

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between:

BRONAGH KERR

Plaintiff;

-and-

THOMAS COOK TOUR OPERATIONS LIMITED

Defendant.

MAGUIRE J

Facts

[1] In this case the Plaintiff, who is now aged 32 years, sues the Defendant for damages for breach of contract, breach of statutory duty and negligence arising out of a package holiday she contracted for at the Iberostar Chich Khan Hotel, Yasmine Hammamet, Tunisia ("the hotel").

[2] The facts are not significantly in dispute between the parties and the court finds them to be as follows. On 1 April 2010 the Plaintiff attended one of the Defendant's retail premises in Belfast. She indicated that she was interested in a holiday and was recommended one at the hotel. The holiday was for one week and the Plaintiff and her partner were both to travel. In the brochure the hotel was described as part of the Defendant's "Style Collection" and was indicated to have a four star rating.

[3] On 16 June 2010 the Plaintiff and her partner travelled to Tunisia and the holiday started. Unfortunately, just a few days into the holiday, on 19 June, the Plaintiff was attacked while she was in the hotel grounds by a cat which jumped out at her from a bush, scrabbing and biting her right lower leg, which was uncovered as she was wearing shorts. After the attack the cat disappeared into the bushes. The injuries received which consisted of deep cuts and scratches required immediate

treatment in the resort and still further treatment when the Plaintiff returned to the United Kingdom. The court has no difficulty in accepting that the incident was very unpleasant for the Plaintiff and ruined her holiday. At the date of the hearing the court was able to inspect some fine white line scarring left by the attack. Dr Bell in a report to the court referred to the Plaintiff suffering from an anxiety state for approximately 6 months with a residual adjustment reaction, including a phobic reaction to cats. Subject to the issue of liability, the court values the Plaintiff's personal injury at £12,500.

[4] Prior to the attack, the Plaintiff told the court in evidence that she had noticed the presence in the hotel grounds of a large number of cats which appeared to roam freely. They did not appear to be owned by anyone. The court is satisfied that this situation had for long pre dated the accident. Reference to the presence of cats in the hotel grounds can be found in an on line "Trip Advisor" comment which was placed before the court dated 4 November 2008 - well before the accident. This referred to there being "lots of cats around who thought nothing of jumping up on your sunbed and curling up on your lap". The court also had before it numerous Trip Advisor comments demonstrating the presence of cats in and around the hotel which post-date the accident. None of the reports, however, make any reference to a cat attacking anyone.

[5] The court finds as a fact that the hotel management and the Defendant must have known of the presence of a large number of cats in or around the hotel. The Defendant carried out monthly health, safety and quality audits at the hotel and the court is satisfied that the person or persons carrying these out would have been likely to observe a large number of cats in or around the hotel, notwithstanding that there is no entry on any of the inspection records provided in discovery which records the presence of cats.

[6] Before the court the Defendant called no evidence. The Plaintiff's account of the incident was therefore un-contradicted.

The causes of action

[7] As noted above, there are three causes of action pleaded in this case. The first relates to breach of contract. The terms of the contract between the Plaintiff and Defendant are found in the booking conditions in the brochure under the heading "Our liability to you". It is stated that:

"Our obligations, and those of our suppliers providing any service or facility involved in any of your Holiday, are to take reasonable skill and care to arrange for the provision of such services and facilities and, where we or our supplier is actually providing the service or facility, to provide them with reasonable skill and care ... You must

show that reasonable skill and care has not been used if you wish to make any claim”.

The touchstone to liability for breach of contract, therefore, is lack of reasonable skill and care on the part of the Defendant and/or its suppliers. However, the booking conditions go on to note that there is an exception to liability being established. This arises where the personal injury suffered is attributable to no fault on the part of the defendant or its suppliers because the fault is attributable to the Plaintiff or someone unconnected with the holiday and is unforeseeable or unavoidable or because the failure is due to unusual or unforeseeable circumstances beyond the Defendant’s control, the consequences of which could not have been avoided even if all due care had been exercised, or due to an event which the Defendant or its servants, agents or suppliers could not have foreseen or forestalled.

[8] The second relates to breach of statutory duty. It is common case that the holiday arrangement in this case fell within the provisions of the Package Travel, Package Holidays and Package Tour Regulations 1992 (“the 1992 Regulations”). Regulation 15 of the 1992 Regulations is that which is relevant for present purposes. This provides at paragraph (1) that:

“The other party to the contract [here the Defendant] is liable to the consumer for the proper performance of the obligations under the contract irrespective of whether such obligations are to be performed by that other party or by other suppliers of services...”.

At paragraph (2) it goes on:

“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...”.

This paragraph then goes on to outline exceptional cases where liability does not arise. These are cases where the failures are attributable to the consumer; and cases where failures are due to the actions of third parties and are unforeseeable or unavoidable; cases where the failures are due to unusual and unforeseeable circumstances beyond the control of the party invoking the exception, the consequences of which could not be avoided even if all due care had been exercised; and cases where the failures are due to an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forstall.

[9] The third cause of action pleaded is common law negligence. In essence this involves the contention that the Defendant failed to take reasonable care to keep the Plaintiff safe by removing feral cats from the hotel grounds; by keeping such cats out

of the hotel and by failing to adopt a system to keep the Plaintiff safe in view of the presence of such cats.

