Neutral Citation [2020] EWHC 2944 (Ch)

Case No E62YX151
Appeal No CF036/2020CA

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CHANCERY APPEALS

On appeal from the order of His Honour Judge Jarman, QC, sitting in the County Court at Cardiff, dated 23 June 2020

The Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET

Date: 9 November 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

TUI UK LIMITED

Appellant

(Defendant in the proceedings below)

- and -

LYNN MORGAN

Respondent

(Claimant in the proceedings below)

- -

- -

Mr Navjot Atwal (instructed by **MB-Law** (**MB Solicitors Limited**) for the Appellant
Mr Ian Skeate and **Mr Andrew McKie** (instructed by **Wilkin Chapman LLP**) for the Respondent

Hearing date: 19 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. Introduction

1. This case relates to an accident suffered by the Respondent, Mrs Lynn Morgan. In July 2015, Mrs Morgan was on the second night of a package holiday with her husband, which package she had purchased from the Appellant, Tui UK Limited ("TUI"). The Morgans were staying at the Morne Hotel in Mauritius (the "Hotel"). At around 9:00pm, Mrs Morgan was returning (on her own) to their room from dinner along an outside, unlit sun terrace adjacent to the swimming pool. Sadly, *en route* to the room, Mrs Morgan collided with a heavy wooden sunbed and fell, suffering injuries to her knees, face and head.

2. Mrs Morgan brought a claim against TUI in contract for damages. The claim alleged breach of an implied term that the services to be provided by TUI under the contract with TUI would be provided with reasonable care and skill, especially with regard the provision of lighting at the place where the accident occurred. As part of her claim, Mrs Morgan relied upon Regulation 15 of the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992 No. 3288) (the "Regulations"),[1] which provides (so far as material):

> "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."

3. The claim was heard in the County Court at Cardiff on 9 and 10 June 2020 before His Honour Judge Jarman QC, who handed down a reserved judgment two days later on 12 June 2020 (respectively, the "Judge" and the "Judgment"). In the Judgment, the Judge found TUI liable to Mrs Morgan, subject to a finding of contributory negligence in the order of 20%. The Judge's order, giving judgment for Mrs Morgan, was made on 23 June 2020.

4. On 14 September 2020, I gave TUI permission to appeal the Judge's decision on liability. TUI contends that Judge erred in a number of respects, which are set out in TUI's grounds of appeal, to which I refer in greater detail below. The thrust of TUI's appeal was that the Judge was wrong to rely on the evidence he did in determining the applicable standard of skill and care regarding the provision of lighting at the accident spot.

5. I heard the appeal remotely via Skype for Business on 19 October 2020. Thereafter, I reserved my judgment. This is that judgment, which is structured as follows:

[1] The Regulations have now been revoked and replaced with the Package Travel and Linked Travel Arrangements Regulations 2018 (the "2018 Regulations"), which implement Directive 2015/2302/EU. The Regulations continue to apply to those contracts concluded thereunder, i.e. to contracts concluded before 1 July 2018: see Regulations 37(2) and 1(3).

(1) In Section B, I consider the relevant legal principles.

(2) In Section C, I set out the relevant parts of the Judgment, so far as they are material to this appeal.

(3) In Section D, I describe and consider TUI's various grounds of appeal against the order of the Judge.

B. The law

6. The starting point is that a term will generally be implied into a contract for services by operation of law to the effect that those services are to be performed with reasonable skill and care: see section 13 of the Supply of Goods and Services Act 1982 (the "1982 Act").

7. This case concerns the scope of that implied term when it comes to a travel agent or tour operator (for ease, I will refer to such an individual or entity as the "organiser"). The organiser may agree to provide services under the contract that are not to be performed by it. Indeed, that will often be the case. Where that is the case, the question arises as to whether the scope of the implied term is such that it includes that delegated performance by the organiser's agents or whether the term merely extends to exercising reasonable care and skill in selecting an appropriate agent.

