

LAWRENCE v NCL (BAHAMAS) LIMITED [2017] EWCA Civ 2222

Lord Justice Hamblen:

Introduction

1. This is a renewed application for permission to appeal against a decision of the Admiralty Registrar, Jervis Kay QC of 16 May 2016, whereby he held that the claim of the respondent claimant for damages for personal injury for negligence succeeded against the applicant defendant in the sum of £5197.

The factual background

2. In early 2013, the claimant booked a holiday to include flights from the UK to Venice, hotel accommodation in Venice, a cruise in the Mediterranean, departing from Venice on the "NORWEGIAN JADE" (a cruise ship operated by the defendant - "the ship") and returning to Venice with return flights to the UK. The booking was made in response to a cruise and stay package advertised by Flights And Packages Limited ("Flights and Packages").
3. The claimant alleged that on 2 July 2013, he sustained injury and loss after tripping over a hazardous step whilst aboard a tender boat in the Greek port of Santorini. The tender boat, the "IPAPANTI" ("the tender") was owned and operated by the Union Boatmen of Santorini.
4. The claimant boarded the tender with the purpose of being transported from the ship to the shore at Santorini. When the claimant was walking from the stern to the bow towards the seating at the bow of the tender, he tripped over a step and fell over, injuring himself. The step in question was between the weather deck and the interior deck.
5. The claimant made a claim against the defendant contending that the incident occurred during the course of international carriage and that the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 ("the Athens Convention") therefore applied. The claimant alleged that the defendant was at fault or in neglect under Article 3 of the Convention and sought compensation.
6. A trial was heard before the Admiralty Registrar on 9, 10 and 11 February 2016 with judgment being given on 16 May 2016. Permission to appeal was refused by the single judge on the papers on 20 February 2017.

The Athens Convention

7. The Athens Convention applies to "international carriage", as defined in Article 1.9. If an incident occurs during the course of such carriage, the Athens Convention will govern the potential liability or otherwise of the "carrier".
8. The following are the most relevant provisions of the Athens Convention:
 - 1) Article 1.1(a) of the Convention provides that the "carrier" is the person "by or on behalf of whom the contract has been concluded, whether the carriage is actually performed by him or by a performing carrier".
 - 2) Article 1.1(b) provides that the "'performing carrier" is the person "other than the carrier being the owner, charterer or operator of a ship, who actually performs the whole of or a part of the carriage."
 - 3) Article 1.8(a) provides that "carriage" covers, "... the period during which the passenger and/or his cabin luggage are on board the ship in the course of embarkation or disembarkation, and the period which the passenger and his cabin luggage are transported by water from the land to the ship or vice versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. . ."

4) Article 3.1, "The carrier shall be liable for damage suffered as a result of ... personal injury to a passenger ... if the incident which caused the damage so suffered occurred in the course of the carriage was due to the fault or neglect of the carrier or his servants or agents acting within the scope of their employment."

5) Article 4.1, "If the performance of the carriage or part thereof has been entrusted to a performing carrier, the carrier will nevertheless remain liable for the entire carriage according to the provisions of this Convention. . ."

6) Article 4.2, "The carrier shall, in relation to the carriage performed by the performing carrier, be liable for the acts or omissions of the performing carrier and of his servants and agents acting in the scope of their employment."

9. In summary, the carrier and/or performing carrier is/are potentially liable for incidents causing personal injury occurring during the course of "carriage". If the incident occurs outwith the course of "carriage", then the incident will not be regulated by the Athens Convention at all and any liability will be determined by any other applicable law.
10. Where the Athens Convention applies and the incident occurs within the course of "carriage", then whether a carrier and/or performing carrier is liable for an incident such as the present one depends on whether the passenger can prove fault or neglect on the part of the carrier/performing carrier.
11. The claimant argued that he had concluded a contract of carriage with the defendant, that the incident occurred during the course of "carriage" and that the Union Boatmen of Santorini was acting as a "performing carrier" at the time. He further alleged that the Union Boatmen of Santorini and the defendant were at fault or neglect for various reasons.
12. The defendant argued that the claimant had failed to prove that the defendant was a contractual carrier, that the incident did not occur in the course of "carriage" and that, in any event, there was no fault or neglect.

