Neutral Citation Number: [2022] EWHC 2557 (KB)

Case No: D34YX959

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
SITTING IN LEEDS

11th October 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

MR JOHN HARRISON	**Appellant**
(a protected party suing by his Litigation Friend MRS AVRIL HARRISON)	
- and -	
TUI UK LIMITED	**Respondent**

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- -

Andrew Young (instructed by Slater Gordon) for the **Appellant**
The **Respondent** did not appear and was not represented

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Hearing date: 11.10.22

Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. This is an in-person hearing of a renewed application for permission to appeal against judgments given and orders made by Recorder Cameron ("the Judge") at Sheffield County Court on 20 November 2019 and 24 March 2020, after a three-day trial from 18 to 20 November 2019. The claim was for damages in respect of injury sustained by the Appellant when he fell at a Portuguese resort hotel on a package holiday which he and his wife had bought from the Respondent. The fall took place late at night on 10 June 2014. A resort security guard (Mr Pedrosa) had found the Appellant lying injured on a service road outside the hotel. The Appellant and his wife had parted company outside a lift within the hotel building where their bedroom was and there is a plan within the trial materials which shows the layout although without indicating in detail the location of the lift or lift door. The Appellant's wife had gone in the lift and up to the bedroom. The Appellant had gone for a walk. There was an entrance to the hotel building near the lift. There was also an emergency exit at the end of a corridor. Outside the emergency exit there was a path with no handrail. Between the path and the service road there was a rockery on an incline which can be seen from photos which I have been shown.

2. The case for the Appellant at trial was in essence that the absence of any handrail was a hazard which put the Respondent in breach of an actionable duty. In his first judgment the Judge found that the absence of any handrail was an obvious hazard to anyone coming out of the emergency exit who was unfamiliar with the path, and in principle constituted an actionable breach. Whether in those circumstances the Appellant could recover damages depended, in particular, on how the fall had occurred. The Appellant's pleaded case advanced at trial was that he had gone down the corridor, exited through the emergency door onto the path to go for his walk, and having done so had fallen down the rockery and onto the service road sustaining the injuries. The Respondent joined issue with this and put the Appellant to strict proof.

3. In the First Judgment the Judge found that the Appellant's case had not been proved on the civil standard. He observed that there was "very limited evidence". A witness statement by the Appellant was in evidence under the Civil Evidence Act 1995 having been given at a time when the Appellant had capacity. As to that, the Judge said it was clear from that witness statement that much of the Appellant's evidence was reliant on what others had told him. The Appellant's wife had made a witness statement and had been cross-examined and re-examined. The Judge accepted that her evidence was truthful and accurate. But the Judge found that the Appellant's wife could not say, from her own observations, where the Appellant had gone after she got in the lift. The Judge also referred to what he said was "clearly" an "assumption" that had been made, that the Appellant had (or might have) exited the emergency door, but that the "basis" for that was "wholly unexplained". The Judge referred to the blood and the piece of glass from the Appellant's glasses, these having been found by a drain in the service road (the drain also being visible in the photographs which I have been shown), which location the Judge said "may represent the site where trauma was sustained". The Judge referred to evidence as "not inconsistent with" the Appellant's case but "not proving it either". The Judge found that it was more likely that the Appellant had gone out for his walk through the door near the lift and not through the emergency door at the end of the corridor. He gave the "basis" for that which was twofold. First, that the Appellant

wanted a walk and – after seeing his wife to the lift – was standing virtually next to the external door through which he had just entered and it was more likely that he went out again through that door. Secondly, that even if the Appellant had instead lost his way or even deliberately gone down the corridor leading to the emergency door, it was still more likely that he would have retraced his steps to the door near the lift rather than open an emergency door. The Judge concluded that, "however the incident occurred", it was more likely than not that it did not happen by the Appellant exiting through the emergency door. Therefore, it did not happen in the way pleaded and the claim must fail. That was the First Judgment.

