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Judgment: approved by the Court for handing down | *Delivered:* **16/12/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF NEWTOWNARDS

_____

BETWEEN:

TREVOR GRIFFIN

Plaintiff/Appellant:

-and-

MY TRAVEL UK LIMITED

Defendant/Respondent

_____

McCLOSKEY J

I INTRODUCTION

[1] This is an appeal against the dismiss by the learned deputy County Court Judge for the Division of Newtownards of the Plaintiff's claim for damages for personal injuries and loss of earnings.

II THE PLAINTIFF'S CASE

[2] The Plaintiff sues the Defendant as the provider of a holiday to the Plaintiff and his partner on the Island of Rhodes in September 2005. The holiday accommodation was in residential premises known as the "Yiota" Apartments. The accident which stimulated the Plaintiff's claim for damages allegedly occurred on

17th September 2005, which was the third day of their holiday, at night time, in a bedroom equipped with two separate beds. The Plaintiff's case is that in the act of going to bed, he withdrew the top sheet of the bed in question, resulting in the side of the structure collapsing on to his right foot. There was photographic evidence of the offending bed, which depicted that the main part of the structure was attached to a wooden headboard. The Plaintiff's case is that this is where the collapse occurred. His complaints are essentially twofold. Firstly, he contends that the inherent design of the bed was inadequate, rendering it vulnerable to what allegedly occurred. Specifically, he complains that the fastening of the main part of the bed to the headboard was inadequate and, further, was prone to significant wear and tear and loosening, in consequence of the bed being regularly moved and maintained. Also embraced by the Plaintiff's primary complaint is a criticism of the absence of any structural connection between the two sides of the bed. The Plaintiff's second main complaint focuses on the conduct of the chambermaid who, according to his evidence, cleaned the room and made the beds daily. The Plaintiff invited the court to infer that the actions of the chambermaid, in particular her physical manoeuvres and basic maintenance of the offending bed, de-stabilized the structure, making it vulnerable to the collapse which allegedly occurred.

[3] The legal foundation of the Plaintiff's claim against the Defendant is twofold. Firstly, he invokes Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 ("*the 1992 Regulations*"), which provides:

> ***"15 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.*
>
> *(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.

(3) In the case of damage arising from the non-performance or improper performance of the services involved in the package, the contract may provide for compensation to be limited in accordance with the international conventions which govern such services.

(4) In the case of damage other than personal injury resulting from the non- performance or improper performance of the services involved in the package, the contract may include a term limiting the amount of compensation which will be paid to the consumer, provided that the limitation is not unreasonable.

(5) Without prejudice to paragraph (3) and paragraph (4) above, liability under paragraphs (1) and (2) above cannot be excluded by any contractual term.

(6) The terms set out in paragraphs (7) and (8) below are implied in every contract.

(7) In the circumstances described in paragraph (2)(b) and (c) of this regulation, the other party to the contract will give prompt assistance to a consumer in difficulty.

(8) If the consumer complains about a defect in the performance of the contract, the other party to the contract, or his local representative, if there is one, will make prompt efforts to find appropriate solutions.

(9) The contract must clearly and explicitly oblige the consumer to communicate at the earliest opportunity, in writing or any other appropriate form, to the supplier of the services concerned and to the other party to the contract any failure which he perceives at the place where the services concerned are supplied."

[4] The Plaintiff also relies on Clause 6 of the written booking conditions apparently contained in a brochure entitled "Airtours – The Holiday Makers – Summer Sun 2005 … Northern Ireland – First Edition". It is not disputed that these booking conditions governed the contractual relationship between the parties. Clause 6 provides:

> "*6. Our responsibility*
>
> *We arrange contracts for transport, accommodation and other arrangements through suppliers who we have taken reasonable care to make sure have good reputations and run safe and efficient businesses. We will monitor and control the performance of our suppliers and judge their performance against the standards and customs in the country where the services are provided.* ***We will pay compensation if those suppliers fail to provide the services they agreed to supply as part of the package originally sold to you. We will accept liability for claims for personal injury as a result of our staff and suppliers being negligent while in the course of their employment or contract.***
>
> *We cannot accept liability in the following circumstances:*
>
> *(a) If you or any member of your party is at fault.*
>
> *(b) If the failure is the fault of someone else not connected with providing the services which make up the holiday which we have confirmed to you.*
>
> *(c) Any unusual or unexpected circumstances beyond our control, which we could not have avoided even if we had used all care possible.*
>
> *(d) Any event which we or the supplier of any service could not help, expect or prevent.*"

Breach of this express contractual term is the second cause of action which the Plaintiff asserts against the Defendant.