The judgment

13. The judge found that:
 - 1) The defendant was the contractual carrier under the Athens Convention, (paragraph 16).
 - 2) The incident occurred within the course of carriage, (paragraphs 17 to 20) and the defendant was responsible for the actions or omissions of the Union Boatmen of Santorini as the "performing carrier", (paragraphs 19 and 20).
 - 3) The step on the tender, whilst necessary and integral to the vessel, was potentially hazardous and required more than being marked with hazard tape. The Union Boatmen of Santorini, acting as performing carriers, were at fault or in neglect in that they should have placed an additional sign at eye level warning passengers of the step. The defendant was also at fault or in neglect by failing to take remedial action aboard the tender either by insisting that the Union Boatmen of Santorini place a sign in that location or, if that was not practical, by failing to deploy their own members of crew to assist or warn passengers of the step, (paragraph 28).

The grounds of appeal

14. There are three grounds of appeal.

- 1) The judge was wrong to find that the defendant was the contractual "carrier" under the Athens Convention.
- 2) The judge was wrong to find the claimants' fall occurred in the course of "carriage" and,
- 3) The judge was wrong to find that the defendant was guilty of/responsible for "fault or neglect" by failing to adequately mark or give warning of the step.

Ground 1, the judge was wrong to find that the appellant was the contractual carrier under the Athens Convention

15. The judge found that the defendant was the contractual carrier for the following principal reasons, as set out in paragraph 16 of the judgment:

"a) There is no evidence that Flights and Packages ever intended to contract in any capacity other than as agent. Nor is there any evidence to suggest that NCL intended to enter into the contract other than as carriers. On the contrary, NCL provided two confirmations. The one provided for Flights and Packages stated in terms that it was the "Travel Agent Copy". The other, the Guest Copy, stated in terms that the "*reservation had been accepted subject to the NCL booking conditions.*"

b) The booking conditions state that a binding contract was entered into when NCL confirmed the booking to the Claimant or to his travel agent. By clause 10 NCL stated that its obligations arose under the Athens Convention which included whilst the claimant was onboard, as well as when he was in the process of getting on or off the ship."

Furthermore Ms Mulligan, the defendant's customer supervisor:

"c) . . . accepted there had been a contract entered into between the Claimant and the Defendant and the course of the subsequent negotiations between the Claimant and the Defendant raise an inference that the Defendant had accepted that it had been in a contractual relationship with the Claimant. There was certainly no suggestion at that stage that it had not or that it was not the carrier for the purposes of the Athens Convention."

16. These conclusions are borne out by the contractual documentation. As set out in paragraph 9 of the judgment:

"a) The claimant contacted Flights and Packages Limited and indicated that he wanted to take up one of their advertised cruises which included 3 days in a hotel in Venice, followed by 7 days cruise on board the ship. It transpired that the Claimant paid a fee to Flights and Packages in respect of the hotel and the cruise but the flights were invoiced separately by the airline in question. . . .

b) Flights and Packages notified the Defendant of the reservation for the cruise element of the holiday. On 15th April 2013 Flights and Packages sent the Claimant an e-mail confirming the booking of a hotel in Venice on 26th June 2013 and the cruise onboard the Ship commencing on the 29th June 2013. The letter portion of the document commenced, "*Dear Guest. We act as agent and have placed this booking on your behalf with various tour operators, your party and ourselves are now subject to their booking terms and conditions.*"

c) The Defendant provided two booking confirmations. One was described as a "Guest copy" and the other as a "Travel Agent Copy". . . the "Guest copy" contains the following information: (i) the "*Travel agent/contract*" is described as being "*Flights and Packages Ltd*"; (ii) the booking date is 1st February 2013; (iii) "*reservation number 2257199*"; (iv) "*Booking Conditions. This reservation has been accepted subject to the Norwegian Cruise Line booking conditions.*" . . ."