8. The distinction was described by Lord Slynn in *Wong Mee Wan v. Kwan Kin Travel Ltd*, which concerned a case like this, namely a package holiday contract:[2]

> "…the issue is thus whether…[the package tour operator] undertook no more than that they would arrange for services to be provided by others as their agents (where the law would imply a term into the contract that they would use reasonable care and skill <u>in selecting</u> those other persons) or whether they themselves undertook to supply the services when, subject to any exemption clause, there would be implied into the contract a term that <u>they would as suppliers</u> carry out the services with reasonable care and skill…"

9. This issue was resolved in favour of the consumer by the introduction of the Regulations, which implemented Council Directive (90/314/EEC) (the "Directive"). The Directive sought to harmonise the disparities between Member States regarding the provision of packaged services.[3] An integral part of so doing was the standardisation of a liability regime that favoured the consumer and imposed liability on the organiser for the proper performance of obligations under the contract regardless of who those obligations were to be performed by.[4]

10. Thus, contracts for the provision of package holidays are typically contracts of "vicarious performance":[5]

> "A contracting party can in the case of many contracts enter into an arrangement by which some other person may perform for him, so far as he is concerned, the obligations of the contract, and the other contracting party will be obliged to accept that performance if it is performance in accordance with the terms of the contract. The contracting party will, however, be liable for any

[2] [1996] 1WLR 38 at 41-42. Emphasis added.

[3] See, e.g., Recitals (2) and (3) to the Directive.

[4] See Recital (17) and Article 5(1) of the Directive.

[5] Beale (ed), *Chitty on Contracts*, 33rd ed (2018) at [19-082].

> breach that may happen, and the other contracting party is not bound or, indeed, entitled to sue the substituted person for breach of contract, although there may of course be a remedy in tort, e.g. where the substituted person negligently damages or causes the loss of goods entrusted to him. This is technically known as vicarious performance and it is "quite a mistake to regard that as an assignment of the contract: it is not."

11. The position that results under English law is that the scope of the reasonable care and skill implied term is now such that the organiser has an obligation to provide the services under the contract with reasonable care and skill regardless of the party to whom the organiser delegates performance of those obligations.[6]

12. In practical terms, the effect of the Regulations is to shift the focus in terms of the organiser's liability from an examination of reasonable skill and care in the selection or offer of accommodation to the exercise of reasonable skill and care in the provision of the particular service (e.g. the operation of a hotel).[7]

13. Contracts for the provision of package holidays will, typically, involve a foreign element in their performance. The holiday-maker purchasing the package will, in many cases, be buying a holiday abroad. In such cases, the question arises as to what informs the content or standard of the obligation on the organiser to exercise reasonable skill and care in the provision of that service.

14. The starting point, in this regard, is the judgment of Phillips J in *Wilson v. Best Travel Ltd*.[8] That was a case in which the plaintiff fell through a glass patio door while on holiday on Kos. The glass complied with Greek safety standards, but not with those prevailing in England. The judge found, on the basis of section 13 of the 1982 Act, that the organiser had "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".[9] When dealing with the standard of care, he said:[10]

> "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. On the facts of this case I do not consider that the degree of danger posed by the absence of safety glass in the doors of the Vanninarchis Beach Hotel called for any action on the part of the defendants pursuant to their duty to exercise reasonable care to ensure the safety of their clients."

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[6] See *Hone v. Going Places Leisure Travel Limited*, [2001] EWCA Civ 947 at [15] (*per* Longmore LJ).

[7] See *Evans v. Kosmar Villa Holidays Ltd*, [2007] EWCA Civ 1003 at [23] (*per* Richards LJ).

[8] [1993] 1 All ER 353.

[9] At 356.

[10] At 358.

15. *Wilson* has been widely approved and followed.[11] Reference to the foreign law informing local standards is obviously sensible. Indeed, that is the law (the *lex loci delicti commissi*) that would pertain according to the general rules of private international law were the holiday-maker to sue in tort (as Mrs Morgan might well have been able to do in this case[12]).

16. However, it must be stressed that the obligation on the organiser to exercise reasonable skill and care is an obligation arising under English law and it is English law that applies to establishing whether the obligation has been breached.[13] It is perfectly possible, as a matter of law, for the obligation to be breached without the local law being infringed. In *Evans v. Kosmar Villa Holidays Ltd*,[14] the claimant suffered a head injury resulting in incomplete tetraplegia after diving into a shallow swimming pool in the early hours of the morning. The claimant did not lead evidence of the local standards prevailing in Corfu, but in the judgment of Richards LJ it was open to him to pursue the claim on the broader basis of breach of an implied term that the services at the apartments at which he was staying would be performed with reasonable skill and care. At [23], Richards LJ said:[15]

> "…[w]hat 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 [v. Thomsons Tour Operators Limited]*,[16] 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."