[5] In the aforementioned brochure, there are both written and photographic depictions of the residential premises in question. They are a small, two-storey building which comprises five studios and apartments. The "*official rating*" is stated to be 'A'. The description is in these terms:

> "*Perfect for couples in search of a holiday hideaway in simple, self-catering style accommodation …*
>
> ***Accommodation***. *Studios sleep two and one bed roomed apartments sleep 2-4, have kitchenette with cooking rings and fridge, bathroom and shower and WC, plus a finished balcony or terrace.*

[6] The Plaintiff testified that his accident occurred on the third night of the holiday. Until then, his bed had seemed fine. He denied having moved the bed or interfered in any way with it. He testified that every morning a maid (the same person) swept the floor, made the beds and cleaned the rooms. This included pulling the offending bed out from the corner position which it occupied, resting against two walls and then pushing it back into *situ*. He asserted that the bedclothes consisted of one sheet covering the mattress and two further light "sheets" above, all tightly tucked in. On the night in question, as he pulled the upper sheets back to facilitate getting into bed, "*… the whole lot just fell on …*" his foot. As a result, the main part of the structure (the base) was resting on the floor, in the manner depicted in the photographs taken immediately thereafter by his partner. He was able to re-assemble the structure by reconnecting the two separate components. This entailed inserting three metal teeth (apparently attached to the collapse base of the bed) into a metal plate fitted to the headboard. He satisfied himself that the fastening was secure and he was confident about the stability of the bed for the remainder of the holiday. In the Plaintiff's words, the bed "*just fell apart*".

[7] The evidence adduced included a letter written by the Plaintiff's partner, Mary McLaughlin. This is dated 30th September 2005. It expresses the couple's concerns about a range of matters pertaining to the holiday and, with reference to the alleged accident, contains the following material passage:

> "*… On the Saturday night, when going to bed, the bed collapsed on my partner's foot leaving a deep gash …*
>
> *Also, because the bed fell on my partner's foot we noticed the mattress was all worn and ripped, it was disgusting …*
>
> ***The bed was not defective. The metal toes hadn't been fitted in properly when the maid was doing the bed that day.*** *But this still shouldn't have happened.*"

[Emphasis added].

According to the letter, this generated the completion of an incident report which also formed part of the evidence. It incorporates the following passage, duly signed by the Plaintiff and dated 20th September 2005:

> "*On Saturday night … guest was straightening sheets on bed, went in between the two beds and the metal 'tooth' that holds the bed frame up just worked itself off the side and fell on the gent's foot …*
>
> *The bed isn't broken, just unhinged itself.*"

According to the first part of this report, the accident occurred at 23.30 hours on 17th September 2005 and was reported at 09.15 hours on 19th September. The unchallenged evidence of the Plaintiff and his partner was that (a) there were no facilities for reporting an accident within the small accommodation building which housed their apartment and (b) they were unable to make a report on the day following the accident (18th September 2005) because this was a Sunday, when the office of the Defendant's local agent was closed.

[8] Ms McLaughlin corroborated some material aspects of the Plaintiff's account. This included the daily activities of the maid. She claimed that the maid's daily manoeuvres of the bed entailed lifting it slightly above the floor. Her evidence was that she observed the Plaintiff pulling the sheet out, whereupon the bed fell on to his foot. She removed the two upper layers (or sheets) of the bed clothing, together with the pillow and took certain photographs. She saw the metal teeth in their detached state. She also removed the sheet covering the mattress in order to photograph this, as it was in the unsatisfactory condition alleged in her aforementioned letter (this being unrelated to the Plaintiff's case). After the Plaintiff had re-secured the bed she remade it for him.

[9] A consulting engineer, Mr. Allen, gave evidence based on the various photographs available and the accounts provided by the Plaintiff and his partner. He testified, in summary:

(a) The mechanism for connecting the sides of the bed to both their headboard and base was inadequate. It lacked permanence, it did not have dowels and it was vulnerable to progressive loosening through normal daily use and maintenance. The fastening mechanism was of an inappropriately light gauge metal, which was not fit for purpose.