d) The NCL April 2013-April 2014 brochure contained the Booking Conditions which include the following (emphasis added):

i. Clause 1 - "*Making your booking - a binding contract between us will come into existence if we verbally confirm your booking and provide a reservation number to you. . . If your booking is made through a travel agent a binding contract will come into existence if your travel agent receives conformation of your booking and a reservation number by any means. . .*"

ii. Clause 3. "*A binding contract between us comes into existence when we confirm your booking to you or your travel agent as set out in clause 1. . .*"

iii. Clause 10(1)- "*Subject to clause . . . 10(6) below we . . . will accept responsibility if, for example, you suffer death or personal injury or your contractual holiday arrangements are not provided as promised or prove deficient as a result of the failure of ourselves, our employees, agents or suppliers to use reasonable skill and care in making, performing or providing, as applicable, your contractual holiday arrangements . . .*"

iv. Clause 10(6) - "*The provisions of the Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 . . . ('2002 Athens Convention') apply to the cruise element of your holiday as well as the process of getting on or off the ship concerned. We are the carrier for the purposes of the Athens Convention. For any claim involving death or personal injury or delay . . . arising out of the cruise element of your holiday and/or the process of getting on or off the ship concerned the only liability we have to you is in accordance with the 2002 Athens Convention. This means that you are not entitled to make any claim which is not expressly permitted by the 2002 Athens Convention. . .*"

17. In summary, Flights and Packages informed the claimant that it was acting as agent and that the contract was subject to the tour operator's terms and conditions. The defendant provided "Travel Agent Copy" and "Guest Copy" booking confirmations and provided a reservation number. The booking confirmation said that the reservation had been accepted, subject to the defendant's booking conditions. The defendant's booking conditions state that for a booking made through a travel agent, a binding contract comes into existence with the defendant when the travel agent receives confirmation of the booking and a reservation number, which it did.
18. The defendant's arguments focus on the fact that it was Flights and Packages who advertised the holiday; it was Flights and Packages with whom the claimant arranged and booked the holiday; it was Flights and Packages whom the claimant paid, that this was done before anything was received and that the holiday included elements other than the cruise. None of this, however, affects the effect of the contractual documentation referred to above.
19. In oral submissions Mr McGrath referred to and relied upon the preamble in the defendant's booking conditions which state that, "where you book cruise only arrangements with the tour operator your contract will be with that tour operator and not with us." It further provides that, "where you book cruise only arrangements with a travel agent your contract may be with us or with the travel agent, depending on how your booking is made." In the present case, Flights and Packages made it clear at the time of booking that they were acting as agents and not as tour operators. This was confirmed by the defendant, who treated Flights and Packages as being travel agents, as borne out by the fact they issued a "Travel Agent Copy" confirmation to them and in the "Guest Copy" confirmation described them as travel agents. Although this specific point is not dealt with in the judgment, the judge was clearly correct to find that Flights and Packages were travel agents rather than tour operators. As he found: "there is no evidence that Flights and Packages ever intended to contract in any capacity other than as agent."
20. As the single judge observed:

"The judge was right to say that the defendant/applicant was the contractual carrier, at any rate, for the period of the voyage. That does not in any way preclude a contract coming into existence between the claimant and Flights and Packages Limited but that company could not be said to be the contractual carrier for the sea voyage, especially since it would hardly be for Flights and Packages Limited to start making sub-contracts with the Boatmen Union of Santorini."

21. For all these reasons this ground of appeal has no real prospect of success.

Ground 2, the judge was wrong to find that the trip occurred in the "course of carriage"

22. The Athens Convention defines course of carriage in the following way:

"with regard to the passenger and/or his cabin luggage, the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation and the period in which a passenger and his cabin luggage are transported to shore by water, land, ship or vice versa. . . ." (emphasis added)

23. The defendant submits that the wording of the Athens Convention is therefore different in relation to disembarkation at port (where the carrier will be responsible for the passenger "and/or" his cabin luggage throughout) and where the passenger is being transported from the ship to port by water transportation. In the latter instance the carrier only remains responsible if the passenger "and" his cabin luggage are being transported to shore at the time (consistent with the start and finish of a cruise, but inconsistent with "hop on, hop off" transportation provided by local providers as happened in the present case). The defendant submits that this is the natural and ordinary meaning of the wording.

