Claim No. 60L00748

IN THE COUNTY COURT

AT OLDHAM

New Radcliffe Street,
Oldham, Lancashire

Thursday 7th February 2008

Before:-

MR. RECORDER MARTIN, Q.C.

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B E T W E E N :-

AVRIL DRABBLE

Claimant

-and-

SUNSTAR LEISURE LIMITED

Defendant

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J U D G M E N T
(As approved)

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J U D G M E N T

MR. RECORDER MARTIN:

1 In this case the Claimant, Avril Drabble (date of birth 23rd April 1953 and 52 years of age at the date of the accident) brings this claim for damages alleging breach of contract by the Defendant arising out of circumstances occurring in the late evening/early morning of 14th/15th June 2005.

2 She alleges that at about 11.45pm she as a guest of the Hotel Tropicana Didim Beach Hotel, Altinkum, Turkey was making her way from a settee in the hotel lounge to the adjacent bar, a matter of taking one or two paces via what she mistook to be an open doorway but which was in fact a non-opening pane of glass. Her left hand struck the glass which shattered, causing her serious injuries, as set out in her pleaded case and in the medical reports contained within the trial bundle.

3 Her case is put in two ways, firstly relying on a breach of Regulation 15 of the Package Travel, Package Holidays, and Package Tours Regulations 1992 and, secondly, by way of breach of an implied term pursuant to section 13 of the Supply of Goods and Services Act 1982. as pleaded at paragraphs 6 and, in the alternative, paragraph 10 of the Particulars of Claim. The pleaded implied term at paragraph 5 of the Particulars of Claim was abandoned by the Claimant's counsel in the course of his closing submissions in that he accepted that paragraph 5 was in effect an implied term requiring a strict or absolute obligation on the part of the Defendants and he accepted that was putting the case too highly. *En passant,* whilst on the topic of the Particulars of Claim, I should indicate that I gave leave to amend the Particulars of Claim by consent so that paragraph 8(c) was amended so as to allege in its amended form "failing to bring to the Claimant's attention the presence of the window by way of stickers, or any adequate stickers attached thereto".

4 It will suffice if I indicate that the Defence pursued at trial was in a nutshell that the Claimant has failed to prove what are the local Turkish safety regulations with which the Defendants had to comply, and by that failure of proof the claim fails. The Defendants concede the application of the regulations and of the Act to the facts of this case.

5 By way of further introduction, the Defendants, having had assigned to them the rights of their sub-contractor, Trust Accommodation Limited by way of a document, which is not in the trial bundle but which was handed in at trial and which I now describe as exhibit 2. The document is a deed of assignment of contractual rights between Hotels4you.com.ltd (formerly known as Trust Accommodation Limited) and Sunstar Leisure Limited, the contents of the document are self-explanatory. Having had that assignment to them of Trust Accommodation Limited's rights pursuant to its contract with the Part 20 Defendant, who were required to perform the allocation of the hotel the subject of this action with regard to the Defendant's brochure advertising its holidays which subsequently the Claimant saw, the Part 20 Defendant did not appear at trial.

6 I am satisfied that they were served by the court with notice of the trial date, there being on the court file a court order of 10th September 2007 directing the trial of this action to take place on 5th February and the days following, and that order bears on its face a stamp of the court indicating that a copy was sent to all parties on 11th September 2007. Further, I have also seen copies of e-mails in a bundle of e-mail documents, which are exhibit 1 in this case, from the Defendant's solicitor to the Part 20 Defendant which again support the case that the Part 20 Defendant had knowledge of the trial date. The trial has continued in the absence of the Part 20 Defendant on the basis that they were well aware of this trial date having been served with notice or having the date drawn to their attention but have not appeared. There is, again, for the sake of completeness, a Part 20 Defendant's Defence of an informal nature which is in the trial bundle at pages 43 to 48 thereof essentially saying that the Part 20 Defendant avers that they were only a handling agent and had nothing to do with the legal battle between the Claimant and Defendant.

