Neutral citation [2018] EWHC 3140 (Admlty)

Claim No. AD-2017-000003

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

BEFORE ADMIRALTY REGISTRAR KAY QC

B E T W E E N:-

DR SUCHETA MAHAPATRA

Claimant

- and –

TUI UK LIMITED

Defendant

Appearances
For the Claimant – Ms Sarah Prager instructed by Irwin Mitchell
For the Defendant – Mr Alex Carington instructed by Miles Fanning Legal
Hearing date: 24th September 2018

APPROVED JUDGMENT
(Handed down on the 16th November 2018)

The Application

1. There are two applications before the Court: (a) The Defendant's application for summary judgment dated 24th July 2018 and (b) The Claimant's cross-application to amend her Particulars of Claim dated 12th September 2018.

Background

2. This claim concerns an incident which occurred on the 16th January 2015 whilst the Defendant's cruise ship "THOMSON DREAM" ("The Ship") was lying alongside in the Port of Havana, Cuba.

3. On the 9th January 2017 the Claimant caused a claim form to be issued against the Defendant alleging that she slipped on standing water on what has been described as the

"gangway". The basis of the claim is that the Claimant had disembarked from an exit in the side of the ship, had passed over the gangway which is between the ship and the permanent walkway which, as is apparent from the photographs provided, is a fixed structure leading to the passenger terminus situated in the port. She had apparently reached a position on that permanent walkway when she slipped and was injured. Particulars of Claim were served dated 2nd May 2017. In the Particulars of Claim it is contended that the Defendant was a carrier owing duties pursuant to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 ('*The Convention*') as enacted by s.183 of the Merchant Shipping Act 1995. Pursuant to Art 1(8) of the Convention carriage is defined as including "*with regard to the passenger and his cabin luggage, the period during which the passenger and/or his cabin baggage are onboard the ship or in the course of embarkation or disembarkation.*" It was pleaded for the Claimant that, as she was in the course of disembarkation, the Defendant was liable for the injury to her regardless of whether or not the Defendant owned or operated the gangway in question.

4. By its Defence filed on the 5th June 2017 the Defendant has drawn attention to the proviso to Art 1(8) of the Convention which provides: "*However with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation*" and contended that the injury occurred on a part of the structure which formed part of the port structure owned by the Cuban Ministry of Transportation and, thus, was outside the scope of the Convention.

The Defendant's Case

5. The Defendant has applied for summary judgment pursuant to CPR r. 24.2 on the basis that the Claimant has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at a trial.
6. For the Defendant Mr Alex Carington submitted:
    a. The claim is currently pleaded under the Athens Convention. The key issue concerning the applicability of the Athens Convention is whether the Claimant's accident occurred during the course of carriage. The Defendant avers that the Claimant's fall did not occur during the course of carriage within the meaning of the Athens Convention and so the Convention does not apply. That is supported

by the photographic evidence which indicates that the fall occurred at some distance from the ship and on a part of the structure which is within the proviso Art 1(8) of the Convention referred to above.

b. The relevant photographs are exhibited to the witness statement of Mr Mark Fanning, dated 24th July 2018 made in support of the Defendant's application. The photographs show the Claimant being treated where she fell on a walkway and that the walkway is apparently a substantial permanent structure forming part of the Port installation. It is a port installation within the natural meaning of the definition and so within the meaning of the Convention.

c. The liability of shipowners/carriers under the Convention has been considered in the case of *Jennings v TUI UK Ltd (t/a Thomson Cruises)* [2018] EWHC 82 (Admlty). The subject matter of the case is substantially similar to that in *Jennings.* The Court should not be persuaded by any submissions based upon the decision of Hamblen LJ in *Collins v Lawrence* [2017] EWCA 2268 (Civ). Furthermore the Claimant's application for permission to amend the Particulars of Claim to include a claim under the Package (Travel etc) Regulations 1992 should not be allowed because:

    i. The application to amend has been made after the expiry of the relevant limitation period for personal injury claims. (The alleged accident occurred on the 16th January 2015 and the application to amend was made on the 12th September 2018, which is over 3 years after the accident assuming the Athens Convention Limitation Period of 2 years does not apply).

    ii. Pursuant to CPR 17.4(2), the Court may only allow amendment if the new claim arises out of the same facts or substantially the same facts. This will be a matter for the Court to consider the Claimant now needs to plead and rely upon to the existence of a package contract with the services under that contract including the use of the Port facilities which are not facts previously pleaded.

    iii. The Court has a discretion whether to allow such amendments on general principles which may include cases that are very weak and circumstances where there is been unjustifiable delay (see *Lokhova v Longmuir* [2016] EWHC 2579 (QB)).

iv. The Court should not exercise its discretion in favour of the Claimant in this case.

