that are used for movement during the course of the holiday package.

f. In the premises, although there may be cases where a tour operator is under a duty to issue a warning in respect of an obvious and serious hazard providing that the danger comes within the scope of the contract, this is not such a case and I do not consider that the Defendant was under any duty to issue a warning.

32. *If there was no such failure by the Defendant was there a failure by a supplier for whom the Defendant is responsible and what is the consequence of the Claimant's failure to adduce evidence of local standards?*

a. Even if the package provider is not personally liable for not assessing the nature of a risk or for failing to issues a warning nonetheless the provisions of Reg. 15 states that the contracting package provider may be liable to the consumer if the obligations under the contract are not properly performed by another supplier.

b. However it is well established that the standard of care to be applied to the services provided by a foreign supplier are the standards applicable in the relevant country, see *Wilson v Best Travel Ltd* [1993] 1 All ER 353 and *Codd v Thomson Tour Operations Limited* [2000] CA both cited in paragraphs 5.85-5.93 of *Saggerson on Travel Law and Litigation.* In the latter case, in which *Wilson v Best Travel Ltd* was cited with approval Swinton Thomas LJ said

> "*[The claimant] then submits that the judge was error in not applying the British standards to this particular lift . . . with the result that there was a breach of duty according to English law. That is not the correct approach to a case such as this where an accident occurred in a foreign country. The law of this country is applied to the case as to the establishing of negligence, but there is no requirement that a hotel, for example, in Majorca is obliged to comply with British safety standards*".

c. It has also become established that there is a burden upon the Claimant to prove his case including what the local standards are and that there has been a breach of them, see the decision of Goldring J in *Holden v First Choice Holidays & Flights Ltd.* 22nd May 2006 QBD, cited in paragraph 5.94 of *Saggerson on Travel Law and Litigation.* In paragraphs 5.98 and 5.99 the learned authors of *Saggerson on Travel Law and Litigation* indicate the necessity for a claimant to provide evidence, that there has been a failure of the standards of care applied locally and

the dangers of seeking to rely only upon the submission that a breach is obvious, and provide a number of examples supporting that view.

d. This issue has also been considered by the Court of Appeal in *Lougheed v On The Beach Limited* [2014] EWCA Civ 1538. In *Lougheed,* the claimant slipped on a patch of water whilst descending a flight of polished steps in a hotel. The claimant did not adduce any evidence of the local standards but argued that the presence of water on the steps was indicative of a failure by the hotel to take reasonable skill and care. The claimant sought to argue that the local standards were a distraction and not determinative of whether reasonable skill and care had been exercised. The Court of Appeal rejected this. At paragraph 16, Tomlinson LJ said:

> "*I cannot accept . . . . [the] broad submission that local standards are a distraction and not determinative of the issues whether skill and care has been exercised. I would accept, as is obvious, that mere compliance with locally applicable regulations will not exhaust the enquiry, for the very reason that the locally applicable standards may recognise that such compliance is of itself insufficient. But I reject the suggestion that the English court can, if it finds local standards to be unacceptable, judge performance in that locality by reference to the standards reasonably to be expected of a similar establishment operating in England or Wales. Such an approach is neither sensible nor realistic. It is also precluded by authority.*"

e. It was also held in *Lougheed* that the evidential burden remains on the claimant with respect to which Tomlinson LJ said that there was "*good reason for not imposing . . . an evidential burden [on the defendant] . . . . unless it is at least shown that the party for whose performance it [the tour operator] is liable knew of the presence of a hazard such as spillage and of the danger to consumers which that hazard posed if not dealt with promptly*".

f. The principles have been summarised at paragraph 5.173 of *Saggerson on Travel Law and Litigation* where the authors have written: "*These cases demonstrate the continuing importance of the local safety standard, however it must be expressed, as the filter through which package holiday accident claims must pass on the way to a finding of liability. The claimant bears the burden of proof in this regard.*"

g. Mr Clarke has sought to argue that *res ipsa loquitur* has a part to play and would have the effect of reversing the burden of proof. He has submitted that there was *prima facie* negligence by the Defendant in allowing the hazard to develop so that the burden of proof is transferred to the Defendant that it had and implemented a reasonable system to combat it. In my judgment this argument cannot be accepted. There is no evidence that the Defendant had allowed the hazard to develop. Indeed, as I have found, the Defendant did not cause water to be on the walkway and had no responsibility for the state of the walkway which was part of the port installation. That being so there is no prima facie case against the Defendant which could give rise to a reversal of the evidential burden. As the dictum of Tomlinson LJ in *Lougheed* referred to above demonstrates there would need to be evidence that the party responsible for ensuring safety on the walkway at least knew of the hazard before there a change in the evidential burden should be contemplated. There is no evidence in the present case that the port authority or owner of the port installation was aware of the conditions which are said to have caused the hazard. Arguably it would also be necessary to demonstrate that a failure to respond to such knowledge was also contrary to the standards of care applicable in the port and there was no evidence of that either.

h. In the present case Mr Carington has submitted that claim fails because the Claimant has failed to plead and prove the local standards and that the contract was not performed with reasonable skill and care in accordance with local standards. In my judgment Mr. Carington is correct. The Claimant has neither pleaded the relevant local standards to be observed by a port operative in Spain nor has the Claimant adduced any evidence as to the relevant standard. There is no evidence which suggests that the port authority knew of the hazard which it is said posed a threat to the consumers. In the circumstances I am bound to follow higher authority and hold that a claim under the Regulations must fail.

Conclusion

33. For the reasons set out above I have decided:

a. The provisions of the Athens Convention do not apply to this case;

b. The Claimant has failed to establish liability against the Defendant under the Package Travel Regulations 1992.

Dated this 22nd day of January 2018