7 From this point in my judgment I now indicate that I will deal with the liability issue only.

8 I now set out the salient features of the evidence that was called before me. The Claimant's evidence is as contained in her three statements, her written statements that is, which she confirmed on oath were true, it is really the first statement at page 51 of the bundle that deals with the circumstances of the accident. I shall refer only to the paragraph numbers rather than reading out those paragraphs into this judgment for the sake of brevity but I highlight that paragraphs 4 and 5 of her first statement describe what happened in the accident. Paragraphs 10 and 11 are also relevant. She was cross-examined and I shall now indicate the salient parts of the cross-examination. She accepted that she did not expect the hotel to comply with rules in England and she also conceded that she did expect that the hotel would comply with Turkish rules. She accepted that bars in general would be dimly lit and that she new at the time of this accident that she needed to take additional care. She said that she had been there for 10 days before the accident happened. She knew that there were doors of glass. "I knew I had to take extra care because of them". She had gone out for a meal at 6pm. She had had one drink with her meal and that was all. She drank water for the rest of the evening. Page 85 of the trial bundle was put to her, which is a document from three people - the guest relations manager, a doctor called to the scene of the accident to treat the Claimant and someone from security, signed by all three, making in particular the assertion that the Claimant was drunk, not able to see in front of her nose and, by reason of the alcohol factor, she did not see the glass. Further, the document asserts the glass door was obviously to be noticed by the presence of stickers, and asserts that in fact the accident occurred not at 11.45pm but 2.45am. The Claimant, when that was put to her, said "It's a total lie. It's very wrong, what they say". Defence counsel then informed me that no evidence was being called to support those assertions in the document. The Claimant described in cross-examination that she walked normally towards the door at a normal pace. Where she was sitting was only three feet from the pane of glass. Her left hand touched the glass only. She said, "I thought it was an open doorway". Those are the matters relevant to liability contained in her cross-examination.

9 Mr. Archer was the next witness. He is a friend of the Claimant's. His witness statement appears at page 69 in the bundle. At paragraph 3 of the witness statement Mr. Archer sets out why he selected the hotel and he refers to the fact that it was advertised as a five star hotel with many amenities. "The fact that it was so rated was particularly important to me as neither myself nor the Claimant wished to be disappointed upon arrival. In the past we have found that hotels with a lower star rating were not up to our demands and frequently lacked what we would consider to be suitable or adequate safety standards." He describes the accident particularly at paragraphs 7 and 8 and the description supports the Claimant's account of what happened. Paragraph 9 of the statement describes the way in which the glass broke. He says, "It broke into many different sizes and shapes, some small and some large and dagger shaped." That description is relevant because the experts use that description to come to a conclusion as to the type of glass in the glass pane, to which I will refer later.

10 Mr. Archer was cross-examined and, again, the relevant parts of his evidence are these. He agreed that the two of them had been in the hotel 10 days prior to the accident. He says he had noticed the glass doors in the hotel before the accident and says, of some significance, that he saw a two inch sticker on one of them. "I couldn't be sure which glass door it was on. I probably noticed it before", referring to before the accident. He described the sticker as having a "palm tree" logo. The sticker was no more than two inches square. The palm tree logo had a green trunk and yellow palm fronds. He remembers having a conversation with the Claimant about the sticker, but said there was nothing particularly remarkable about the conversation. He was then asked about the Claimant's alcohol intake and his own, and he replied, "Neither of us were drunk. I'd had a bottle of beer. We got back to the hotel between 10.30 and 11 o'clock and we didn't have a drink on our return".