The Claimant's Case

7. Ms Sarah Prager, for the Claimant, submitted:
    a. That the decision of Hamblen LJ in *Collins v Lawrence*, who identified the relevant issue to be whether the passenger was in the course of "disembarkation" when the injury occurred and agreed with HHJ Simpkiss' conclusion on the facts of that case, should be followed so that the injury would be one which did occur during carriage so as to be embraced by the Convention.
    b. In the alternative she submitted that it would be proper to allow the amendment sought by the Claimant's application dated 12th September 2018 on the basis that the claim arose out of substantially the same facts and;
    c. That the court should exercise its discretion in favour of the Claimant;
    d. The delay in making the application to amend was not unjustifiable because the Claimant had to wait for the Defence before applying to make the amendment.

Consideration

The principles applicable to applications made pursuant to CPR Part 24

8. This matter concerns an application for summary judgment for the Defendant on the ground that the Claimant has no real prospect of successfully pursuing the claim. The starting point is to consider the principles relevant to the making of such an order. These may be summarised as follows:
    a. *Summary judgment.* The Civil Procedure Rules Part 24.2 provides: "*Grounds for summary judgment The court may give summary judgment against a claimant or defendant on the whole of a claim or a particular issue if–(a) it considers that– (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial*."
    b. The leading authorities which provide guidance on how CPR Pt 24 is to be applied are set out in the White Book. They are: *Swain v Hillman* [2001] 1 All E.R. 91 (CA), *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550 (CA), *Three Rivers DC v Bank of England (No.3) (Summary*

Judgment) [2001] UKHL 16; [2003] 2 A.C. 12; [2001] All E.R. 513; [2001] Lloyd's Rep. Bank. 125 (HL), *ED&F Man Liquid Products v. Patel* [2003] EWCA Civ 472, *Trustees of Sir John Morden's Charity v Mayrick* [2007] EWCA Civ 4 (CA), *Nigeria v. Santolina* [2007] EWHC Civ 437 (Ch), *Apvodedo NV v. Collins* [2008] E.W.H.C. 775 (Ch) and *Easyair Ltd. (t.a Openair) v. Opal Telecom Ltd* [2009] EWHC 339 (Ch). The authorities demonstrate that:

i. Although the Court should not conduct a mini trial or adopt the standard of proof, ie a balance of probabilities which would be used at a trial, the court should consider the evidence which can reasonably be expected to be available at the trial. It has been said that the rule "*is designed to deal with cases which are not fit for trial at all*";

ii. the test of "*no real prospect of succeeding*" requires the judge to take an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment;

iii. it is a discretionary power;

iv. the court must carry out the necessary exercise of assessment but not by conducting a trial or a fact finding exercise;

v. it is the assessment of the case as a whole which must be looked at;

vi. accordingly, "*the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality*";

vii. In *Apvodedo NV v. Collins* [2008] E.W.H.C. 775 (Ch) it was held that it is not appropriate, on an application for summary judgment, to resolve a complex question of law and fact, the determination of which requires the trial of the issue having regard to all the evidence.

c. In *Easyair Ltd t/a Openair v Opal Telecom Ltd* [2009] EWHC 339 Lewison J., as he then was, provided a helpful summary:

i. The court must consider whether the Claimant has a "real" as opposed to a "fanciful" prospect of success*: Swain v Hillman* [2001] 2 All ER 91;

ii. A "realistic" case is one that carries some degree of conviction. This means a case that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii. In reaching its conclusion the court must not conduct a "mini−trial": *Swain v Hillman*;

iv. This does not mean that the court must take at face value and without analysis everything that a party says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel at [10]*;

v. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi. Where a summary judgment application gives rise to a short point of law or construction the court should decide that point of law if it has before it all the evidence necessary for a proper determination and provided the parties have (as here) had sufficient time to address the point in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim.