17. It seems to me that the following propositions emerge from the case-law:

(1) The question before the court involves consideration of the alleged breach of an obligation governed by English law, but performed abroad. No questions of private international law arise.

(2) However, the court will not automatically apply the standards that would pertain if the performance were in England. To the contrary, the court will regard the standards prevailing in the place of performance as "a very important signpost"[17] in determining the content of the obligation.

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[11] See, for example, *Lougheed v. On The Beach Limited*, [2014] EWCA Civ 1538 at [5] (*per* Tomlinson LJ); *Japp v. Virgin Holidays Limited*, [2013] EWCA Civ 1371 at [5] (*per* Richards LJ).

[12] A claim in tort was pleaded by Mrs Morgan, but appears not to have been pressed at trial and did not feature in argument before me. Accordingly, the applicable law to this cause of action was not specifically considered either before Judge Jarman, QC or before me.

[13] Although TUI's standard form terms and conditions were pleaded by TUI, I was not taken to these provisions in any detail. I proceed on the basis – which was not contested – that English law is the applicable law in this case.

[14] [2007] EWCA Civ 1003.

[15] See also *Goldbourn v. Balkan Holidays & Flights Limited*, [2010] EWCA Civ 372 at [19] (*per* Leveson LJ).

[16] Court of Appeal (Civil Division) Transcript No 1470, 2000.

[17] To quote Leveson LJ in *Goldbourn v. Balkan Holidays & Flights Limited*, [2010] EWCA Civ 372 at [19].

(3) If it can be shown that the standards prevailing in the place of performance have been infringed, then it seems to me that the organiser's English law obligation to exercise reasonable skill and care will almost inevitably also be breached.

(4) However, the converse does not, as it seems to me, necessarily follow. It may well be that even if the standards prevailing in the place of performance have been complied with, it does not necessarily follow that the organiser will escape liability. The standards prevailing in the place of performance may, for no justifiable reason, fall so far below either internationally accepted or English standards that the organiser assumes an obligation to exercise reasonable skill and care that is informed not by the local standards, but by other standards. I stress that the obligation on the organiser is to exercise reasonable skill and care, and that whilst standards (be they local, English or international) will be important in articulating what is reasonable, they are not the last word.

(5) In short, I consider that there is an asymmetry in the obligation assumed by an organiser:

(a) If the standards prevailing in the place of performance are breached, the term implied by section 13 of the 1982 Act will likely also have been breached;

(b) On the other hand, even if the standard prevailing in the place of performance have been complied with, that is no more than a very important signpost that the term implied by section 13 of the 1982 Act has not been infringed.

(6) That leaves cases like the present case, where it is unclear what the standards prevailing in the place of performance actually are. As can be seen from the Judgment, this was the question that most troubled the Judge. He found that:

(a) Had the accident happened in England or Wales, then TUI's duty to exercise reasonable skill and care would likely have been breached.[18]

(b) The safety regulations in Mauritius as to external lighting applicable in hotels was unclear.[19]

(7) Whilst the burden of proving a breach of the implied term of reasonable skill and care falls on the claimant – here, Mrs Morgan – that burden does not necessarily oblige the claimant to demonstrate what were the locally applicable standards in order to succeed in the claim, although of course such standards are an important signpost. In particular, where the local standards are unclear, the court is not going to require the claimant to incur and waste time and expense in seeking to prove that which is vague, nebulous or non-existent. In such a case, the claimant is perfectly entitled to have resort to other material in order to establish that the obligation to exercise reasonable skill and care has been breached.

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[18] Judgment at [18].

[19] See [21]*ff* of the Judgment. It was for this reason, that the Judge had to have recourse to international standards.