4. The Second Judgment arose because Counsel for the Appellant made an application on 25 November 2019 to amend the Particulars of Claim, post the delivery of judgment (orally) but prior to the sealing of the Court's order. As everybody recognised, that was an exceptional course, but it can be appropriate. Reference has been made in the papers to the case of Stewart v Engel [2000] 1 WLR 2268, but it has not been necessary for me to be provided with the authority or taken to it. The basis of the application for post-judgment amendment was that the Appellant ought to be permitted to rely on an alternative way in which the incident could have occurred, namely that without exiting the emergency door, the Appellant had found himself on his walk outside the emergency door – which could not be opened from the outside – and, in the absence of a handrail, had fallen down the rockery onto the service road. The argument was that if that was what had happened, the claim in damages should succeed. The argument moreover was that if either the original scenario (exiting through the emergency door) or the alternative scenario (being outside it and unable to get in through it) had occurred, the claim for damages should succeed.

5. The Second Judgment dealt with the application. In fact, by then the order had been sealed. As to that, the Judge made clear that this had not been his intention and he considered, on its legal merits, the application for permission to amend the pleaded claim, post-trial and post-judgment. In doing so, the Judge explained that – in light of the application to amend now being made – it was appropriate to address whether the "alternative factual scenario" now being put forward "would be proved" on the basis of "the evidence that was available at the trial". The Judge encapsulated the Appellant's position as being that, on the evidence available at trial, it was "more likely than not that [the Appellant] either came out of [the emergency] door or approached that door with a view to going into it". The Judge referred to the evidence as to the location of the blood and glass, which he said involved "no direct indication" of the Appellant having been in the vicinity of the emergency door or rockery immediately below the path leading from the emergency door. The Judge ruled that, on the basis of the evidence available at trial, had the alternative case of attempted entry through the emergency door been pleaded at the time he gave the First Judgment, he would have made it clear that "neither the original nor the alternative case had been proved on the balance of probabilities". He said that "the evidence that I heard is at least equally consistent with [the Appellant] simply falling whil[e] walking along the service road and not falling from the door or the path at all". In those circumstances, the Judge said, "had the pleadings been amended during the course of trial at any time before I had given my judgment the eventual result would have been the same in that I would have dismissed the claim". In those circumstances, he said, it could not be appropriate to allow the amendment to plead the alternative claim.

6. Permission to appeal was refused on the papers by Eady J who gave detailed reasons.

Argument

7. For the Appellant, Mr Young emphasises a number of points, individually and in combination, in contending that the appeal is arguable with a realistic prospect of success. He says, in essence: that the Judge was wrong in the First Judgment to reject the claim being advanced (based on 'exit' through the emergency door); that the Judge was in any event wrong in the Second Judgment to refuse permission to amend to rely on the alternative claim advanced (based on 'attempted entry' through the externally-locked emergency door, not having first gone through it); and that the Judge in refusing permission to amend went wrong in his conclusion about whether the evidence in the case supported or could support the claim succeeding. The nature of the points advanced by Mr Young, as it seems to me, includes the following overlapping species of error: error of approach by the Judge; the making of findings which were not open on the evidence; flawed or legally inadequate reasoning; the failure to take into account relevant evidence; or the giving of no weight to evidence where that course was not open to the Judge.

8. Mr Young begins with the Judge's ultimate reasoning – on the issue of how the Appellant's injuries were sustained – in the First Judgment. He submits that the Judge, squarely and exclusively, based his decision on 'inherent likelihood'. He submits that this should only have been the 'starting point' and the Judge needed to evaluate all the evidence including those 'likely probabilities'. He submits that, in basing his conclusion on the two aspects which the Judge emphasised, the Judge failed to give 'any weight' to the rest of the evidence: the Judge effectively 'cleared the decks' and 'started from scratch' rather than evaluating the evidence as a whole. Mr Young submits that, far from not assisting the Judge, the other evidence in the case did 'prove the case' on the 'exit' scenario basis, and that it was not open to the Judge to find that it did not.

9. Mr Young emphasises a number of further features. There is the oral evidence given by the Appellant's wife which the Judge in terms accepted as both truthful and accurate. He submits that it was not open to the Judge to conclude that the Appellant's wife 'could not say from her own observations where the Appellant went after she got in the lift', in circumstances where in cross-examination she was saying precisely that. Mr Young emphasises the actions that were speedily taken at the hotel by those in positions of managerial authority. There was the fence promptly installed outside the emergency door. Then there was a railing. His point is not that this action constitutes some 'concession' to what happened; but rather that it reflects what was understood (and must have been understood) to have been reported as to what had happened, including reported by the Appellant himself. Emphasis is placed on Mr Pedrosa's witness evidence that the railing was erected "due to [the Appellant]'s fall and what he/his wife stated was the reason for his fall". Emphasis is placed on the witness evidence of the manager (Mr Pereira) which said: "In light of [the Appellant]'s fall and what he alleged was the cause of this fall", it was decided to erect a railing at the side of the path. Next, Mr Young emphasises an incident report which was written by the night manager, and showed me the emphasis placed on that report in his closing submissions at the trial (where he said "close attention" needed to be paid to it). Mr Young relied in particular on the recording in that incident report of the staff member (night manager)'s "view of [the] cause", as guest falling over "from quite a height" near the car park". Mr Young also relies (by way of an application to adduce it) on putative fresh evidence in the form