11 He was asked about the document at page 85 in the bundle from the various people I have referred to from the hotel and said this, "We didn't see either a guest relations officer of the hotel or anyone from security after the accident. The only one we saw was the doctor five to six minutes after the accident happened. No idea why the doctor signed that document." And then back to the accident itself, "It happened within seconds". Mr. Archer then described just before the accident, "She stood up. Next thing glass was all over". Then he went back to the description of what she did prior to the accident, having stood up. "She turned", in other words she had her back to the pane of glass to begin with. "She turned". He said he had his back to the glass wall "We were sat next to one another on the settee. Miss Drabble was nearest the glass panel. The accident happened to the side of me. The settee was forward from the glass panel but not by much. I agree that, as she walked towards the panel, she was walking at a normal pace. She got up from the settee." There was a fairly large coffee table in front of them. "She shuffled to the end of the table, which was no great distance, and then turned towards the glass panel and", he said, "she took a step, a step and a half at most, to the glass panel". And then in re-examination, when dealing with the stickers or logos, Mr. Archer said as follows: "It (meaning the sticker) may have been on more than one of the panels", and he then said "the logos (meaning the stickers) were intermittent" and then he said he was not sure if the logo, or a logo, was on this panel, meaning the panel that the Claimant struck. "I'm six foot five. It must have been above my head height, the logo that I saw."

12 The next witness was Mr. Nick Large, whose statement is at page 76 in the bundle. He is a completely independent witness. He is not a friend of either of the two earlier witnesses, but it is also important to note that he was not an eyewitness to this accident. He describes the glass panels the subject of this action at paragraphs 2, 3 and 4 of the witness statement. He says at paragraph 2 "I noticed that none of the doors or windows had any kind of markings on them to indicate their presence". At paragraph 6 of the witness statement he refers to taking a photo of the replacement window after the accident. That photo, or a copy of it, a poor copy, black and white copy, appears at page 79. I record that I have seen a colour print which was by way of a DVD played onto a television screen during the course of the trial and that colour copy was certainly far better than the black and white photocopy, and, again, there is a feature of that colour copy that I will return to. Mr. Large was cross-examined Before he was cross-examined he was taken through the taking of the photograph and said this, "I took the photo a couple of days later. I'm standing in the lounge where the three piece suites are. Beyond the panel is a bar." That is all I have got of the description from Mr. Large as to what was behind the glass panel.

13 In cross-examination it was put to him by counsel that, looking at the colour copy on the DVD on the t.v. screen, there was the possibility that it revealed a sticker or logo in the middle of the glass. Mr. Large was having none of that, "No logo on this photo. I never saw a logo on the panels at all or on this panel" which would be a reference to pre-accident. He then explained why he was particularly aware of markings on glass and said "On a previous holiday in Spain we'd seen stickers plastered all over windows. I thought stickers were important prior to the accident. I never remarked on it before the accident." Defence counsel then put to Mr. Large the contrary evidence from Mr. Archer as a witness for the Claimant and Mr. Large said "What Mr. Archer said is wrong" and repeated, "I never saw a sticker". It was then put to him that what he was saying in terms of the absence of stickers might be because of hindsight, that his mind was, as it were, playing tricks on him, his having known of the accident and the circumstances of it", and he said, "No, I don't accept that". So that is the evidence from Mr. Large.

14 There were contained within the bundle assertions made by the hotel at page 85, which I have already adverted to, and there are also assertions that come from the Part 20 Defendant in e-mails to which the Claimant's counsel has referred me, which assert that there were stickers on the glass pane before the accident occurred. My findings with regard to the assertions made by the staff of the hotel, by which I refer to the three signatories to the document at page 85, and to the assertions of the Part 20 Defendant, are as follows. I accept Mr. Archer's evidence that only the doctor saw the aftermath of the accident and that the other two signatories to the document at page 85 were not present before or within a short period after the accident. Having accepted Mr. Archer's evidence on that point, I find that the document at page 85 is something which I place no reliance at all upon; I do not regard it as safe so to do and discount it altogether. So far as the assertions concerning stickers made by the Part 20 Defendant in e-mails or otherwise howsoever, is concerned, again, I place no reliance whatsoever upon those assertions. I do that because the Part 20 Defendant has, to the best of my knowledge, never supplied any sworn statements of evidence to this court, nor have they bothered to appear before me at this trial.