(8) In the course argument, I put to Mr Atwal (counsel for TUI) what would happen if there was no identifiable prevailing standard that could be ascertained by reference to, say, safety regulations at the place where the accident occurred. His contention was that, in those circumstances, the claimant's case must – absent the exceptional case – fail. In short, the absence or unascertainability of local standards would be fatal to the claimant unless (to quote from Phillips J's judgment in Wilson) the absence of such a safety standard might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question.[20]

(9) I do not accept that contention. Although "local standards" will doubtless be a "very important signpost" where they are readily ascertainable by reference to – say – a local law or regulation, in cases where there is no readily ascertainable standard it will be for the claimant, as in *Lougheed*, to establish the content of the duty by leading other evidence.[21]

C. The Judgment

18. At [1]–[17] of the Judgment, the Judge resolved a number of factual issues that arose on the evidence before him:

(1) At [13], the Judge found that "the accident spot…was not pitch dark, it was enough to make it very difficult to see the dark wooden sunbed, especially when someone was walking from the lit pathway onto the unlit sun terrace. If it were necessary to put a figure on it, in my judgment it is likely to have been a little less than 0.24 lux, as that is the figure for the nearest point going back to the lit pathway".

(2) At [17], the Judge found that it was the lack of lighting that caused the accident. He put it in the following terms:

> "It does not follow from that latter finding [i.e. that lighting had been installed after the accident at the accident spot] [that] the accident was caused by the lack of lighting on or adjacent to the sun terrace a[t] the time of the accident. On the basis of all my findings of fact above, however, I am satisfied that it was so caused".

19. At [18]–[20], the Judge reminded himself of the relevant law, which I have considered in Section B above. Given the nature of TUI's grounds of appeal, it was necessary for me to consider the law in a little greater detail than the Judge did. However, I stress that the Judge directed himself entirely properly as to the applicable legal principles.

20. At [21]–[28], the Judge turned to the parties' expert evidence relating to external lighting applicable to hotels in Mauritius. The main problem in this regard (as the Judge found) was that there is no "prevailing standard" in the form of regulations or the like to which Mrs Morgan could point for an answer to the question: What were the Hotel's obligations regarding external lighting?

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[20] See *Wilson* at paragraph 14 above.

[21] What that evidence might be will turn on the individual case and is, in essence, a question of fact, not law. In *Lougheed* itself, evidence as to the general practice or standard in other establishments in the same country was led: see [26]-[27].

21. The evidence of Mr Magner, Mrs Morgan's expert, was considered by the Judge at [22]–[25]. Mr Magner referred extensively to the International Standards Organisation's standard ISO 30061 on emergency lighting (the "ISO Standard"). The ISO Standard prescribes minimum luminosity for emergency lighting of 0.5 lux and Mr Magner relied upon this to establish that minimum luminosity at the accident spot should have been 0.5 lux.

22. Commenting on Mr Magner's evidence, the Judge said at [23] (emphasis added):

> "Mr Magner accepted in cross-examination that this standard relates to minimum luminosity at surface level for hazard perception in worst conditions such where there is smoke. He accepted that the standard did not apply strictly to what lighting would be required at the accident spot, but it refers to whether the public or workers have access. He said that the standard is frequently used in construction to give a minimum for such hazard perception. The minimum is 0.5 lux, and this is one of the few universal principles. Where, as in Mauritius, there is no specific local standard, he said that this is what is used. He said that he was not surprised that there is no such local standard in Mauritius, as it is 'behind' the UK. He could not name a specific hotel where it has been specifically adopted but said he had been involved in a number of cases in Mauritius where it was used. In his report, he says that his local enquiries and analysis are based upon a combination of case-specific enquiries and his collective experience of Mauritian standard in practice in that county since 2002."

23. At [25], the Judge accepted Mr Magner's evidence as to the applicability of the ISO Standard in setting an irreducible minimum standard relating to emergency lighting:

> "In my judgment, given that the ISO standard relates to emergency lighting and therefore to potential life-threatening situations, the evidence of Mr Magner that in lighting terms this was one of the few universally acceptable principles is not surprising and I accept it. It is unlikely in my judgment that hotels in Mauritius are free to provide no emergency lighting at all".

24. The Judge went on to accept that it did not follow from this that "this was the minimum standard applicable to the accident spot".[22] In the same paragraph, he went on to find that "the accident spot was upon a walkway which customers may reasonably be expected to use to access their rooms after the pool closed".

25. The Judge's conclusion on the evidence and therefore the issue of the scope of the Hotel's obligation to light the accident site is at [27] (emphasis added):

> "This is not the sort of case as in *Wilson*, where there is a specific local standard which is lower than, for example, the prevailing British Standard. It is a case of coming to a conclusion on the limited evidence before me of whether there is likely to be a prevailing local standard and if so, what it is likely to be. I prefer and accept the evidence of Mr Magner on this point. On the evidence before me, it is likely that the standard relating to the provision of lighting on the sun terrace was likely to be the minimum set by the ISO standard. Having come to that conclusion, I gain some comfort in it from the conversation between Mrs Morgan and Mr Chiarel some days later, from the contemporaneous reports and from the fact that lighting was then provided adjacent to the sun-terrace."

