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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

MELISSA JANE DINSMORE (A MINOR) BY SANDRA DINSMORE HER MOTHER AND NEXT FRIEND

-v-

BALKAN TOURS LIMITED

DEENY J

[1] The plaintiff, who was born on 15 July 1987, sues for personal injuries sustained by her on holiday in Bulgaria on 23 May 1994. Mr Alan Comerton QC appeared with Mr Copeland for the plaintiff and Mr Gillespie appeared for the defendant. I was informed by counsel that the delay in bringing the action to trial was caused by difficulties with legal aid and the illness and subsequent death of the principal solicitor in the office of the plaintiff's solicitors. The action arises out of the facts I now set out.

[2] On or about 24 March 1994 the plaintiff's mother Sandra Dinsmore arranged a holiday through Travel World, Lisburn Road, Belfast. For these purposes they were acting as agents of the defendant and no point arises. The holiday was to be for Mrs Dinsmore, the plaintiff, her brother and Mrs Dinsmore's then partner Gilmore Catterson. They all travelled out to Bulgaria together on a flight organised by the defendants on 22 May 1994. They checked into the Hotel Mercury as arranged as part of the package holiday. On the following morning a courier from Balkan Tours addressed the holidaymakers who had flown in the night before. He explained various relevant matters to them.

[3] According to the evidence of Mr Catterson the representative, who was in his 30's and English, recommended the Hotel Saturn next door for their use but explained that they would have to pay for some of the facilities there such

as sunbeds. They would not have to pay for the swimming pool. This was relevant as the Hotel Mercury had no swimming pool.

[4] It was put to Mr Catterson in cross-examination that the representative who had addressed him was in fact a Bulgarian called Stefan Buhchev. He did not disagree with this suggestion. It was put to Mr Catterson that after explaining other matters Mr Buhchev would have invited questions which Mr Catterson said was probably right. It was put to him that in answer to questions he would have said that there were outdoor pools at two other hotels one of which was indeed the Saturn but that he believes he would have said there were charges for use. This latter part Mr Catterson did not remember.

[5] Mrs Dinsmore in her evidence said that they did ask where the swimming pool was and that they were directed to the Hotel Saturn as the nearest to their own hotel. The defence called Mr Stefan Buhchev. He had been one of two representatives, both Bulgarian, for the defendant at the time in question. He had ceased to work for them many years ago, but was still in the tourism business. I thought him an honest witness upon whom reliance could be placed. He did not pretend to remember the actual meeting but it was one of many which he would have held at that time and he knew the structure thereof. He went through the sort of material that he would have informed the holidaymakers about. He agreed that he would be asked questions at the end of his tour and would sometimes be asked about swimming pools. He would tell them of the hotels which did have swimming pools. At this time they were open to the public and could be used against a local fee or charge. He knew there was some charge.

[6] The Hotel Saturn was not operated by Balkan Tours Limited but by a company in London which was wholly unconnected with the defendant.

[7] He was insistent that he did not include the pools in his presentation, only in response to questions. It was not in the defendant's programme. Pools were not common at this time with only 4 in approximately 100 hotels. Any member of the public, Bulgarian or visitor, could use those pools provided they paid a local charge. There had been a system of vouchers in the past under communist rule but that was not the case in 1994. He was not instructed to tell the defendant's clients about the Saturn Hotel but did so if asked. At no stage did he ever make arrangements himself with the Saturn Hotel for the convenience of the defendant's customers. He could not say there was a system by which this pool was provided by the Saturn. The defendant obviously knew there was a pool there. The defendant's employee knew there was a pool there but there was nothing organised. He did not recommend it.

[8] In re-examination he said most people preferred the beach in any event, which he told me was only approximately 200 metres from the Mercury Hotel ie only very slightly further than the pool in the Hotel Saturn. It was possible that the charge which was subsequently paid by Mr Catterson was only for the sunbeds and not the pool.