(b) The bed was poorly designed, on account of a lack of fixed cross members and dowels, contributing to its instability.

It seemed to me that Mr. Allen's critique was based primarily on the first of these two criticisms.

[10] Rather singularly, the evidence adduced on behalf of the Plaintiff included a report prepared by a practising Greek lawyer, a member of the Athens Bar Association. This report addressed, in the words of the author "*… the general provisions of the Greek civil law and their interpretation on which the civil liability of the provider of touristic services against the consumer is founded*". According to the author:

> "*It is clarified that there are no special provisions or regulations that set the obligations and security measures the hotel owner must take, concerning the maintenance of objects within the hotel, in case of physical injury … or specific security rules comprising the event that has given*

rise to your action. Such rules exist only for the building facilities and do not include provisions for the objects within the facilities."

The report documents the relevant general provisions of Greek law – contained in the Greek Civil Code, the Greek Penal Code, the Special Law for the Protection of Consumers and the Presidential Decree 339/1996 – together with certain judicial decisions, which are duly summarised. In argument, Mr. McCollum (on behalf of the Plaintiff) highlighted particularly Judgment 162/2004 (Dodekanese Court Appeal) which was to the effect that the Defendant hotel owner was liable for injuries inflicted by a "flying" parasol, which became detached from its housing in conditions of strong wind, on account of a failure to carry out regular and adequate inspections. This constituted negligence under the provisions of Greek law.

[11] It is important to define the context to which the evidence of Greek law belongs. Firstly, I am satisfied that there is no true conflicts of laws issue, with the result that the provisions of Greek law will not determine the fundamental question of whether the Defendant is legally liable to compensate the Plaintiff. Secondly, Regulation 15(1) of the 1992 Regulations makes clear that where (as in this instance) the contractual obligations undertaken by the provider of a holiday are performed by some third party, the contracting holiday provider remains liable to the consumer for the due performance of such duties: see in particular Regulation 15(1) and (2). Thirdly, there are two aspects of clause 6 of the contractual conditions which may be highlighted. The first is an unequivocal acceptance by the Defendant of its responsibility to compensate the consumer where any of the Defendant's ***suppliers*** fails "*… to provide the services they agreed to supply as part of the package originally sold to you*". The second is an unambiguous acceptance by the Defendant of liability for "*claims for personal injury as a result of our staff and suppliers being* ***negligent*** *while in the course of their employment or contract*" [my emphasis].

[12] Accordingly, in the present instance, this gives rise to the following analysis:

(a) The Defendant is contractually liable to the Plaintiff for any failure by the Defendant's "*suppliers*" to provide services undertaken by them. This would plainly embrace the supplier of holiday accommodation, as in the present context.

(b) There is an express contractual undertaking to compensate consumers for personal injuries sustained as a result of the negligence of both employees of and suppliers engaged by the Defendant. This constitutes, in effect, a contractual obligation to take reasonable care for the Plaintiff's safety.

(c) Having regard to the language of Clause 6, it matters not whether the negligent personnel are direct employees of the Defendant or suppliers whom it has engaged.

I am mindful of the statement in Clause 6 that *the Defendant* will monitor and judge the performance of its local suppliers "*against the standards and customs in the country where the services are provided*". In my view, properly construed, this statement does not restrict the Defendant's express contractual undertaking to compensate contracting consumers for personal injuries caused by the negligence of the Defendant's staff and suppliers. Furthermore, Clause 6 makes no attempt to import any aspect of Greek law into the contract, while simultaneously excluding or diluting the English law of negligence. Finally, in any event, the decision in Judgment 162/2004 (*supra*) suggests that there is no material distinction between the law of negligence in the two legal systems in the context under consideration.