d. Although the present application is founded solely upon the operation of CPR 24 it is to be noted that there is a connection between the operation of CPR Parts 3 and 24. In *Taylor v. Midland Bank Trust Co. Ltd (No.2)* [2002] WTLR 95 it was held that, in a suitable case, an application for summary judgment may be combined with an application to strike out under CPR Pt 3.4 and the court may treat an application for summary judgment as if it was one to strike out and vice versa. CPR Part 3.4 provides: "Power to strike out a statement of case - 3.4 (2) *The court may strike out a statement of case if it appears to the court – (a) That the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) That the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; (c)That there has been a failure to comply with a rule, practice direction or court order*."

e. With respect to the operation of CPR Part 3 the White Book contains the following guidance: "*The statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L. Feb 2, 2000, C.A.). A*

claim or defence may be struck out as being not a valid claim or defence as a matter of law (Price Meats Ltd. v Barclays Bank PLC [2000] 2 All ER (Comm) 346, ChD. However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v. British Airways, The Times, January 2000 referring to Barratt v.Enfield B,C, [1989] 3 W.L.R. 83, HL, [1999] E All E.R. 193). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v. McAlpine-Brown [2000] LTL January 19, CA). An application to strike out should not be granted unless the court is certain that the claim (or defence) is bound to fail (Hughes v. Colin Richards & Co. [2004] EWCA \Civ. 266; [2004] P.N.L.R. 35, CA).

Whether the Defendant's application under CPR Part 24 should succeed.

9. Although Ms Prager sought to argue that there is an issue of fact as to where the Claimant was injured, in my judgment the photographic evidence available clearly indicates that the Claimant was injured in a position on the walkway or structure which was a permanent fixture operated by the port authority. Ms Prager acknowledged that there is no evidence available which remotely suggests any contrary conclusion. In these circumstances the court should carry out an exercise of assessment to establish whether there is an absence of reality in a case being put forward. In my view the suggestion that it might be established that the injury occurred other than in an area of the structure which was a permanent part of the port structure lacks reality and should be disregarded for the purposes of deciding the present application.

10. However, as I understand the position, Ms Prager sought not only to argue that the actual position where the injury took place is a factual matter which is in issue, which I have considered above, but there is also an issue as to whether the circumstances in which the injury took place fall within the provisions of Art.1(8) of the Convention. The full wording of Art.1(8) of the Convention provides that carriage covers "*with regard to the passenger and 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 during which the passenger and his cabin luggage are transported by water from 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. However, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation" (emphasis added).

11. In *Jennings v TUI UK Ltd (t/a Thomson Cruises)* [2018] EWHC 82 (Admlty), I was asked to consider whether a passenger who was in the process of disembarking from, as it happens, the same vessel in the port of Malaga and was injured whilst on the fixed walkway leading to the terminus was being 'carried' within the provisions of Art 1(8) of the Convention. I held that he was not because of the proviso contained at the end of Art. 1(8), underlined above, and because the area in which the injury occurred was within the proviso as being a fixed port installation. Ms Prager recognised that, in the present case, the injury occurred in or on part of the port installation but drew attention not only to the decision of HHJ Simpkiss in *Collins v Lawrence* [2017] 1 Lloyds Rep 13, which I did consider in *Jennings*, but also to the views of Hamblen LJ in the course of deciding whether the claimant in that case should be given permission to appeal. Although Ms Prager did not put it so bluntly in the course of the hearing I consider that she was urging me to conclude that my decision in *Jennings* was wrongly decided or, at least, there is a real prospect of successfully arguing that it was.

12. In *Collins v Lawrence* [2017] 1 Lloyds Rep 13, a case in which Ms Prager appeared for the Claimant, HHJ Simpkiss held that the Convention applied where a passenger was injured when he fell in the course of disembarking, by way of free standing steps leading from a grounded fishing boat to a shingle beach, so that the claim became time barred under the more restricted provisions as to time limitation which arise under the Convention. Ms Prager also appeared before Hamblen LJ on an application for permission to appeal the above decision. Hamblen LJ upheld the reasoning of HHJ Simpkiss, refused permission to appeal and gave reasons for that decision which he caused to be reported.