Liability

[10] For the Plaintiff, Mr Brian Fee QC (with whom Mr Morrissey BL appeared) argued that on the above facts liability could be established under the respective headings of breach of contract, breach of statutory duty, and negligence. Whichever heading was used, this was a case in which the Defendant was responsible for a breach of the obligation which rested on it to take reasonable skill and care to ensure the safety of the Plaintiff. The Defendant and the hotel management locally were aware of the situation on the ground and failed to take any steps to ensure that the Plaintiff was safeguarded against the presence in or around the hotel of feral cats.

[11] For the Defendant, Mr Skelt BL argued that the Plaintiff had failed to prove (the onus of proof being on her) that this was a case in which the Defendant had not taken reasonable skill and care for the Plaintiff's safety. In his submission what was reasonable in the circumstances fell to be considered by reference to the standards of care which apply in Tunisia. No evidence, counsel pointed out, had been given as to what these standards were. Accordingly, the court could not conclude there was a breach of such standards. It had, he said, been open to the Plaintiff to bring before the court expert evidence as to the relevant standard but in the absence of same the Plaintiff could not succeed.

[12] In support of his argument, Mr Skelt relied on a series of cases: Wilson v Best Travel Ltd [1993] 1 AER 353; Evans v Kosmar Villa Holidays [2007] EWCA Civ 1003; Griffin v My Travel UK Ltd [2009] NIQB 98; Goldbourn v Balkan Holidays Ltd [2010] EWCA Civ 372; and Lougheed v On the Beach Limited [2014] EWCA Civ 1538. The court has considered these. In Wilson the court asked: Must [the tour operator] 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? Phillips J's answer to this question was:

"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 ... Thus 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 such a feature which would be found in an English hotel unless the absence of such of a feature might lead a reasonable holidaymaker to decline to take a holiday in the hotel in question".

A similar conclusion was reached in Evans, Richards LJ indicating that (at paragraph [23]):

“... I do not think that [the 1992 Regulations] affects the principle laid down as to the standard to be applied to a hotel, namely that the hotel is required to comply with local safety regulations rather than with British safety standards”.

Evaluation

[13] It seems clear that the obligation which rests on the hotel management in this case which consequently, due to the operation of the Regulations, is also owed by the Defendant, is that of the delivery of the services and facilities connected to the provision of the holiday by the application of reasonable skill and care. This is so whether the case is analysed in terms of breach of contract, breach of statutory duty or common law negligence. In respect of all of these causes of action while the above is the general approach, there will be special situations where liability may not be established. The court has set out the language defining these above at paragraphs [7] and [8] *supra*.

[14] The court must ask itself whether on the facts of the present case the Plaintiff has established to the civil standard of proof that the accident which befell her resulted from the failure of the hotel management/tour operation to perform their obligations.

[15] More specifically the court must seek to determine whether given the presence of a large number of cats roaming free in or around the hotel, the Plaintiff's accident resulted from a failure on the part of the hotel management/tour operator to safeguard against the risk which their presence represented.

[16] The court is inclined to think that if a large number of stray cats was roaming around a hotel this situation would give rise to some obligation on the part of the hotel management to use reasonable skill and care to control them in an appropriate way. The court finds it difficult to accept that the presence of the cats creates no obligation whatsoever on the hotel management. The obligation which arises, moreover, at, at least, a general level, would apply equally, whether the hotel in question is in Tunisia or the United Kingdom or elsewhere. However, this is not the end of the matter. There is still the issue of what is the appropriate standard of care which the court should apply. The court can see that differential standards of care may well exist as between one country and another in relation to a matter of this kind.

[17] In this case there has been no evidence adduced by the Plaintiff which establishes the standard of care which the court should apply. It seems to the court

that, unless there is such evidence, the court is unable to conclude that there has been a breach of the obligation. Consequently, with reluctance, the court is forced to conclude that the Plaintiff has failed to prove her case. While Mr Fee sought to escape this conclusion by arguing that in this area of the case the onus of proving that it had acted with reasonable care and skill should rest with the Defendant, the Court is unable to accept this submission which was unsupported by authority.

[18] In the court's view the Plaintiff's claim fails on a second basis as well. This relates to the way in which the Plaintiff sustained her injuries. The court has no evidence before it of any propensity on the part of any of the cats at the hotel to attack in the way this cat did. There is also no proof that the cats are properly described as "feral" in the sense of having aggressive or dangerous characteristics. In these circumstances it seems to the court that the attack was not foreseeable and that consequently the damage sustained by the Plaintiff was too remote to enable the Plaintiff to recover damages under any of the heads pleaded. The case comes within the exceptional cases referred to above.

[19] The court finds that the damage sustained by the Plaintiff has not been proved to have been caused by any breach of contract, or breach of statutory duty or common law negligence on the part of the hotel management or the Defendant. Even if it could be said that there had been a failure in general terms to control the cats, the Plaintiff's injuries were caused by an event which (on the basis of the evidence before the court) was out of the ordinary and could not have been anticipated.

Conclusion

[20] While the court acknowledges that the Plaintiff was the victim of an incident which will have spoilt her holiday and have caused her considerable distress and upset over a not insubstantial period, it is unable to find for her for the reasons it has given.

[21] Accordingly the Plaintiff's claim must be dismissed.