UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 138
Record Number: 2019/342
High Court Record Number: 2017/6905P

Noonan J.
Haughton J.
Collins J.

BETWEEN/

SIOBHAN KELLETT

PLAINTIFF/APPELLANT

-AND-

RCL CRUISES LIMITED, PANTHER ASSOCIATES LIMITED T/A CRUISE HOLIDAYS AND PANTHER ASSOCIATES T/A TOUR AMERICA

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 21st day of May, 2020

1. I agree with Noonan and Collins JJ. that this appeal should be dismissed. In particular I agree that, while the trial judge found a "deficit" in the appellant's evidence in respect of local regulations, guidelines or standards applicable in St. Maarten for such boat trips, he ultimately decided the case on the basis of the standards that might "be thought to be applicable in this jurisdiction". In so doing he took the approach most favourable to the appellant. On that basis he was entitled to come the conclusions that he did in respect of the various criticisms/allegations of negligence put forward by the appellant's consulting engineer, and to dismiss the case on the basis that the appellant had failed to discharge the onus of proving a failure by the respondent to exercise "reasonable care and skill", the test approved by the Supreme Court in *Scaife v. Falcon Leisure Group (Overseas)Limited* [2008] 2 I.R. 359.

2. Although it was not strictly speaking necessary, both Noonan J and Collins J have, following careful analysis of Council Directive 90/314/EEC, of s.20 of the Package Holidays and Travel Trade Act, 1995 and various U.K., Northern Ireland and Irish authorities, expressed views on the issue of whether, in cases such as this, the Irish court should assess "reasonable skill and care" and "failure to perform or the improper performance of the contract" by reference to standards or regulations prevailing where accident occurred, or by reference Irish standards – or perhaps some EC or international standard. These *obiter dicta* differ in material respects, and having carefully read the judgments that they are delivering I wish to briefly express a view.

3. Noonan J. at paragraph 39 suggests a number of principles, starting with the principle that the appropriate test under s.20 is whether reasonable skill and care have been employed in the provision of the service complained of. That is uncontroversial. He suggests as his second principle that –

"(b) the standard by which the test of reasonable skill and care is to be judged is the standard, as distinct from the law, applying in the place where the event complained of occurs. The issue of liability is to be determined by reference to Irish law."

He then qualifies this by suggesting that the court can have regard to "internationally accepted norms", and "that there may be cases where the court can have regard to the standards prescribed in Irish legislation such as the Hotel Proprietors Act 1963 and the Occupiers Liability Act 1995 in determining whether there has been compliance with the Directive and the 1995 Act". Whilst he is careful not to give any order to the principles that he enunciates, principle (b) is prominently positioned.

4. For the reasons given by Collins J., I am hesitant to express principle (b) as the approach to be taken in these cases. It is a principle that appears to have been adopted in UK and Northern Ireland cases because of a reluctance to impose UK or 'western' standards on

assessment of accidents occurring in other jurisdictions arising from a recognition that standards vary enormously across different countries, and because if the plaintiff's country of origin standards were applied this would result in different standards being applied to holiday makers from different countries. Principle (b) has not (yet) been accepted in this jurisdiction. I believe that Collins J. is correct in identifying that *Scaife* appears to have been decided in the High Court by reference to Irish standards (there being no evidence of standards/regulations prevailing in Spain), and that the Supreme Court stopped short of endorsing local standards as determinative, Macken J. noting that "the application of a lower standard, if such exists in respect of the safety of hotels in Spain, might not necessarily comply with the provisions of the Directive".

5. It is also arguable that principle (b) puts too great a burden on a plaintiff seeking to establish a claim, and may result in the assessment of claims on the basis of lower standards than apply in this jurisdiction or elsewhere in the EU. This would seem to run counter to the consumer protection objectives recited in the Directive including establishment of the right to sue package tour organisers directly (rather than having to identify and sue the suppliers of services in the holiday destination), and the objective of seeking guaranteed standards in holiday packages. In this regard I note the opinion of Advocate General Tizzano in *Leitner v. TUI Deutschland GmbH& Co. KG (Case C – 168/00)* [2002] E.C.R. 1-02631 that the provisions of the Directive must be interpreted in the manner most favourable to the person they are intended to protect, namely the consumer of the tourism service.

6. I prefer to tentatively adopt the view expressed by Collins J where he states:

> "47. In this context, the standard of 'reasonable care and skill' appears to me to import a flexible standard requiring a broader approach than that which has in fact been adopted in the United Kingdom, one that has regard to any applicable local regulations and standards – perhaps particularly those of a technical nature - but which also has

regard to the wider circumstances, including the nature of the activity and the risk, the adequacy of any local regulations or standards and the broad circumstances in which accident and injury occurred. The standards applicable in the Member State in which the holidaymaker and/or organiser reside may also be relevant: that certainly appears to have been the approach taken in *Scaife*."

7. Such is the uncertainty and divergence on this issue that I fully agree with Collins J that in an appropriate case – and it does not arise in this appeal - there needs to be a preliminary reference to the CJEU under Article 267.

8. I also tend to agree with Collins J's observations as to the burden of proof. There is some force to the argument that, if a *prima facie* case is established by a plaintiff, even on the basis of standards applicable in this jurisdiction, the onus should then be on a defendant to prove local regulations/standards and compliance with such standards where that is raised as a defence. In saying this I do not wish to be interpreted as suggesting any departure from the well-established common law rule that, subject to those rare cases where *res ipsa loquitur* applies, the onus rests on a plaintiff to prove all elements of their case on the balance of probabilities. Rather this is said in the context of the possibility that the test of "reasonable skill and care" is a broad and flexible one that may enable a plaintiff in the first instance to prove a want of care based wholly or primarily on failure to perform the contract or supply the services to standards set in this jurisdiction.

9. As matters stand before pursuing a claim plaintiffs and their lawyers and experts would be well advised to research holiday destination standards/regulations, in order to be prepared to establish breach of such local standards, or at least to contest compliance with local standards asserted by a tour organiser as a defence, or alternatively in order to criticise such standards or the manner in which they are applied or policed locally as being inadequate: they would, as has been observed, fail to do so at their peril.