III THE DEFENDANT'S CASE

[13] Somewhat unusually, the Defendant's evidence was adduced through the medium of affidavits, relying on the provisions of the Civil Evidence (Northern Ireland) Order 1987. The first deponent was Rachel Edwards, who describes herself as a Consumer Affairs Executive in the employ of Thomas Cook Limited, a company which assumed responsibility for all of the Defendant's affairs in 2007. Ms Edwards avers that her duties embrace the realm of health and safety in resorts. On 10th June 2009, she inspected the bedroom in question and she deposes as follows:

> "*The bed frames are made up of a bed base connected to foot and headboards with legs. I lifted up the bed base to view the brackets which are used to slide the bed frame into the head/foot boards and legs …*
>
> *The brackets looked to be of a strong metal and about 10 centimetres in length. To lift the bed base from the brackets one had to raise the bed by over 10 centimetres*".

Ms Edwards also deposes to a system of inspection of the subject premises, documented in records bearing the title "*My Travel Monthly Property Checklist*", which are exhibited to her affidavit. [I shall address these further below]. She suggests that this system -

> "*… accords with the travel industry reasonable practice of monthly property checks …* [which] *involve the representative walking around the property and visually inspecting the fabric and furniture of the building, its safety features and noting any hazards or action required on the checklist …*

> *I can see nothing on the documentation to indicate a problem was ever detected regarding the beds in these properties prior to or after the Plaintiff's alleged incident …*
>
> *I have reviewed our incident report files which we have in resort for 2008 and 2009 and can find no record of any previous complaint or injury regarding the beds at the Yiota Studios Apartments, Rhodes …*
>
> *From my experience of working in the travel industry and in particular holidays supplied in Rhodes I see nothing about the Yiota Studios and Apartments, the inspection documentation that would give a tour operator cause for concern about the suitability of the services supplied particularly with reference to the beds …*
>
> *In my experience … a reasonable system of inspection by the tour operator would not include physically checking each and every bed in an overseas property made available to UK customers to ensure the joints or hinges or brackets are secure …*
>
> *To expect a level of inspection involving examination of each individual item of furniture would place a significant and intolerable burden upon the tour operator and in excess of what would be expected of a reasonable system of inspection. In my experience the property, fixtures and fittings of the Yiota Studios and Apartments accords with the acceptable local customs and standards of a simple self-catering style accommodation available in Rhodes at the time.*"

Finally, the deponent suggests that, as regards the beds in the apartments, there has been no infringement of any local standard or any technical requirement or regulation.

[14] The inspection records exhibited to the affidavit of Ms Edwards appear to encompass the period June to October 2005. In each of these records, paragraph 4.03.01 poses the question "*Is all bedroom furniture clean, secure and in good condition*"? While the manner in which the records (which are based on a box ticking system) have been completed by their author is somewhat opaque, their thrust appears to be that this particular question habitually elicited a positive answer. While there was no evidence about what the inspection of bedroom furniture actually entailed, the clear import of Ms Edwards' averments (above) is that this did not extend to examining the integral fastening mechanisms of beds.

[15] The author of the second of the Defendant's affidavits is Mr. Kukuras, who describes himself as the manager of (*inter alia*) the subject premises. He avers that these were constructed in 1982 and received a "Property Operating Licence", valid for five years, on 20th January 2004 from the relevant authority (duly exhibited). He asserts that in September 2005, a cleaner visited the premises daily. Her duties were to clean floors, empty bins, clean kitchen surfaces and bathrooms. Fresh towels and bed linen were provided twice weekly. The beds were made by the deponent's father, a carpenter by trade, some seven years ago. He claims that there have been neither accidents nor complaints concerning any of the beds in the premises and that they remain in use today. Further, the beds have never needed repairs and they, together with other aspects of the premises, are "checked" at the beginning of every holiday season.

IV THE NATURE AND SCOPE OF THE DEFENDANT'S DUTIES

[16] As already recorded, the Plaintiff's cause of action is twofold: see paragraph [3], *supra*. I refer to, but do not repeat, my analysis of Regulation 15 of the 1992 Regulations and the relevant contractual obligation undertaken by the Defendant, in paragraphs [11] and [12] *supra*. Having regard to the terms and breadth of the contractual obligation, in clause 6, I rather doubt whether, in the context of the present case, Regulation 15 subjects the Defendant to any different, or greater, legal duty. In this respect, I concur with Longmore LJ in ***Hone –v- Going Places Leisure Travel Limited*** [2001] EWCA. Civ 947 that, in cases of this *genre*, the contract between the parties will normally represent the appropriate "*starting point*": see paragraph [12].

