# Barbados, a bikini and a float glass balcony door: assessing "local standards" in package holiday claims

## By Rachel Tandy

**On 7 November 2013, the Court of Appeal gave judgment in *Japp v Virgin Holidays* [2013] EWCA Civ 1371. It confirmed that, when assessing whether holiday accommodation complies with "local standards," the standards to be applied are those in force at the time the accommodation was built, and not those that apply at the time of any accident. It will be welcome finding for tour operators and their insurers.**

### BACKGROUND

1. Mrs Moira Japp went on holiday to Barbados in September 2008. Whilst there, she chose to spend an afternoon relaxing on her hotel balcony, reading a book. As she stepped outside, she closed the sliding glass balcony doors behind her.

2. Some time later, the telephone rang in her hotel room. Mrs Japp got up to return inside and answer the call. In the time that had passed, she had forgotten that the glass doors were closed. She walked straight into them, and the glass shattered.

3. Mrs Japp, who was wearing only a bikini, sustained several deep lacerations to her body. She sued her tour operator, Virgin Holidays, seeking damages in respect of her personal injury.

## THE COUNTY COURT DECISION

4. The case at first instance turned – as is so often the case – on the issue of whether the balcony doors had met local standards. There was a particular focus on the 1993 edition of the Barbados National Building Code.

5. That code stipulated that safety glass should be installed in all doors with a glass area exceeding 05.$m^2$. The balcony doors at Mrs Japp's hotel, which was built in 1994, were caught by that provision. However, annealed float glass had been used in their construction instead of safety glass. It was clear that the doors did not comply with the Code.

6. Accordingly, the main question before the Judge below was how far the Code represented local standards. Extensive expert evidence was heard on that issue. Mrs Japp's expert said that it was custom and practice in the industry to follow the Code. Virgin Holidays' expert said that some building professionals were aware of the code and some were not, and accordingly the Code could not be taken to represent local standards. The learned Judge preferred the evidence tendered by Mrs Japp's expert.

7. However, he also concluded that *"Although there is no statutory requirement for hotels to carry out works to comply with the Code or update to comply with the Code, in my judgment if the hotel in question fails to do so then it runs the risk of being held liable in the event of an accident occurring because of a breach of that code and a failure to update to comply with it… it seems to me that there is a continuing duty on a hotel to have regard to safety issues and if necessary update facilities."*

8. Accordingly, the Defendant was held liable to the Claimant for her damages, assessed at £19,200.

## THE ISSUES ON APPEAL

9. The Defendant appealed the Judge's finding on three grounds:

   a. The learned Judge was wrong as a matter of law to find that the duty of care fell to be considered by reference to custom and practice at the date of the accident, rather than at the date of the construction of the hotel;

   b. The learned Judge was wrong as a matter of law to find that the hotel owed a continuing duty to update the fabric of the premises as custom and practice developed; and

   c. The learned Judge was wrong to find as a matter of fact that the custom and practice at the date of construction of the hotel was to comply with the Code.

10. The Court of Appeal allowed the Defendant's appeal on grounds (a) and (b). Richards LJ, giving the only judgment, said *"where the question is whether a structural feature of a building complies with local standards, the starting point must be the standards applicable at the date of design and construction, which in this case means those applicable at the date when the balcony doors were installed. There will be circumstances where changing standards make specific provision for further action to be taken in relation to a structural feature of an existing building (the regulations relating to the removal of asbestos may provide an example). Subject to that, however, I do not think that there can be a duty to engage in a constant process of updating existing buildings, by rebuilding or refurbishment, so as to reflect changes in standards."*

11. In relation to the third ground of appeal, the Defendant argued that the experts had only considered whether the Code represented local standards in 2008. They had not directed their minds to the question of whether it

was treated as such in 1994. It also attacked the logic and reasoning of the evidence tendered by Mrs Japp's expert.

12. However, the Defendant's appeal failed on that ground. The Court of Appeal held that the Judge below was entitled to prefer the evidence of Mrs Japp's expert. Once that finding had been made, the conclusion that the Code represented local standards in 1994 was inevitable. The appeal was therefore dismissed.

## ANALYSIS

### A Less Onerous Duty

13. Tour operators and their insurers across the country will be breathing a sigh of relief as a result of this judgment. The finding of the Judge below that there was a *"continuing duty"* to update hotel premises and facilities would have been potentially extremely costly for the English travel industry.

14. The question was a critical one. As Virgin Holidays submitted at the appeal hearing, that finding essentially saddled hoteliers with *"a continuing duty to tear out and replace all features of their premises that do not comply with developing standards."* The cost of complying with such an onerous duty would no doubt have been reflected in the price of accommodation. Tour operators seeking to guard against the knock-on effect of such a finding would also presumably have faced higher insurance premiums. It would have been a severe blow to the industry to allow such a finding to stand unchallenged.

15. In light of those considerations, it might seem surprising to some practitioners that this question was ever in dispute. However, the only

precedent case on point, to which the Court of Appeal referred, was an occupiers' liability case. There were no "local standards" cases which dealt specifically with the date at which those standards should be assessed. It is therefore significant – if not perhaps surprising – that the point has now been clarified. The notion of there being a "continuing duty" to review and update hotel premises and facilities has been emphatically rejected.

16. However, the travel industry should not fall into the trap of taking this to be a blanket rule. It is subject to an important qualification set out by Richards LJ in his judgment. He stipulates that his conclusion is subject to any requirement set out in local standards that further action must be taken. Therefore, the wording of any relevant local standards should be scrutinised closely. If they envisage regular checks or reviews, any claimant consumer will be in a stronger position to be able to argue that modern safety standards should apply.

17. So, for example, in *Codd (an infant) v Thomsons Tour Operators Ltd* (2000) Times 20 October, the Claimant had been injured by the door of a lift in a Spanish hotel. Spanish law required the hotelier to inspect the lift regularly. Evidence was provided showing that the lift had been inspected once a month and no fault was found. Evidently if a fault or problem had been identified, there would have been a duty to repair the lift. It seems probable that any such repairs would have needed to comply with current local safety standards, rather than the historical standards which would have applied when the lift was constructed.

## The Importance of Expert Evidence

18. There is one other point of note arising from this case. It is trite law that it is for the claimant consumer to prove what local standards apply. Until

he or she can do so, there can be no finding of breach. For that reason, evidence as to those standards is of great significance. It should not be scrimped on.

19. The courts have been at great pains to emphasise this. In *Holden v First Choice & Flights Ltd* (22 May 2006, unreported), Goldring J said that drawing inferences about what local standards might be was *"no substitute for evidence for what is local custom and what may be the local regulation."* That comment was cited with approval by the Court of Appeal in *Goldbourn v Balkan Holidays Ltd and another* [2010] EWCA Civ 372.

20. The expert evidence tendered in this case was extensive. It also proved to be a virtually complete answer to the question of liability. That is likely to be so in many cases where the relevant local standards do not have any legal force. That fact also makes any adverse first instance decision difficult to appeal, for the simple reason that the preference of one expert's opinion over another is a matter of discretion for the trial judge. An appeal court is extremely likely to conclude – as it did in this case – that it cannot interfere in such a finding.

21. Mrs Japp's case seems to indicate that claimant consumers have taken on board the courts' previous comments as to the importance of such evidence. In those circumstances, defendant tour operators and other travel industry professionals would be well advised to remind themselves of those comments, and to select expert witnesses with care.

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