Novus Actus – Risk vs. Inconvenience

23rd May 2018

In Philip Clay v TUI UK Ltd [2018] EWCA Civ on 23rd May 2018 the Court of Appeal gave judgment in favour of the Respondent in an interesting case considering the liability of a tour operator under the Package Travel, Package Holidays, and Package Tours Regulations 1992 (the "**Package Travel Regulations**") for injury to the Appellant after a balcony fall.

The Respondent was represented in the Court of Appeal by Ronald Walker QC of 12 King's Bench Walk who was instructed by Mark Fanning of Miles Fanning Legal.

Background

The Appellant had booked a package holiday for himself, his family, and his parents to the Guayarmina Princess Hotel, Tenerife.

The Appellant and his family were staying in one room and his parents in an adjoining room each with its own balcony accessed via sliding doors that could be locked. The balconies were offset from each other with a gap of around 78 cm between the decorative ledges underneath each balcony. The rooms were two storeys up with a drop of roughly 20 feet to ground level.

In the early hours of one morning, after the children had gone to bed, the claimant, his wife and parents met for a nightcap on his parents' balcony. After joining his family on the balcony, the Appellant went inside to use the bathroom but on returning he shut the sliding door behind him and it locked thus trapping himself and the others on the balcony. After trying to open the door and gain the attention of passers by in the street below the Appellant decided to he would step from one balcony to the other using the ledge out side of the balustrade to gain access. Unknown to him the ledge was merely a decorative feature and not load bearing and it gave way immediately under his weight and he fell two storeys suffering serious injury.

The claim was brought for breach of the terms of the holiday contract and under Regulation 15 of the Package Travel Regulations.

At trial in the County Court at Cardiff HHJ Seys Llewellyn QC heard factual and expert evidence from both parties. It was agreed that liability would be judged by reference to the local standards of a hotel in Tenerife (as per Lougheed v On the Beach Ltd [2014] EWCA Civ 1538). At trial the Claimant argued three breaches of local standards: (i) failure to maintain facilities, namely the lock to its original and proper condition; (ii) the ledge was part of the balcony and should have been weight bearing; and (iii) the hotel failed to warn the Appellant of risk.

The Defendant argued that there was no breach of local standards in respect of (i) to (iii) above and that the act of climbing over the balustrade of the balcony was "so unexpected and/or foolhardy as to be a *novus actus interveniens*".

HHJ Seys Llewellyn QC found no breach of local standards in respect of the need for warnings and the construction of the balcony ledge and also found the Claimant's actions to be a *novus actus interveniens*. The claim was dismissed and the Claimant then appealed.

Grounds of Appeal

The Appellant appealed on two grounds. Firstly, the judge had misdirected himself as to the appropriate test of remoteness. Secondly, the judge had failed to consider relevant evidence and/or the judge's conclusion that the defect in the locking mechanism was not causative of the accident was wrong.

There was an issue between the parties on the appeal as to whether or not the judge had found a breach of local standards in respect of the lock (and the Respondent, by a Respondent's Notice, argued that, if he had, he had been wrong to do so). In the event the Court of Appeal did not find it necessary to decide this issue, because the claim failed even on the assumption that there was a finding of breach of duty.

The Appeal

In support of these grounds the Appellant contended (i) that the starting point is that a defendant is liable for a consequence *of a kind which is reasonably foreseeable* (Simmons v British Steel Plc [2004] UKHL 20); (ii) the judge should then have started his assessment as to reasonable foreseeability by considering whether it would be reasonable for the Appellant to try to escape the balcony, rather than the exact type of escape undertaken (Hicks v Young [2015] EWHC 1144(QB)); (iii) relying on comments of Morris LJ in Sayers v Harlow UDC [1958] 1 WLR 623 at p630 that it is "the most natural and reasonable action" for someone who finds themselves "undesignedly confined" to seek means of escape, the judge should have considered it reasonable that the Appellant would seek to escape; (iv) when seeking to escape from being locked out by the Respondent's breach of duty, the injury will not be too remote if the Appellant faced only inconvenience, rather than danger (Sayers v Harlow) and that the correct approach is to weigh the degree of inconvenience with the risk involved in trying to escape; (v) when considering this risk, it was insufficient to simply consider it "obvious" and "life threatening" and that this should be a subjective test based on what the Appellant himself thought the risk was; (vi) as the risk was carefully considered by the Appellant and his family (who were described as "careful" people by the judge), the risk was clearly not "obvious to him"; and (vii) the Appellant's mistaken belief that the ledge would support his weight was not so unreasonable as to break the chain of causation, particularly when balanced against the above, and should have been addressed as an issue of contributory negligence.