[17] I am reinforced in this view by a consideration of the origins of the 1992 Regulations, which are of no little significance. They transpose Council Directive 90/314/EEC ("*the Directive*") which, in its preamble, contains the following material recitals:

> "*Whereas if, after the consumer has departed, there occurs a significant failure of performance of the services for which he has contracted or the organizer perceives that he will be unable to procure a significant part of the services to be provided; the organizer should have certain obligations towards the consumer;*
>
> *Whereas the organizer and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract; whereas, moreover, the organizer and/or retailer should be liable for the damage resulting for the consumer from failure to perform or improper performance of the contract unless the defects in the performance of the contract are attributable neither to any fault of theirs nor to that of another supplier of services;*"

Article 5 of the Directive provides:

> *"1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services.*
>
> *2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:*
>
> *- the failures which occur in the performance of the contract are attributable to the consumer,*
>
> *- such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable,*
>
> *- such failures are due to a case of force majeure such as that defined in Article 4 (6), second subparagraph (ii), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.*
>
> *In the cases referred to in the second and third indents, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.*
>
> *In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.*
>
> *In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.*
>
> *3. Without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a*

contractual clause from the provisions of paragraphs 1 and 2.

4. The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity. This obligation must be stated clearly and explicitly in the contract."

[18] The Directive received some consideration in ***Hone,*** where Lord Justice Longmore stated:

> "[19] … *It is significant that the terms of both the preamble and the body of the Directive itself refer to improper performance and must, therefore, envisage that the standard of performance is to be derived from the contract and not from the terms of the Directive itself*".

I would add that in my opinion this analysis is amply supported by the language of Regulation 15(1) ("*… the proper performance of the obligations under the contract …* ") and Regulation 15(2) ("*… the failure to perform the contract or the improper performance of the contract … ")* and I concur with it. Throughout the Directive, there is a clear emphasis on obligations of a contractual nature. As further noted by Longmore LJ, in paragraph [20], the text of the relevant ministerial speech makes clear that the purpose of the 1992 Regulations was confined to implementing the Directive.

[19] In ***Holiday Law: The Law relating to Travel and Tourism*** (Grant and Mason, 4th Edition) one finds the following helpful commentary on the Directive and the 1992 Regulations (at pp. 25-26):

> "*Until 1993 there was virtually no statutory control of package holidays. The relationship between tour operators and clients was left almost entirely to the common law …*
>
> *It is hard to over-estimate the effect that these Regulations have had on the travel industry. The provisions in the Regulations created a completely new statutory framework within which tour operators must now work. Important new civil liabilities were imposed and there are a battery of new criminal offences. Additionally a new system of consumer protection was created to protect clients against the insolvency of tour operators. However … large parts of the contract still remain a matter for the common law …*

> *A large number of additional rules have been created which operate alongside the ordinary law of contract and impact upon it to a greater or lesser extent.*"

Interestingly, the authors express the view that the decision in ***Hone –v- Going Places*** represents the law (see p. 136). In summary, for the Plaintiff to succeed it is necessary to establish the terms of the contract and to discharge the onus of proving fault – unless the contractual terms, properly construed, make the Defendant strictly liable.

[20] Having regard to the above analysis and in consequence of the terms and breadth of the contractual obligation in play in the present context, a detailed excursus through the various decided cases helpfully brought to the attention of the court by the combined diligence and industry of the parties' counsel seems an unnecessary exercise. I consider that, having regard to the terms of clause 6, the following questions arise:

(i) With specific reference to (a) the design and condition of the offending bed and (b) the conduct of the chambermaid (or cleaner), what were the content and scope of the contractual duty of reasonable care undertaken by the Defendant to the Plaintiff ?

(ii) In the particular circumstances, was there any breach of such duty?