of an English translation of the ambulance record which was available only in Portuguese within the trial bundle. Two aspects of that ambulance record are emphasised. The first is the reference in the translation to the Appellant as having "suffered a fall from a wall of about 2m in height". The second is the record of the ambulance having been called by Mr Pedrosa at 23:41 which would put it at 20 minutes after husband and wife parted at the lift. Finally, emphasis is placed by Mr Young on the absence of any evidence of any obstacle having been identified in the service road other than the rockery between the emergency door and path and the service road. Mr Young relies on all of these key aspects of the evidence making individual, but also cumulative, points about them.

10. Mr Young also makes a distinct point about the Second Judgment. He says the Judge made an 'error of approach' in the way in which the three 'scenarios' were evaluated. By that stage the Judge was considering: (i) the pleaded claim with which he had dealt in the First Judgment (the scenario in which the incident had arisen after the Appellant exited to the emergency door); (ii) the alternative scenario which was the subject of the application to amend (in which the incident had arisen after the Appellant had approached the emergency door from outside after walking along the path and then falling down the rockery and onto the service road); and (iii) the scenario in which neither of those things happened but rather the Appellant had fallen in the service road. Mr Young submits that the 'error of approach' that the Judge made was to compare individually each scenario relied on by the Appellant – (i), and then (ii) – and find that scenario (iii) (falling in the service road) was 'more likely' than that individual alternative. Mr Young's point is that what the Judge, at least arguably, ought to have been doing in law was to be comparing the likelihood of (iii) (falling on the service road) as compared with the 'aggregate' likelihood of either and therefore both of the other two alternative scenarios ((i) and (ii)). I interpose: that 'aggregation' is because, Mr Young says, the claim would succeed if scenario (i) had occurred or if scenario (ii) had occurred.

Footnotes

11. Before I turn to discuss all of these points and what I have made of them there are two footnotes to identify at this stage in the analysis. The first is that Mr Young has touched in his submissions on this question: whether the evidence supports the conclusion that the Appellant himself must have told the security guard (Mr Pedrosa) at the time, when encountered lying in the service road late at night on 10 June 2014, that he had fallen down the rockery from the path outside the emergency door. I was able to look with Mr Young at the evidence of Mr Pedrosa having passed on information to Mr Pereira and the evidence of Mr Pereira about what happened in the light of that information. Mr Young, candidly, tells me that there was no exploration in cross-examination with Mr Pedrosa about a conversation which he had (or must have had) with the Appellant. The point which has now emerged – namely that it must have been the case that the Appellant had reported this to Mr Pedrosa – was not one that was put to this witness; and it was not put as part of the Appellant's case at trial. The second footnote is this. In her reasons, Eady J said of the incident report that it did no more than record the subjective view of a staff member. She went on to add in parentheses that it "might" also be observed that the incident report also recorded that "the guests were drunk". As to that, Mr Young had ventilated with me whether that was a misattribution by Eady J of something said not by the writer of the incident report but rather said elsewhere by

Mr Pereira. On reflection, Mr Young fairly accepted that the point identified by Eady J was indeed recorded in the incident report, albeit as an observation attributed in the report to "the hotel".

Discussion

12. I have looked, carefully and afresh at all the points being advanced in this case in order to see whether – with Mr Young's assistance – I can find any arguable ground having a realistic prospect of success either individually or in combination. Having done so, I have reached the same conclusion that was reached by Eady J on the papers. In my judgment, there is no realistic prospect that the various points advanced in this proposed appeal could succeed.