[9] A description of this evidence is a necessary precursor to what then occurred. Mr Catterson with Mrs Dinsmore and the two children then did indeed progress to the Hotel Saturn. They went through the hotel to the swimming pool. He paid for the hire of sunbeds for Mrs Dinsmore and himself. There was a significant number of other clients of the defendants who went along at that time. The children went for a swim. He does not recall any entrance fee being asked for. After some time he went in with the children to buy them confectionary in the lobby of the hotel. A plan and photographs of that lobby were available to the court. On returning to the pool after their purchase the children were running. To his horror Melissa who was then only 6 years old ran straight into a plate-glass wall which crashed about her. She was screaming and other people were shouting. She was cut and bleeding. A taxi was obtained and they went to a local medical centre for treatment. She was treated there and when she returned home, but has been left with noticeable facial scarring.

[10] He himself had thought this was an empty space and not a glass wall. They were so clear, there was no warning. Although he was heading for the adjacent glass doors he had not noticed that there was glass on either side of those doors. He said there was nothing stuck to the glass ie to warn of its presence. He later put it that he did not remember seeing signs on the door. He was cross-examined about this but maintained that he had noticed that there were no signs both before and at the time although he admitted that he did not later return to the Hotel Saturn. He was asked about the glass on the ground after the accident and he said it did not appear to have any stickers on it.

[11] The plaintiff herself had no recollection of the accident and gave no evidence about it. Mrs Dinsmore had no evidence to give on the issue of negligence.

[12] Mr Stefan Buhchev was called by the defendants as previously mentioned. He became aware of the plaintiff's accident the same afternoon. He was notified by the manageress of the Hotel Mercury. He went to the Saturn Hotel to see what had happened. He was given information which was not led before me save to confirm that there was indeed somebody selling sweets and souvenirs in the lobby of their hotel. He was shown the location of the accident by some hotel employee. The glass had gone. He was asked if there were stickers, on the other side of the door but he could not be

positive about that. A year later there were stickers but that, obviously, does not assist the defendants.

[13] I was addressed only indirectly on the issue of the proper law to apply to this issue of negligence. It seems to me that the fons et origo on this issue is the judgment of Willes J on behalf of the Court of Exchequer Chamber in Phillips v Eyre [1870] L.R.6 Q.B.1 at pp28-29.

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England…Secondly, the act must not have been justifiable by the law of the place where it was done."

This quotation was cited with approval by Lord Hodson in the House of Lords in Chaplin v Boys [1969] 2 All ER 1085. There has been considerable case law about the issue as to what "justifiable by the law of the place" means. However it is not necessary for me to deal with that here. I say that because the plaintiff called Mr Finn Sherry, Chartered Civil Engineer, to give expert evidence with relation to that. He was emphatic that as long ago as 1982 glass of a kind fragile enough to break on impact from a small child would not have been permitted to have been included in a building in the United Kingdom. In his opinion, given the particular nature of the location of this glass, it would have been replaced by any reasonable hotel owner. The presence of signs on the glass or sofas or flowers or some other method of preventing a child running in to the glass would have mitigated any negligence on the part of the hotel.

It occurs to me that a child used to the safety standards prevailing in the United Kingdom may need to be warned by a tour operator that such standards do not exist if they were to visit a country less well off or developed than our own. However I do not need to find that here. I find as a fact that the glass was fragile enough to break on the impact of a 6 year old child. That is clearly unsuitable to be placed in a location where indeed children were on holiday and will be running back and forwards. Independently of that, the failure, as I find on the balance of probabilities, to place any stickers or other warnings about the nature of the glass constituted a failure to take care on the part of the hotel owner. I do not have to decide whether or not the state of the glass was "justifiable" by the law of Bulgaria because I heard no evidence on that point. Although Mr Buhchev had come from Bulgaria he did not seek to refer to any material, or even express a lay opinion about the matter.

[14] One therefore turns to the real issue in the action which is whether the defendants in this action are vicariously liable for the negligence of the owners or occupiers of the Hotel Saturn, Sunny Beach, Bulgaria. In addressing that I note that it was expressly opened by Mr Comerton that the plaintiff here does rely on the contract between the parties rather than negligence. This is obviously a concession one can understand in the circumstances of the case where it would be unrealistic for a tour operator to inspect and ensure the safety not of premises to which they were sending citizens of this country but to other premises which those citizens might possibly visit in the course of the holiday. That would be to extend the duty of care in negligence too far.