13. In *Jennings v TUI UK Ltd (t/a Thomson Cruises)* I held that the walkway was a fixed structure set on the quay and therefore, at the time of the incident, the Claimant was in or on a port installation as referred to in the exception set out in Art 1(8) of the Convention and therefore the injury did not occur at a time which was included during a period of

carriage for the purposes of the Convention. I set out my reasons for distinguishing the decision of *Collins v Lawrence* as decided by HHJ Simpkiss and I do not consider that they need to be repeated here. The additional question is whether the views of Hamblen LJ in *Collins v Lawrence* should cause me to change the approach I adopted in *Jennings.* It is interesting to note the timing of the decisions.

14. The hearing in *Jennings* took place on the on the 14th November 2017 and the judgment was handed down on the 22nd January 2018. In the meantime Hamblen LJ gave his judgment on the 23rd November 2017. Each of the decisions was thus, as I understand, made without any reference to the other.

15. It was not argued in *Collins* that the proviso to Art.1(8) of the Convention specifically applied in that case. Thus neither the application of the proviso nor the question of whether the type of fixed walkway relevant in *Jennings* case came within the proviso contained in the Convention. In paragraph 19 of his judgment Hamblen LJ considered the matter of the "gangway" provided by the shore facility. He was dealing with an argument raised by analogy and it is not clear whether he was referring to the "gangway" which usually refers to the moveable gangway placed between a ship and any fixed port structure which might properly be regarded as part of the port installation. In my judgment there is a distinction between a moveable "gangway" and a walkway which is, in my view, part of the port installation. Whether an injury which occurs on the moveable gangway is to be considered as taking place in the course of carriage has not, so far as I am aware, been considered or decided and it is a moot point as to whether it would be considered as part of the port installation for the purposes of the proviso. The issue of whether a walkway which forms part of the fixed structure is, or is not, a port installation or even forms part of the quay itself was not a matter which was necessary for the decision in *Collins* and if, which I do not think is the case, Hamblen LJ was intending to express a view on that aspect I respectfully consider that such a view would be *obiter*.

16. For the reasons set out I do not consider that knowledge of Hamblen LJ's judgment would have caused me to come to a different conclusion in *Jennings.* During the present hearing there was some consideration as to whether the decision in *Jennings* has been appealed or been the subject of an application for permission to appeal. In the event counsel considered that it had not and, if it has, the results of such appeal or application

have not been brought to my attention. *Jennings* is a decision of the Admiralty Court which deals with the specific issue of whether the fixed walkway in a port is part of the port installation for the purposes of the proviso to Art 1(8) of the Convention and thereby remains the law as presently decided until it is either appealed or held to be wrongly decided.

17. As the facts in the present case indicate that the injury took place on a structure which is, as I decided in *Jennings*, to be considered as part of the port installation for the purpose of the proviso in Art 1(8) of the Convention a contrary decision in this case would be inconsistent with the decision in the *Jennings* case. In my judgment it follows that the Claimant's claim to have been injured in the course of carriage is caught by the proviso contained in Art 1(8) of the Convention and has no reasonable prospect of success. Applying the principles referable to applications made pursuant to CPR 24 I therefore consider that the Defendant's application should succeed in respect of the claim presently pleaded.

The Claimant's application to amend the Particulars of Claim

18. However, as so frequently occurs in this type of application, the Claimant has issued an application to amend her Particulars of Claim so as to raise issues which should not be subjected to the attention of CPR Part 24 and thereby defeat the Defendant's application. In such cases the court must exercise its discretion as to whether the proposed amendments should be allowed. Pursuant to CPR Part 17.3 the court should consider whether the proposed amendments do themselves have a real prospect of success and where the application is made after the expiry of a relevant limitation period it may, by virtue of the provisions of CPR Part 17.4(2), only allow the amendments if they arise out of the same or substantially the same facts as have been pleaded. In addition the court should, in exercising its discretion, consider the strength of the claim and whether there has been delay in making the application to amend and whether the delay can be justified (see *Lokhova v Longmuir* [2016] EWHC 2579 (QB)).