[22] Judgment at [26].

26. Accordingly, the Judge found TUI liable for Mrs Morgan's accident under the Regulations for the poor lighting where she fell.[23]

D. Consideration of the grounds of appeal

(a) The grounds of appeal

27. TUI advanced five grounds of appeal before me. These can be summarised as follows:

(1) The Judge misunderstood the ISO Standard as setting minimum standards of emergency or general lighting in external areas.

(2) The Judge was wrong to find that the ISO Standard set a universal principle in respect of emergency or general lighting.

(3) The Judge should not have felt bound to infer a local standard on the basis of the limited evidence before him and, to the extent that he did, he was wrong to infer a local standard from the fact that the Hotel installed additional lighting after the accident. Instead, the Judge should have found that the local standard was not proven.

(4) There was no good evidence before the Judge to the effect that the deficiency in lighting would have made any difference. That is, Mrs Morgan had not proved that but for the 0.26 lux difference in lighting, the accident would not have happened.

(5) The structure of the Judgment shows that the Judge pre-determined the issue of liability before giving consideration to the issue of local standards. The issue of local standards is fundamental to the resolution of package travel cases and should have been at the forefront of the judgment.

I consider these various grounds below.

(b) Grounds 1 to 3

28. Grounds 1, 2, and 3 all seek to attack the Judge's findings in relation to the contractual standard of skill and care in this case in respect of lighting the area where the accident occurred. It is therefore convenient to consider these grounds together.

29. Mr Atwal took me through the ISO Standard at some length and made a number of points which were directed to the fundamental inapplicability of the standard to the place where and the circumstances in which the accident occurred. Essentially, it was said that the ISO Standard applied to minimum luminosity requirements for installed emergency lighting. It did not prescribe what areas were to be lit. In consequence, the Judge should not have relied on the ISO Standard as establishing minimum luminosity requirements at the accident site.

30. I consider that Mr Atwal was right in his reading of the ISO Standard. However, the question before the Judge was not whether that standard was – according to its terms or

[23] Judgment at [29].

according to local law or practice[24] – applicable, but whether it was an appropriate standard to use to determine the factual question of whether TUI had breached its duty to perform the services it was providing to Mrs Morgan with reasonable skill and care.

31. That is exactly how the Judge regarded the ISO Standard. It is clear from [23] of the Judgment (which I have quoted, with relevant emphasis, at paragraph 22 above) that the Judge entirely understood that it was Mr Magner's evidence that there was no specific local standard in Mauritius. The Judge recorded that it was Mr Magner's opinion, based upon his experience in Mauritius, that the ISO Standard was what was likely to have been used in the absence of any local regulation. The Judge also recorded that it was Mr Magner's opinion that the ISO Standard was likely to be that applicable to the issue of minimum luminosity in accident area.

32. It is, of course, entirely right that Mr Laffin's evidence was not to that effect. But the Judge was entitled to prefer Mr Magner's evidence. It is quite clear that neither Mr Magner nor the Judge was under the impression that the ISO Standard was, either on its own terms or by virtue of local law, actually the standard applicable to the place where and the circumstances in which the accident occurred. It was not. Rather, in the absence of definitively applicable rules, the Judge was looking for material that he could use to inform TUI's obligation to exercise reasonable skill and care. Although the Judge did not put it in these terms, what he was looking for was a proxy for the local standards that were lacking in this case. I consider that not only was he entitled to do so, in his capacity as the finder of fact in this case, but that he was right to do so.

33. At [25] of the Judgment (quoted in paragraph 23 above), the Judge accepted that the ISO Standard prescribed an irreducible minimum in respect of emergency lighting. In so finding, it was clearly at the forefront of the Judge's mind that the ISO Standard was not of direct application to the issue of luminosity at the accident site.[25] Again, the Judge was applying what were inapplicable standards in order to fill the void in the local law. He was absolutely right to do so.