[15] It can be seen that this case is easily distinguishable from the decision of Phillips J, as he then was, in Wilson v Best Travel Limited [1993] 1 All ER 353. The learned judge in that case found that the duty of a tour operator to ensure reasonable safety was discharged if the tour operator checked that local safety regulations had been compiled with and the duty did not extend to excluding a hotel (for their guests to stay in) whose characteristics, so far as safety was concerned, failed to satisfy the current standards applying in England provided always that the absence of the relevant safety feature was not such that a reasonable holidaymaker might decline to take a holiday at the hotel in question eg "if a hotel included in a brochure had no fire precautions at all." It is important to remember that in this case the defendant did not include the Hotel Saturn in their brochure. The plaintiff was not staying there nor, as I have said, did I hear any evidence about the safety regulations in force in Bulgaria at that time.

[16] My attention was also drawn to a decision of the Privy Council in Wong Mee Wan v Wan Kin Travel Service Limited and Others [1996] 1 WLR 38 [1995] 4 All ER 745. In that case the plaintiff's daughter, a resident of Hong Kong, bought a package tour for part of mainland China offered by the first defendant, a Hong Kong travel company. The tour was for an all in price including transportation as specified in the itinerary. The main purpose of the tour was to visit a lake in China and part of the tour consisted of a lake crossing. In the course of crossing the lake, and owing to the negligence of the driver of a speed boat employed by the third defendant, the plaintiff's daughter was thrown into the water and drowned. Their Lordships concluded that whether a contract was one where the defendant agreed merely as agent to arrange for services to be provided by others, in which case there was an implied term that he would use reasonable care and skill in selecting those other persons or one where the defendant agreed to supply the services, in which case subject to any exemption clause there was an implied term that he would as supplier carry out the services with reasonable care and skill, was a matter of construction of the particular contract. (P746).

[17] The statement of claim herein had been amended several times from its original service on 14 May 1997. I gave leave to further amend it on 25 January 2005 at the hearing of the action by the addition of the following paragraph 3:

> "It was a term of the said contract that the plaintiff's party could use the swimming facilities of the Saturn Hotel at the Sunny Beach Resort."

However it should be noted that this leave was granted on foot of an important concession by Mr Comerton QC. When he first applied to amend Mr Gillespie strongly objected. He did so, not only on the basis of the lateness of the hour, nearly 11 years after the cause of action arose. He also was taken by surprise. Furthermore he did know of the existence of the witness who had taken the original bookings from Mrs Dinsmore but because of the state of the pleadings hitherto he did not have her available. He would have to apply to adjourn the case. Subsequently after some discussion Mr Comerton accepted that his amendment should not relate to anything that was said in Belfast at the time of the making of the original contract but should deal with the matter set out otherwise in the evidence. For completeness I should say that this is a concession made in the context of the case. Not only would Mr Gillespie have been entitled to an adjournment of the matter in the circumstances if the concession had not been made, but he said, on the second day, that his instructions were that the travel agent employee concerned would have denied that any such thing was said or was an oral part of the contract as she had never been to the resort in question and had no knowledge that such facilities were indeed available. It is also right to say that Mrs Dinsmore's then partner Mr Catterson had a somewhat different recollection of the alleged conversation with the travel agent than Mrs Dinsmore in that he seemed to believe that it had happened on the second visit to the travel agent when he attended to pay the balance of the price of the holiday ie almost certainly after the contract had already been made by Mrs Dinsmore. Furthermore a dispute between counsel in the course of the giving of evidence by Mrs Dinsmore, as to the admission or otherwise a statement from her was resolved by the court being invited to note that she had told her instructing solicitor of the alleged conversation with the travel agent but had done so only in June 1998, some 4 years after the accident. In those circumstances it might be thought that it is very unlikely, even if the case had been adjourned that the plaintiff could have satisfied the court that an undertaking regarding swimming pool facilities had been given as part of the contract when it was initially made in Belfast.

[18] It is appropriate to examine now the terms of the contract between the parties to see if liability for this accident does rest with the defendant. There were four printed forms which had been completed in manuscript or typescript (Exhibit 6, 7, 8 and 9) setting out the essential details of the holiday

which had been booked, albeit with the repeated error of describing Mr Gilmore Catterson as Mr C Gilmore. In Exhibit 8 there is clear reference to the parties agreeing to the booking conditions which had been drawn to the attention of the consumer. Although that document is signed, clearly wrongly, "C Gilmore" there was no issue between the parties in fact. They agreed that the terms of the contract, with the possible exception of what was said at the meeting on the first day of the holiday in Sunny Beach, were to be found in the Balkans Tour brochure of 1994. It is clear that the proper law of this contract is the law of Northern Ireland – see for example condition 10 on page 19 of the brochure.