15 Finally, I must deal with the evidence of the defence witness, Gemma Scott. She was the customer services manager for the Defendants from 2003 to March of 2007. In evidence in chief she said that this was not a problem hotel for the Defendants and not a problematic hotel. She said that the Defendants would have had over 1,000 customers a year staying at this hotel. She was cross-examined. As the customer services manager her job was to deal with customer complaints and court cases. She said from the Defendants' point of view safety was an important. "We always make sure that the hotels had their licences and met the regulations", meaning the regulations that applied locally to each hotel. "We had a contract with Trust Accommodation Limited, who were responsible to do the health and safety checks. We relied on Trust giving us the go-ahead. This hotel was a five star hotel. We relied on Trust to approve it was a five star hotel. The supplier rating is Trust's rating".

16 That then is the evidence on liability from the witnesses called before me with the exception of the expert evidence, which I will deal with later. I should say that in part some of the findings I now make as to how the accident happened do rely upon the opinions of the experts contained in their joint statements.

17 So my findings as to how this accident occurred are as follows. I accept the Claimant's account of her accident, supplemented by Mr. Archer's account, and, therefore, I find she (1) mistook the glass pane for a door opening; (2) she had been sitting with Mr. Archer on a settee a little forward of the glass pane immediately before this accident; (3) she got up with her back to the settee, shuffled by a coffee table in front of her, then took a pace or a pace and a half down the side of the settee into collision with the glass which then broke into shard-like fragments and caused her injury; (4) the lounge at the time was dimly lit (I find it is not possible to make any more detailed finding as to the quality of that lighting); (5) the Claimant was not drunk or under the influence of alcohol so as to be impaired at the time of this accident.

18 I now make findings as to the presence of a sticker, which is described by the experts as a glazing manifestation, on the glass pane the subject of this accident. The relevant evidence comes from Mr. Archer and Mr. Large. The Claimant could not help in this point, for reasons that are obvious. Mr. Archer's evidence amounts to the existence and use by the hotel of a sticker by way of a glazing manifestation on a pane of glass or it may be more than one sticker, together with the possibility that there may have been a sticker on the very pane of glass that broke when the Claimant collided with it. Mr. Large, on the other hand, contradicts Mr. Archer by his assertion that he saw no stickers at all in use prior to the accident. Doing the best I can, the apparent contradiction between the Claimant's two witnesses causes me to conclude that the Claimant has not proved on the balance of probabilities that a sticker was not present on the panel that she walked through. I bear in mind that Mr. Large was not an eyewitness to this accident. I have to warn myself that there is in the circumstances a danger that he may have allowed hindsight to influence his perception of the state of affairs prior to the accident. I do not mean by any means that he has misled me but that there is a risk that he has made a genuine mistake.

19 So far as findings with regard to the nature of the glass itself -- this is where I rely on the joint statements of the experts – my findings are these. I should say the joint

statements appear at pages 222/3 and 254. The dimensions of the glass I find to have been 2.1 metres by 0.9 of a metre or, put Imperially, eight feet by three feet. I find that the thickness of the glass was four millimetres and I find the type of glass to be ordinary annealed glass, i.e. not safety, laminated or toughened glass, and those findings are as contained in the agreement between the two experts, they having analysed the available evidence.

20 I next turn to the relevant law. I have been assisted by counsel in the provision of an authority bundle which has within in at its first entry the Package Travel, Package Holidays and Package Tours Regulations. I do not read out the regulation but have reminded myself of its content at Regulation 15.1 and 2. Likewise, I have available to me via the various cases the terms of section 13 of the Act, particularly as is set out in the *Wilson v. Best Travel Limited* case. The terms of section 13 are well known to me. "In a contract for the supply of a service where the supplier is acting in the course of a business there is an implied term that the supplier will carry out the service with reasonable care and skill". The relevant law is contained in the case of *Wilson v. Best Travel* which was not, by reason of its date, i.e. pre-dating the regulations, a regulation case, it was a section 13 case, but it has been relied upon by a line of authority, including Court of Appeal decisions, to inform decision-makers as to the relevant principles, both under the regulations and for section 13 purposes, and supporting those comments I should say that I have noted the decisions particularly in *Codd v. Thomsons Tour Operators*, a decision given on 7th July 2000 by the Court of Appeal, and also the decision of Goldring J, in *Holden v. First Choice Holidays & Flights Limited*, given on 22nd May 2006, and finally the decision of the Court of Appeal in *Evans v. Cosmar Villa Holidays*, a decision given on 23rd October 2007 [2007] E.W.C.A. civ. 1003. The principle, the test that I apply is that I apply English law to the concepts of duty of care and breach, but that in applying the standard of care, that is to be taken as compliance with local safety regulations. That is said many times but it begins with Phillips J, (as he then was) in the *Wilson v. Best Travel* case, specifically at page 538 in that judgment. It is then cited with approval by the various Court of Appeal decisions and that of Goldring J, to which I have referred.