19. The proposed amendments are attached to the Claimant's application dated the 12th September 2018. The first amendment is contained in Paragraph 7. It relates to the original claim as pleaded and seeks to pray in aid the decision of Hamblen LJ in *Collins v Lawrence.* This aspect has already been considered above and since I have already decided that that decision does not assist the Claimant's case it follows that it is not an

amendment which provides the Claimant with a real prospect of success on the claim. Accordingly, in my judgment, permission to make that amendment should not be allowed.

20. Paragraphs 8 to 12 and the additional part of paragraph 13 seek to introduce a claim under the Package Travel etc Regulations of 1992 ("the Regulations"). The incident relating to the alleged injury took place on the 16th January 2015 and the application to amend was therefore made over 3 years after the injury occurred. The claim has therefore been made outside a relevant time limit applicable to that type of claim. The new pleading alleges that the holiday provided by the Defendant was a Package contract within the meaning of Regulation 2 of the Regulations and that the owners or the operators of the 'gangway' were suppliers of services within Regulation 15 of the Regulations. It is further alleged that it was an implied term of the Package contract that the services would be provided with reasonable skill and care. Although the facts of the injury are the same for both the claim under the Athens Convention, originally pleaded, and the proposed amendment under the Regulations nonetheless it appears to me that the amendment involves the introduction of new facts which were not originally pleaded and does not arise out of substantially the same facts as originally pleaded. Applying CPR Part 17.4(2) it therefore appears to me that it is not permissible to allow the amendment.

21. However if the conclusion set out in paragraph 20 above is wrong it is necessary to consider whether the court should exercise its overall discretion as to whether to allow an amendment taking account of all the circumstances including the strength of the claim and whether the application to amend has been made timeously.

22. As to the strength of the claim under the Regulations I considered this aspect at some length in paragraph 26-31 of the judgment in *Jennings.* In paragraph 31 of *Jennings* I considered whether the Defendant would owe a duty of care in the light of the decisions in *Jones v Sunworld* [2003] EWHC 591 and *Martens v Thomson Tour Operations Ltd* 1999 MCLCC (unreported) and the paragraph 5.82 of *Saggerson on Travel Law and Ligitation,* 6th Ed. by Matthew Chapman, Sarah Prager and Jack Harding. I concluded that there was no duty with respect to the harbour installation itself and that the defendant in that case was not under a duty to issue a warning so as to be personally liable for the injury. I also noted, in paragraph 32, that, following the decision of Tomlinson LJ in

Lougheed v On The Beach Limited [2014] EWCA Civ 1538, if it is to be contended that the Defendant is liable for the acts of foreign operators, it will be necessary to establish what the local standards are and that there has been a breach of them. As has been stated in *Saggerson on Travel Law and Litigation* (supra) at paragraph 5.173: "*The cases demonstrate the continuing importance of the local safety standard, however it must be expressed, as the filter through which package holiday accident claims must pass on the way to a finding of liability. The claimant bears the burden of proof in this regard*".

23. On this aspect Mr Carington has submitted that the Claimant must prove a breach of local standards but has not pleaded or provided any evidence of any applicable local standards or pleaded a breach of such standards. In consequence I take the view that the proposed amendments to the Particulars of Claim fail to plead a case which has any real prospect of success and, accordingly, permission to amend should be refused.

24. Further, in considering whether it would be proper to allow the amendment I consider that there has been a significant delay in seeking to amend the claim which cannot be justified. The witness statement of Ms Manders, in support of the Claimant's application, effectively states that the amendments are made as a consequence of receiving the Defence setting out the Defendant's case on liability. The Defence is dated 2nd June 2017 and was served on 8th June 2017. However the application to amend was made over 14 months later and only after the Defendant applied for summary judgment. This lengthy delay is not explained in the Claimant's evidence in support of its application. Furthermore, as Mr Carington submitted, there is no apparent reason why the Claimant did not plead the Package Tour regulations at the outset or needed to wait for receipt of the Defence to establish that it might have such a claim. The Claimant should have known that the Regulations might be applicable when the claim was made and there was no necessity to wait for the Defence to raise this claim.

Conclusion

25. For the reasons set out above I hold that the Claimant's application to amend the claim should be dismissed and that the Defendant's application for summary judgment pursuant to CPR Part 24 should succeed.

Dated this 16th day of November 2018