[19] As indicated above the plaintiff and her family were staying at the Hotel Mercury which is mentioned on page 5 of the brochure which deals with the resort of Sunny Beach in Bulgaria. The Hotel Saturn is not mentioned at all. There is no reference to a swimming pool in the pages relating to Sunny Beach, save at Hotel Globus. They are preceded by pages 2 and 3 of the brochure which contain some general information about the holidays. Again there seems to be no reference that would convey that the defendants were providing access to a swimming pool as part of the holiday which the consumer was purchasing.

[20] Not surprisingly there is a certain amount of reference to the sea and the beach which was clearly shown in the brochure photographs. Mr Gillespie drew attention to the passage headed "Excursions" on page 3 of the brochure. It points out that excursions were available to a variety of places but that the defendants "DO NOT organise any excursions but our representative will be happy to arrange excursions as a service to clients without any liability by Balkan Tours." He argued that if the defendants were excluding liability for excursions which were mentioned in the brochure, a fortiori, the defendants could not be held responsible for a part of the plaintiff's holiday which they were neither providing nor even arranging with a third party.

[21] I note that on page 4 of the brochure, which dealt with Sunny Beach it was said of the Hotel Globus that: "There is an indoor swimming pool and a health centre where a local charge is made in sterling for the use of these facilities." This would be consistent with the defendants contention that the most they did was inform the holidaymakers, through their representative, of where the swimming pools were but cautioning them that a charge would be made.

[22] The Booking Conditions which I described as important are to be found at pages 18 and 19 of the brochure. I set out the two most relevant in full:

> "22. Liability
> Balkantours will accept liability for matters which arise as a direct result of the Company's negligence and/or breach of its contractual duty to exercise care in making arrangements for its passengers, including any acts or omissions by its employees or agents. Further, Balkantours will accept liability for any negligent act or omission of its suppliers who may operate elements of your holiday arrangements, including any claim involving death, personal injury or illness. Liability does not include claims arising out of carriage by air or sea (see Scheduled Carriers' Liability above).
>
> 23. Personal injury (unconnected with arrangements made by us)
> Should you or any member of you party suffer illness, personal injury or death, through any misadventure during your holiday out of an activity which does not form part of our holiday arrangements, nor part of any excursion sold through us, we shall offer you assistance in pursuing any claim you intend making against the offending party. This includes advice and guidance and my include a contribution towards initial legal costs and expenses which in our opinion or reasonable and appropriate in the circumstances, provided that you request such assistance within 90 days from the date of the misadventure."

[23] It was the case that the two witnesses from the defendants emphatically denied making any "arrangements" for the passengers with the Hotel Saturn and there was no evidence to contradict their testimony. Although the testimony of Mrs Lynn was a little difficult to follow at times, in this regard she was fully borne out by Mr Buhchev. Nor, it can be seen, was the swimming pool expressly referred to in the contract.

[24] With regard to the second sentence the plaintiff must contend that the defendants are liable for a "negligent act or omission of its suppliers who may operate elements of your holiday arrangements…." However again the evidence is contrary to this being one of the holiday arrangements. It was also contrary to the Hotel Saturn being one of "its suppliers." Mr Gillespie contended that there must be some commercial relationship between the defendant and one of its suppliers and there was none here. It would be arguable that there might be some arrangement with some other company to supply a part of the holiday arrangements in return for some duty

undertaken by the defendant without money changing hands. But there is no evidence even of that here. It was the case that, perhaps surprisingly, neither the plaintiff's mother nor Mr Catterson actually returned to the Hotel Saturn to pursue the point or to establish what the nature of the relationship was between Balkan Tours and the swimming pool. Nor does the rather vague evidence of what was or was not said in Belfast help.

[25] I have to say, with some regret, that the circumstances here seem to fit more comfortably into "…any misadventure during your holiday out of an activity which does not form part of our holiday arrangements…." Once more there seems to be no evidence that help was sought or given to pursue any claim directly against the Hotel Saturn. It may well be that such civil claims were not available in Bulgaria at that time or, if they were, would yield compensation of a level that was not attractive enough to make the effort worth the while.