[21] In some of the decided cases, there is a discernible emphasis on the standards to be expected in the country or locality where the subject accident occurred. In one of the more recent decisions, ***First Choice Holidays –v- Holden*** [unreported, 22nd May 2006] the relevant contractual obligation undertaken by the holiday provider was comparable to that arising in the present case and it was common case that in order to succeed, the Plaintiff had to establish a failure by the Defendant "*to carry out its obligations with reasonable skill and care*". Goldring J formulated the issue in these terms [pp. 14-15]:

> "*Assuming the Plaintiff slipped on liquid as the Recorder found, has she proved on the balance of probability that in failing to have a system such as that adumbrated by the Recorder the hotel fell below the standards of safety of a Tunisian hotel?*"

The judge answered this question in the negative and dismissed the appeal accordingly. He based his approach on ***Wilson –v- Best Travel*** [1993] 1 All ER 353, a decision at first instance predating the 1992 Regulations, in which Section 13 of the Supply of Goods and Services Act 1982 and the Defendant's express contractual undertakings provided the foundation for the Plaintiff's claim for damages for serious injuries sustained through tripping and falling through a hotel glass patio door. The legal criterion devised by Phillips J was that of "*reasonable safety*": see p.

356g/h. His Lordship analysed the tour operator's legal duty in the following terms [at p. 358b/d]:

> *"What is the duty of a tour operator in a situation such as this? Must he refrain from sending holidaymakers to any hotel whose characteristics, insofar as safety is concerned, fail to satisfy the standards which apply in this country? I do not believe that his obligations in respect of the safety of his clients can extend this far. Save where uniform international regulations apply, there are bound to be differences in the safety standards applied in respect of the many hazards of modern life between one country and another. All civilised countries attempt to cater for these hazards by imposing mandatory regulations. 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."*

The court concluded that the absence of safety glass in the patio doors in question did not give rise to a breach of the Defendant's duty to exercise reasonable care for the safety of its clients.

[22] The decided cases belonging to this sphere include ***Evans –v- Kosmar Villa Holidays*** [2007] EWCA. Civ 1003, a decision of the English Court of Appeal. The factual matrix of this decision – which concerned whether there was any duty to guard against an obvious risk viz. diving into the shallow end of a swimming pool at a Greek holiday apartment complex during hours of darkness – is remote from that of the present case. The significance of the decision lies in the court's approach to the question of how what might be termed "the local dimension" impinges on a holiday provider's duty to take reasonable care for the safety of its contracting customers. The following excerpts from the judgment of Richards LJ are of particular significance:

> *"22. [The first of the implied terms pleaded by the claimant may owe its formulation to Wilson v Best Travel Ltd [1993] 1 All ER 353. In that case the plaintiff, while staying in a hotel in Greece on a holiday booked through the defendant tour operator, sustained serious injuries on tripping and falling through glass patio doors at the hotel. The plaintiff's claim, which pre-dated the 1992 Regulations, was based on an implied warranty that the*

structure of the hotel would be reasonably safe, alternatively a duty of care arising out of the term implied by s.13 of the Supply of Goods and Services Act 1982. The judge, Phillips J (as he then was), found against a warranty but accepted the existence of a duty of care. He held that the service provided by the defendant included the inspection of properties offered in its brochure and that the defendant owed a duty to exercise reasonable care to exclude from the accommodation offered any hotel whose characteristics were such that guests could not spend a holiday there in reasonable safety (p.356d-h). The evidence was that it was the practice in England, but not yet in Greece, to fit safety glass to doors. In those circumstances the judge held that there was no breach of the defendant's duty, stating (at p.358b-d):

> *'What is the duty of a tour operator in a situation such as this? Must he refrain from sending holidaymakers to any hotel whose characteristics, in so far as safety is concerned, fail to satisfy the standards which apply in this country? I do not believe that his obligations in respect of the safety of his clients can extend this far. Save where uniform international regulations apply, there are bound to be differences in the safety standards applied in respect of the many hazards of modern life between one country and another. All civilised countries attempt to cater for these hazards by imposing mandatory regulations. 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.'*

23. A claim such as that in Wilson v Best Travel Ltd would no doubt be put differently under the 1992 Regulations: since the tour operator is directly liable under those regulations for improper performance of the contract by the hotel even if the hotel is under independent ownership and management, the focus can be on the

exercise of reasonable care in the operation of the hotel itself rather than in the selection of the hotel and the offer of accommodation at it. But I do not think that this affects the principle laid down as to the standard to be applied to a hotel abroad, namely that the hotel is required to comply with local safety regulations rather than with British safety standards. That was the approach in Codd v Thomson Tour Operators Limited (Court of Appeal judgment of 7 July 2000), in which the claimant had been injured while travelling in a lift at a hotel in which he was staying in Majorca. The tour operator accepted that it would be liable (presumably under the 1992 Regulations) if negligence was established against those who were responsible for running and managing the hotel, but the judge found that liability was not established. The Court of Appeal dismissed the claimant's appeal, citing Wilson v Best Travel Ltd for the proposition that there was no requirement for the hotel to comply with British safety standards, and holding that there was no breach of local safety regulations and that there was no negligence by the hotel management either in relation to the maintenance of the lift or in relation to safety procedures.