21 Insofar as the section 13 implied terms cause of action is concerned, again, the test is in terms of has there been a performance with reasonable skill and care, has there been compliance with local safety regulations. That is the standard of skill and care required. There is a further opportunity for a claimant where compliance cannot be proved which is, again, in Phillips J's judgment in the *Wilson* case in these terms (I am reading from page 35), referring to local safety regulation compliance, "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", and then these words, "unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question". I am going to paraphrase those particular words, applying them with care, as "the reasonable holidaymaker test".

22 Just dealing with the Claimant's pleaded case on implied terms, I referred earlier to paragraphs 6 and 10 of the pleading. I say as follows that, to the extent that the Claimant in her pleaded case seeks to argue for any more rigorous obligation by

"implied term" I reject that argument. I find no case has been made out for any more extensive or rigorous implied term, applying the usual tests for the implication of terms, business efficacy, et cetera.

23 I next turn to the burden of proof. I remind myself that as a general principle the Claimant has the burden of proof to the standard of the balance of probabilities, and I direct myself that, whilst argument has been raised before me that there should be a reversal of the burden of proof in this case, I find I am not persuaded by that argument. I take as my guidance the Court of Appeal decision in *Codd*, particularly paragraph 24 of the judgment, likewise the decision in *Holden* at page 16. Those are firm and clear statements that the burden rests with the claimant, and I propose to follow that guidance. But out of courtesy to the argument that has been addressed to me that the evidential burden should be reversed and placed upon the Defendant to show that the Defendant has complied with local safety regulations, I determine that this case is not similar to the case of *Ward v. Tesco* to which I was referred. I conclude that the circumstances of this case are not such as to give rise to an obvious fault situation, which used to be called a *res ipsa loquitur* case, the circumstances are far from that, nor is it a case where the facts are under the sole control of the Defendants. I conclude that the Claimant with an appropriate expert or, further, or in the alternative by appropriate enquiry of the Defendants' disclosure, or by their own enquiry, the Claimant could have obtained the evidence as to compliance with local safety regulations that may be available.

24 I now turn to the requirement to consider whether the Claimant has proved that the Defendant has failed to comply with local safety regulations; those are the words used in the *Wilson v. Best Travel* case and repeated in other cases, local safety regulations. Returning to page 358 in the *Wilson v. Best Travel* case, the particular passage is as follows – and I now read therefrom – "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."

25 In my consideration of what is a local safety regulation I have reminded myself of the words Phillips J, used before "local safety regulations" and they are "that all civilised countries attempt to cater for these hazards by imposing *mandatory* regulations", and I emphasise the words "mandatory regulations". In submission before me counsel for the Defendant argued that those words required a standard that was imposed by law. Counsel for the Claimant argued to the opposite effect, that that would be too severe a test. In my perusal of the authorities I found some help in the *Evans* case, and I say at once I appreciate that the *Evans* case was in part concerned particularly with not a local safety regulation but whether the Federation of Tour Operators' handbook could be regarded as imposing a safety regulation. At paragraph 25 Richards LJ, said as follows: "I can deal briefly with the failure to comply with minimum standards laid down by the F.T.O. I have already described the F.T.O.'s health and safety handbook and the 'Suggestions for swimming pool safety' contained within it. In my view, the handbook is referred to correctly as guidance. It is advisory in character and has no legal force. It

does not lay down standards with which Cosmar is required to comply." I repeat, whilst we are not dealing in this case with a local safety standard, nevertheless, Richards LJ, excludes the F.T.O. handbook from relevance on the basis that it was only advisory and it had no legal force; and it is that requirement for legal force that, in my conclusion, leads me to regard that quality as the nature of a local safety regulation. So in examining the evidence I deduce that I should be seeking evidence of a legal requirement with which this particular hotel had to comply.