Mr Comerton sought to argue that it was foreseeable that the child would use this lobby on the way to the pool. That might well be right but that could be said of many other things in a holiday without such reasonable foreseeability creating any duty of care, under contract or otherwise, on the travel company. He argued that this situation was different from the provision of a park or a restaurant. This hotel was used by children a lot eg on the evidence of Mr Graham, a witness called by the defendant. But that does not bring the situation within Condition 22.

[26] I accept his submission that some small charge would not prevent this being part of the arrangements for the holiday. But the word "arrangements" on its own, even if applicable here, in the first sentence of condition 22 would not be enough because it must be coupled with the company's negligence or breach of contractual duty. Where the defendant went further, and quite far, was to accept liability for the negligence "of its suppliers who may operate elements of your holiday arrangements." It may be said that they were working in parallel with the Regulations which had come into force by then.

[27] For completeness I refer to The Package Travel, Package Holidays and Package Tours Regulations 1992 (UK No. 3288). These do extend to Northern Ireland and came into force on 23 December 1992. By virtue of the definition and Regulation 2 they applied to package holiday in question. Regulation 15 renders a party in the position of the defendant here:

> "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."

[28] It can be seen therefore that the plaintiff, to benefit from this provision, would have to show that the operator of the swimming pool at the Hotel Saturn was a supplier of services as part of the performance of the obligations under the contract. As has been shown the availability of swimming at this swimming pool was not one of the obligations under the contract here. That interpretation of this Regulation seems clear even without reference to the head note: "Liability of other party to the contract for proper performance of obligations under contract."

[29] My views on the interpretation of that Regulation in the light of the evidence make it unnecessary to rule on Mr Gillespie's alternative submission ie that the Regulations did not cover services which were not "pre-arranged" but which were provided at the resort, even by the other party to the contract. For that submission he relied on certain unreported cases cited in and the views of the author of Sigerson, Travel Law and Litigation (2004).

[30] Reference was made to the dictionary definition of supplier. A supplier is one who supplies ie "to make good, to satisfy, to provide, furnish, to fill, occupy (as a substitute) to serve instead of." (Chambers English Dictionary).

In R v Delgado [1984] 1 All ER 449 the Court of Appeal in England was considering the meaning of supply in the context of the misuse of drugs. It rightly said that in the light of the shorter Oxford English Dictionary a large number of definitions is given "but they have a common feature, vis that in the word 'supply' is inherent the furnishing or providing of something which is wanted." Words and Phrases Legally Defined does not have a definition that expressly refers to the supply of services. Stroud's Dictionary of Words and Phrases (6th Edition) 2000 deals with such cases under the rubric of the supply of good or services under the Value Added Tax Act 1983. However they do not seem to really advance the matter with the possible exception of Granada Group v Customs and Excise Commissioners [1991] 2 VATTR 104. There it was held that the provision of free meals by a motor-way service station to the drivers of coaches who brought their coaches to the service station was a "Supply" within the meaning of the Act.

[31] It seems to me that it would be a distortion of language to say that the existence of a swimming pool in a neighbouring hotel made that hotel one of the defendants suppliers any more than the existence of a good restaurant in another hotel, frequented by the defendants customers, would make it a supplier. That is reinforced by the concluding words of the first sentence of condition 22 which includes "any acts or omissions by its employees or agents." There has to be some kind of legal relationship between the

defendant and the swimming pool at the Hotel Saturn for it to become an agent. That is expressly denied by the defendants' witnesses and there is no documentary or oral evidence to contradict it.

[32] Another aspect of the matter that would tell against the plaintiff is the absence of any consideration for any contractual term at the commencement of the holiday. The holiday had been booked and paid for. The representative would, I think, have got short shrift from Mr Catterson if he had asked for an additional payment from him in return for the information that there was a swimming pool nearby which the children could use. Applying the general rules regarding the implication of terms of a contract would lead one not to imply a term in this contract that a swimming pool would be available near the passengers' hotel, whether for a small charge or otherwise. It is in contract, effectively, that the plaintiff sues. Therefore, and not without regret, I come to the conclusion that the minor plaintiff cannot succeed here, and I find for the defendant.