24. In the present case, there was no evidence to support the pleaded claim of non-compliance with local safety regulations, and that way of putting the case was not pursued at trial. In my view, however, it was still open to the claimant to pursue the claim on the other bases pleaded in the amended particulars of claim. What was said in Wilson v Best Travel Ltd did not purport to be an exhaustive statement of the duty of care, and it does not seem to me that compliance with local safety regulations is necessarily sufficient to fulfil that duty. That was evidently also the view taken in Codd, where the court found there to be compliance with local safety regulations but nevertheless went on to consider other possible breaches of the duty of care. "

Accordingly, the thrust of this decision is that, in principle, a failure by a tour operator to exercise reasonable care in the provision of services and facilities to its customers can be established even where there is no evidence of non-compliance with local safety standards and regulations. Alternatively formulated, compliance with such requirements will not *necessarily* be determinative of the question of the tour operator's liability to the contracting holidaymaker.

[23] Under the doctrine of *stare decisis,* none of the decisions in the English cases mentioned above, including ***Evans***, is binding on this court. By well established

principle, the decision in ***Evans***, emanating as it does from the English Court of Appeal, is considered to be of persuasive, rather than binding, authority. I consider the reasoning of Richards LJ cogent. In my view, the formulation of the tour operator's legal duty in ***Wilson*** is rather narrow and, properly analysed, was probably not intended to constitute an all encompassing exposition of the duty under consideration. Furthermore, it predates the introduction of the 1992 Regulations. While, admittedly, this issue was not considered *in extenso* in ***Codd – v- Thompson Tour Operators Limited*** [unreported, 7th July 2000], I consider that Swinton Thomas LJ, at the very least by implication, was endorsing this approach: see paragraphs [22] – [24]. Further support for the correctness of the analysis and reasoning of Richard LJ is provided by reflecting on *the contractual dimension* – which will, invariably, be fact sensitive. The argument advanced by Mr. Dowd (on behalf of the Defendant) was that the decision in ***Evans*** should be treated with caution, as it makes no reference to ***Holden*** (paragraph 21, *supra*). In my view, this does not undermine the cogency of the reasoning in ***Evans*** in any way. Furthermore, ***Evans*** is a decision of the Court of Appeal, whereas ***Holden*** is a decision of the High Court (on appeal from the County Court). Finally, and in any event, I do not treat the formulation of the tour operator's duty by Goldring J as either a purported comprehensive statement of the law in this sphere *or* as necessarily excluding liability in the fact sensitive context under consideration in the present appeal.

[24] In the present case, I find nothing in the express contractual obligation undertaken by the Defendant – rehearsed in paragraph [3] above – incorporating either expressly or by implication a qualification to the effect that the holiday provider's duty of care is to be measured exclusively by the barometer of local safety standards and regulations. I accept that the question of compliance with local safety standards and regulations may be a factor to be weighed in considering (a) the content and reach of the Defendant's duty of reasonable care and (b) whether there has been a breach thereof, *in the particular circumstances*. However, bearing in mind that cases of this kind invariably concern claims brought by United Kingdom nationals against United Kingdom firms against a background of harmonious EU standards, I consider that proof of compliance with local safety standards and regulations should not, *ipso facto*, be treated as determinative of either the ambit of the legal duty owed *or* the question of whether there has been any breach thereof. I shall approach the determination of the present appeal accordingly.

[25] In the present case, I find, firstly, that (a) the providers of the accommodation in question and its fixtures and fittings, including the offending bed *and* (b) the chambermaid (or cleaner) were, in the language of clause 6 of the booking conditions, "*suppliers*". They were also "*suppliers of services*" within the meaning of Regulation 15 of the 1992 Regulations. The chambermaid was either a freestanding supplier of services or, alternatively, an agent of the principal supplier of services. This, correctly, was not disputed on behalf of the Defendant and, further, is tacitly admitted in the affidavit of Mr. Kukuras.