In short, the Respondent contended that the judge had not made a finding of any breach of local standards, that the judge was right to find that the Appellant's actions amounted to a *novus actus inteveniens* and that in reaching that conclusion he had applied the correct test and weighed up the degree of risk associated with the means of escape vs. the level of inconvenience as per Sayers v Harlow.

The Court of Appeal decided by majority (Moylan LJ dissenting) that both grounds of appeal should fail and upheld the decision of the trial judge. In the leading judgment, Hamblen LJ found that the judge had not misdirected himself as to correct legal test for remoteness. He also found that the judge had not erred in finding the Appellant's actions to be a *novus actus*.

He considered the judge had paid “full regard to the evidence of the Appellant, his parents and his wife”. The judge’s conclusion that the Appellant “did not know and could not know that the ledge was safe” was “firmly founded on the evidence”. Further, Hamblen LJ considered the Appellant’s submission that the judge failed to take account for the degree of inconvenience suffered faced by the Appellant and his family to have “no force”. As such the finding of *novus actus* was “clearly justifiable” and that as the matter was for the trial judge to evaluate the Court of Appeal should not intervene.

Moylan LJ in his dissent considered that the judge had failed to come to a judgment on whether personal injury of some degree was a reasonably foreseeable consequence of the defect in the lock. He found that if the judge had “expressly answered this issue, he would have concluded that it was foreseeable that the appellant might sustain personal injury from being trapped in the balcony because it was foreseeable that he might try to escape and might sustain some injury as a result”. Moylan LJ also considered that the judge “either applied the wrong test or reached a flawed evaluation” on the issue of *novus actus*.

Comment

The judgment provides a useful analysis of the issues of remoteness and *novus actus*.

As to remoteness, Hamblen LJ found that the submission that the relevant consequence to be foreseen was incurring some personal injury seeking to escape from the balcony, not the precise type of injury, and that some personal injury was foreseeable was never presented to the judge at trial.

Further, the Appellant could not point to any finding made by the judge as to reasonable foreseeability under this wider interpretation and that the issue of reasonable foreseeability was considered by the judge when considering whether there had been a breach of duty in failing to give adequate warning to the Appellant. This was the context in which the issue of foreseeability was considered in the judgment at first instance. It was not for the Court of Appeal to effectively substitute the Appellant’s pleaded case.

Of perhaps more interest, is Hamblen LJ’s consideration of *novus actus* and the specific approach adopted in cases where an individual has become trapped as a result of a defendant’s alleged breach. He followed the reasoning in Sayers v Harlow and considered that the judge was correct to essentially weigh up the degree of inconvenience faced by the Appellant and the degree of risk taken in attempting to escape. In the present case the Appellant and his family had “some inconvenience and the danger of climbing over the balcony balustrade in the dark was obvious and life threatening; hence the finding of *novus actus interveniens*”.

It was important that the Appellant’s actions were *voluntary* and his conduct was “considered and deliberate. There was no necessity for the Appellant to take any risk, but he nevertheless chose to expose himself to real danger and to an obvious risk of death or serious personal injury”. This reinforces the common sense approach that weighs up factors of risk and inconvenience (or even danger) when deciding the issue.

The risks to which Mrs Sayers was exposed whilst standing on a toilet roll holder some two feet off a solid floor of a bus station toilet in order to climb over a locked door were very

different to those faced by Mr Clay when stepping into the unknown two storeys up on the side of a hotel in the dark. The Court of Appeal's decision is clearly the right one.

Miles Fanning Legal is a law firm specialising in the defence of travel, marine and international personal injury claims on behalf of insurers and tour operators.

Dated 23rd May 2018