13. The Judge plainly had the evidence well in mind and evaluated it. Although in the First Judgment on the issue of what had happened on the night in question the Judge ultimately 'based' his conclusion on two points which he identified, that was not a "starting point" but was the culmination of the Judge's evaluation of all the evidence. The First Judgment specifically referred, for example, to the evidence relating to where the blood and glass from the Appellant's spectacles had been found. That was evidence, moreover, to which the Judge returned in the Second Judgment. The Judge expressly dealt with the question of direct evidence. He dealt with the witness statement which had been put forward by the Appellants and adduced in evidence under the 1995 Act. But the Judge gave a sustainable reason – namely the reliance being placed by the Appellant on what he had been told by others – why he was not able to rely on that as recording the Appellant's own recollection of what had taken place. Rightly none of the grounds of appeal impugn the way in which the Judge dealt with that aspect of the evidence. The Judge concluded that the evidence of what exactly had happened was "very limited". That is understandable in circumstances where direct evidence of what had happened would have been a statement from someone recalling it; evidence from an eyewitness; video evidence of the incident; or something else of that nature.

14. The Judge had heard the evidence – orally in cross examination and re-examination – of the Appellant's wife and clearly evaluated that evidence. Nothing in the Appellant's witness statement said that she had 'seen' her husband walk down the corridor towards the emergency exit. In cross-examination and re-examination the questions of what had happened when she and the Appellant parted at the lift were probed. I have considered the various passages in the cross-examination and re-examination on which reliance is placed by Mr Young and also those passages to which Eady J referred. The problem is that there is clearly a difference between the Appellant's wife saying – honestly – that what she thought had happened was that her husband had left her at the lift and then gone down the corridor. As she put it in her oral evidence: "he must have missed the exit where we came in, and he went down the wrong corridor"; agreeing that "he walked down another corridor"; and also "[I] just got to the lift and he walked and I don't know any more". But there is a difference between that and evidence that says that she had "seen" him turn away from her and walk down a corridor. Looking at the transcript, I can see no evidence of her saying that that is what she "saw". The Judge, beyond argument, was entitled to deal with that evidence in the way that he did when he said she could not "say from her own observations" where the Appellant went after she got in the lift. The Judge, moreover, plainly had a considerable advantage over me having heard the three days of trial evidence that immediately preceded the giving of that First Judgment, as well as the submissions about the trial evidence. In any event, the Judge

expressly dealt with the possibility that the Appellant had gone down the corridor towards the emergency door, explaining his finding that even if that had happened it was more likely that the Appellant would have turned back and gone through the main entrance (through which he and his wife had just come) rather than proceeding to the emergency exit and pushing through it to go outside.

15. I have no doubt that the Judge had well in mind the incident report which had been emphasised so strongly in the closing submissions to him. He plainly had in mind the steps that had been taken in the immediate aftermath of the incident, including the fence and then the railing being installed, all of which he had heard and read about in the evidence. The Judge referred, in terms, in the First Judgment to the "evidence of Mr Pereira" about "the installation of a handrail". Having dealt with the Appellant's evidence, and the Appellant's wife's evidence, the Judge went on to say: "No one else saw what happened". He then said: "There clearly appears to have been some assumption that [the Appellant] came out to the [emergency] door … or might have done, so but the basis for this is wholly unexplained". I cannot accept Mr Young's submission, even arguably, that the Judge in describing an "assumption" was dealing only with the evidence that had been put forward on behalf the Appellant. He had dealt with the evidence of the Appellant and the wife. He gone on to talk about others and that "no one else" had seen what had happened. He did not express his point about the "assumption" by reference to the Appellant's wife's evidence. In my judgment, it is clear that the reference to there having "clearly appear[ed] to have been some assumption" was recognising that it had been taken that the Appellant had come out of the emergency door: where the best and most obvious source that the Judge had seen for that was the incident report; and where this and that was the very point being emphasised from that report. The Judge characterised this as an "assumption". The night manager (who wrote the incident report) had not witnessed the incident. The Judge characterise the basis of the assumption as "wholly unexplained". Beyond argument, in my judgment, it was open for him to do so. It is not arguable that the Judge overlooked the incident report.