34. It is important to stress that I regard these questions as, essentially, questions of fact. It is trite that it is the judge at first instance who is the primary finder of fact, and that an appellate court should be slow to interfere with the findings made by the court below. In this case, the Judge properly directed himself and made findings of fact that were open to him on the material before him.

35. It follows that grounds 1, 2 and 3 must be dismissed. More specifically:

(1) The Judge did not misunderstand the ISO Standard, but was perfectly aware of its nature, ambit and applicability. Ground 1 accordingly fails.

(2) The Judge was entitled to find, on the evidence before him, that the ISO Standard set an irreducible minimum as to emergency lighting, although I am not sure that the Judgment actually went as far as this. As I have noted, the Judge did not simply apply the ISO Standard to the accident site. He was careful to draw a distinction

[24] Indeed, it appeared to be the case that Mauritius had not itself adopted the ISO Standard, albeit that *(i)* Mauritius was a member of the International Standards Organisation and *(ii)* the ISO Standard had been made by the International Standards Organisation.

[25] See also [26] of the Judgment.

between the standard set by the ISO Standard and the duty on TUI (performing its contractual obligations vicariously by way of the Hotel) to light the accident area to the same minimum standard. It follows that Ground 2 fails.

(3) The Judge did not, when the Judgment is properly considered, infer anything about local standards from events after the accident. Ground 3, therefore fails.

(c) Ground 4

36. It is fair to say that the question of causation was briefly treated in the Judgment (at [17]). That appears to be a reflection of the manner in which the point was put to the Judge at the hearing below, and it was not suggested to me on appeal that the Judge had, in the Judgment, failed to grapple with a specific point that was argued before him.[26]

37. Before me, ground 4 was put in the following way. The argument, simply put, was that the Judge should have considered whether the "minor" difference in lighting of 0.3 lux materially contributed to Mrs Morgan's accident. Mr Atwal, on behalf of TUI, contended that there was no evidence on this issue and that therefore the Judge had no proper basis to make the finding on causation that he did.

38. I do not consider there to be anything in this point. The Judge considered the facts of the case very carefully in the Judgment. At [7] – [17], the Judge considered the issue of "how dark the terrace was at the time and point of contact between Mrs Morgan and the sunbed". At [17], the Judge concluded that the accident was caused "by the lack of lighting". That finding has to be read against what follows in relation to the standard of skill and care. Thus, the lack of lighting (noting the Judge's use of the definite article) must be a reference to the deficiency of 0.36 lux which was found to prevail at the spot where the accident occurred. Otherwise, it would have been more appropriate to talk about a more general lack of lighting.

39. Of course, the whole point of the emergency lighting described in the ISO Standard is to enable the ordinary person to navigate areas so lit safely. The Judge was entitled to make the inference that had the minimum standard described in the ISO Standard been met, Mrs Morgan would have been able to see where she was going. Of course, it may be that in the case of a particular person even this minimum standard would be insufficient to enable them to find their way. But absent that point being taken – and, to my mind, that would be a point for TUI to assert and prove – the court is entitled to proceed on the basis that Mrs Morgan has the visual acuity of the ordinary person.

40. It follows that ground 4 is dismissed.

(d) Ground 5

41. Mr Atwal accepted that ground 5 had been infelicitously pleaded: he made no suggestion – indeed, he expressly abjured it – that the Judge had pre-judged the matter before him. Rather, the point made in ground 5 was that the Judge had failed properly to analyse the legal questions that were before him, and that this was reflected in the (incorrect)

[26] There is a duty on counsel to draw to the judge's attention such omissions, so that he or she can deal with such points prior to any appeal. There was no suggestion that the Judgment contained any such omission or that any such point had been made to the Judge in this case.

structure and approach of the Judgment. Essentially, the contention was that the Judge had treated the issue of local standards as an "afterthought", and had placed too much weight on his conclusion (at [18] of the Judgment) that had the accident occurred in England or Wales, TUI would have been liable to Mrs Morgan.

42. Put this way, ground 5 amounts to no more than a re-run of grounds 1, 2 and 3. I see nothing objectionable in the structure of the Judgment, and I reject ground 5 for the basic reason that it is obvious that ample consideration was given by the Judge to the issue of local standards, as I have described. It is not enough to say that that issue does not appear in the "right place" (a subjective question, if ever there was one) in the Judgment.

E. Disposal

43. For all these reasons, I dismiss this appeal.