24. The judge rejected this submission observing that:

"The defendant submitted that where this is being done by means of water transport then it is only included as a period of carriage if the passenger and his cabin luggage are the subject of such transportation. In my view such a literal construction of the Article would be contrary to a purposive construction of the Convention as it would mean that only disembarkation at the beginning and end of the voyage would be included. Further, and in any event, Art.1.6 defines "*cabin luggage*" as not only including luggage which the passenger has in his cabin but also luggage which otherwise in his "*possession, custody or control*". The article does not provide that the passenger must be in the process of being transported with all his cabin luggage and if a literal approach is to be applied it would be enough that when the passenger was in the course of transportation he had some or any of his possessions with him. It is difficult to envisage any situation in which a passenger might wish to go ashore during the course of a cruise without taking any of his possessions with him."

25. In my judgment the judge was clearly correct in the conclusion that he reached. The purpose of the reference to both the passenger and his cabin luggage in Article 1.8 is to ensure that there is responsibility for both during the periods of carriage identified. Responsibility does not depend on whether the passenger is being transported with his cabin luggage or whether they are being transported separately, nor would it make any sense for responsibility to be so dependent. Mr McGrath submits that such a division of responsibility is sensible and reflects the fact that the Article is meant to apply to transport at the beginning and end of the cruise rather than transport at intermediate stops. There is no language in the Article to support this distinction. Moreover, the same insensibility arises since it is perfectly possible for a passenger and his cabin luggage to be transported separately at the beginning and end stages also. Further as the judge pointed out, a passenger is always likely to be accompanied by some, at least, of his cabin luggage.

26. As the single judge observed:

"The use of the word "and" in the relevant part of article 1.8(a) is shorthand for the previous expressions "and/or". It would be little short of absurd to hold that if a passenger took some part of his cabin luggage with him to the point of disembarkation in Santorini, the Convention applied but if not, the Convention would not apply."

27. For all these reasons, there is no real prospect of ground 2 succeeding on appeal.

Ground 3, the judge was wrong to find the appellant was guilty of/responsible for fault or neglect by failing to adequately mark or give warning of the step.

28. As is not challenged, the judge found that:

"The carriers are bound to take reasonable care of their passengers. The fact is that the vast majority of cruise passengers are retired people and therefore by reason of age less able to look after themselves than younger, more able bodied persons. It follows that cruise operators and any performing carriers should take it upon themselves to exercise that care, which is commensurate with carrying elderly passengers who might be less wary of potential danger."

29. The judge found that the step was a potential hazard and it was insufficiently marked at the relevant time; that it would have been easy for the owners of the tender to place a warning sign at a visible height by the entrance or for the defendant to request for this to be done, and that, if this could not be done, the defendant should have ensured that the crew warned passengers of the hazard. As the judge observed, "What was needed was sufficient foresight to identify the hazard and sufficient common sense as to how to tackle it efficiently."

30. The defendant objects that there was no pleading that a warning sign needed to be provided, but this was specifically pleaded at paragraph 10(a) of the particulars of claim.

31. The defendant contends that the judge was wrong to find that the hazard was insufficiently marked, but this was a factual matter for the judge to determine in light of all the evidence and the recognised need to take care of elderly passengers.

32. The defendant further objects that it was not for the defendant to put up notices on the Union Boatmen of Santorini's tender or to put members of their crew on board the tender. But the defendant is answerable for the fault or neglect of the performing carrier and, in any event, crew warnings could be provided without going on board the tender.

33. In essence this ground involves a challenge to the trial judge's findings of primary fact. There is no real prospect of such an appeal succeeding.

34. As the single judge stated, "The question of actual negligence was a matter of fact and degree for the judge and this court would not interfere with the judge's findings."

Conclusion

35. For all these reasons the renewed application for permission to appeal must be refused. Given that ground 2 of the application concerns a novel point of law, I consider that the decision should have a neutral citation so that it can be reported in accordance with Practice Direction (Citation of Authorities) [2001] 1 WLR 1001.

Order: Application refused.