16. The Judge did not address the ambulance record, which was before him only in Portuguese. But that is entirely unsurprising since no reliance was placed on it and neither of the two points now made were made at trial about its contents. The timing point ("23:41") would have been open as a point to make on the face of the document, since it is obvious even in the Portuguese version that that document is recording date and time of the call. I agree with Eady J that, in principle, it cannot be open to the Appellant in this case to (have what would be a third opportunity now to) change the shape of the case on appeal, by reference to evidence (the translated document) that was not before the Judge and could have been before the Judge. But in any event the ambulance record, in giving a description of what is said to be a "wall" but more relevantly is said to be "a fall" from "height" is evidence of the same nature as that which the Judge described as involving an "assumption" with a "basis" which is "wholly unexplained". The position about not taking a point at trial – which I made earlier in relation to what Mr Pedrosa may or may not have been told by the Appellant – applies 'a fortiori' in relation to what may or may not have been said to somebody compiling an ambulance record (not relied on at trial or in evidence in translation at trial). So far as the timing is concerned I cannot in any event see how the 20 minutes time lapse is somehow more consistent with the Appellant going down a corridor and pushing through the emergency exit and then falling, rather than his going out of the

entrance through which he and his wife had entered and then walking around the outside and falling (it might have been different if the time period had been much shorter). I cannot see that anything material can turn on the ambulance record in the context of the other evidence in the case and the reasons given by the Judge. But in any event, there is the objection of principle which I have identified that this is evidence that could have been adduced and relied on below.

17. Nor can I accept that the Judge was 'clearing the decks' and ignoring all of the evidence when identifying the "basis" for his ultimate conclusion in the First Judgment. The Judge referred to the evidence and the phrase that he used was that he was being left to assess the likelihood on "very limited evidence". I do not accept the submission that his reasons constituted choosing to give evidence "no weight". He said that the evidence referred to was "not inconsistent" with the Appellant's case. He then said that the evidence "did not prove it either". That was a clear description of the Judge not being satisfied that the evidence that was before him was capable of satisfying the civil standard. What the Judge did, and what he was entitled to do, was to step back and consider – in the light of all of the evidence – the 'likely probabilities' given the limited evidence and the limited assistance that it gave. That was clearly what he did when he articulated as the "basis" for his ultimate conclusion the two powerful points he made, relating to the likely probabilities.

18. I can see no arguable error of approach by the Judge in relation to the First Judgment or the findings made in it. Turning to the Second Judgment, nor – in my judgment – is it arguable with a realistic prospect of success that it was not open to the Judge to conclude that the scenario (iii) of the Appellant falling in the service road was at least as consistent with the evidence as the two other alternatives (i) and (ii) 'cumulatively'. Based on all the evidence, in my judgment and beyond argument, the Judge was entitled to form that view of the evidence. The remaining question is whether the Judge actually took that approach or whether his approach was vitiated by the 'error of approach' identified by Mr Young and recorded earlier. As to that, the Judge referred to whether it could be said on the evidence available at the trial that was more likely than not that the Appellant "either" came out of the emergency door (scenario (i)) "or" approached the emergency door with the view to going into it (scenario (ii)). He went on to say that he would have made it clear, had the alternative been pleaded at trial, that "neither" the original (scenario (i)) "nor" the alternative (scenario (ii)) case has been proved on the balance of probabilities. But importantly he then went on to say this: "It seems to me that the evidence that I heard is at least equally consistent with [the Appellant] simply falling while walking along the service road and not falling from the door or the path at all". The phrase "not falling from the door or the path at all", read in context, was clearly a reference to the 'cumulative' possibility or likelihood of either of the two other alternatives (scenario (i) or (ii)) having taken place. It is, in my judgment, very clear that the Judge was putting them together 'cumulatively' as being within the description of scenarios in which the Appellant had "fall[en] from the door or the path at all". It is, in my judgment, clear beyond argument that what the Judge was saying was that scenario (iii) was "at least equally consistent with the evidence" as were scenarios (i) and (ii) taken 'cumulatively'. That meant – as the Judge explained – the claim would not have succeeded on the evidence, to the civil standard, even had the claim been pleaded and advanced on the basis of the two other alternatives. The Judge did not adopt the approach which, it is said by Mr Young, would have been an arguable 'error of approach'.

Conclusion

19. I can find in the points advanced on behalf of the Appellant, viewed individually and viewed in combination, no arguable appeal with a realistic prospect of success. In those circumstances I will refuse the renewed application for permission to appeal. There has been no attendance by a legal representative to make submissions for the Respondent at this hearing and there will be no order as to costs.

11.10.22