[26] In my view, both the Plaintiff and his partner were candid and honest witnesses and I accept the essential core of their evidence. Specifically, applying the standard of the balance of probabilities, I make the following findings:

(a) The Plaintiff's accident occurred as described in evidence by his partner and him.

(b) Neither the Plaintiff nor his partner had manoeuvred the offending bed at any time prior to the accident.

(c) The bed was physically manoeuvred daily by the chambermaid and, taking into account the season of the year, I infer that this had occurred on numerous occasions prior to the Plaintiff's accident.

(d) The beds had not been moved together by the Plaintiff and his partner. Nor had they re-positioned the bedside table, as suggested.

(e) The metal mechanism for securing the bed structure was in the detached condition described by the Plaintiff.

(f) The Defendant's agents conducted the monthly inspections described in their records, but these did not incorporate any examination of the fastening mechanism.

[27] I accept the critique advanced by the Plaintiff's consulting engineer. No conflicting expert evidence was adduced on behalf of the Defendant. I consider that having regard to the design of the offending bed, the fastening mechanisms should have been inspected from time to time. It was common case that they were the subject of no inspections at all. The justification proffered for this in the affidavit of Ms Edwards was that this does not commonly occur in the travel industry in the locality or country concerned and, further, it would subject tour operators to an intolerable burden. I consider that the first part of this asserted justification cannot absolve the Defendant from legal responsibility without more, having regard to my analysis of the holiday provider's legal duty, as set out above. Furthermore, the evidential foundation for this discrete claim is inadequate. Secondly, the suggestion of an intolerable burden is simply unsustainable, having regard to the evidence. The bed in question was the subject of maintenance and attention by a maid six days every week. This provided an ideal opportunity for a simple, visual and palpable check of the fastening mechanism at reasonable intervals – for example, once monthly. However, this was not one of the maid's duties. No practical or other justification for excluding this from the range of the maid's duties was put forward. The acts and omissions of the holiday provider/tour operator are to be measured by the barometer of the hypothetical reasonably prudent and conscientious agency. I accept the consulting engineer's evidence that the offending bed was vulnerable to instability, having regard to

those features of its design highlighted by him. In my opinion, the hypothetical reasonably prudent and conscientious holiday provider and its suppliers and agents would have taken the simple and inexpensive precaution of checking the fastening mechanism of the offending bed from time to time. The evidence establishes that this precaution was at no time taken from the date of construction and installation of the bed at least three years prior to the accident date. In my view, this constitutes a want of reasonable care which, having regard to my findings about how the Plaintiff's accident occurred, was plainly causative. For these reasons, I conclude that the Plaintiff has established a breach of Clause 6 of the contract.

[28] The medical report of Mr. McGovern FRCS, prepared some ten months after the event, describes a crushing type injury to the Plaintiff's right foot, entailing significant bruising and tenderness during the initial phase. The court's evaluation of this injury is assisted by the contemporaneous photographs, which depict clearly marked bruising and swelling. Mr. McGovern was satisfied that there was a continuing intermittent ache at the time of his examination. This was indicative of incomplete recovery. A permanent resolution of symptoms was to be expected. In my view, the Plaintiff underplayed the extent of his injury when giving evidence. I measure general damages for pain and suffering and loss of amenity at £2,000. The loss of amenity which this award encompasses includes the obvious loss of enjoyment of the Plaintiff's holiday, while taking into account that this enjoyment was impaired by certain other factors, unrelated to the court's finding of liability against the Defendant. The Plaintiff also claimed damages for the loss of two weeks' earnings, arising out of his employment in an industrial cleaning firm. The reasonableness of this period of absence is manifest and, properly, was not challenged. The evidence, while not fully satisfactory, establishes a net loss totalling £240 and I award this sum also.

[29] Accordingly, I allow the appeal, substituting a decree in the amount of £2,240 in favour of the Plaintiff against the Defendant. The order as to costs shall be finalised following the parties' submissions on this discrete issue. While my conclusion differs from that of the learned deputy County Court Judge, I would observe that the court at first instance did not have the benefit of the engineering evidence adduced upon the hearing of this appeal.