26 Now, in searching the evidence both counsel agreed that I should adopt a fairly wide approach and the approach that commends itself to me is that which the defence expert, Mr. Magner, describes at paragraph 1.10 in his report, and that is the approach I endeavour to follow: "The technical basis of local standard in a given country is defined by a complex mix of constitutional national, regional, provincial and local laws, supported or substituted, depending on the situation by formal standards, technical instructions, local and national codes as well as other documented sources of best practice and augmented on occasions by technical custom and practice, traditional techniques, cultural and historical factors." That I find to be a useful tool to help me in my consideration of the evidence as to establishing a local standard and local safety regulation.

27 I next deal with my analysis of the expert evidence. The reports of each expert are in the trial bundle and the first expert was the Claimant's expert, Mr. Josey. He gave his evidence, he was cross-examined. The content of the report is there to be read, and the same applies to Mr. Magner. Questions were asked of Mr. Josey and answers supplied, which again are in the bundle, and joint statements have been produced. I do not know why the experts were incapable of producing one joint statement between the two of them. It seems to be a sad feature, but nevertheless each of them was directed by case management directions to provide their own version of that which they believed the two agreed or disagreed, which is why we have two joint statements..

28 But now I must set out my reasons for why I prefer Mr. Magner's opinion to Mr. Josey's, which is my conclusion. The reasons for that are as follows. Firstly, Mr. Josey's qualifications and specialism is as to the cladding of a building or, as he described it, the external envelope of a building. He is a partner in a forensic architects' practice. That is not the most obvious relevant discipline to deal with the circumstances of this accident as it concerns internal glass and a personal injury accident. So his qualifications and expertise do not lend themselves particularly to assist me in the analysis of this case. Secondly, he has no experience of cases involving factual circumstances in Turkey. Thirdly, he has not dealt with a personal injury case before. Fourthly, if one looks at his first report it is apparent, and it is my conclusion, that he misunderstood the relevant law to apply by way of a background and framework, for his opinion. I read his report as if Mr. Josey took the provisions of English law as being more determinative of the issues that were the subject of his opinion. Fifthly and, most importantly, he acknowledged that his role as an expert was as a forensic architect who has "accessed the documents in the case and researched the issues via information technology". That is very different to the experience of Mr. Magner, to which I will return. It is inferior to the experience of Mr. Magner. I also found Mr. Josey seemed to stretch his points a little too far for an independent expert seeking to assist me. I

thought his reliance upon the article by Michael Blacking referring to a Mr. Piepenbrock contained at page 252 to be unwarranted, which article and reference to Mr. Piepenbrock really I find of no assistance, that being relevant to earthquake engineering, which is a matter far removed from the issues I am dealing with in this case. My general impression of Mr. Josey was that he appeared out of his depth in this particular area of expertise.

29 I prefer Mr. Magner because he had the following qualities, firstly, that he was a consulting engineer who had been instructed in similar cases on about 30 occasions from 1990 onwards in cases which involved human contact with glass in Turkey. He told me that in the course of those investigations 20 of them or thereabouts involved site visits to Turkey in which he made it his business to enquire of local municipalities what their standards were and also researched widely around the particular case in terms of looking at standards applying in other hotels. I formed the view that Mr. Magner was genuinely independent as an expert in his endeavour to assist me in my deliberations. I conclude that, where there is a clash of opinion between the two experts, I prefer Mr. Magner's opinion.

30 I now turn to look at what evidence there is on the issue of has the Claimant proved to me a non-compliance by the Defendant with local safety regulations? A number of Turkish regulations have been drawn to my attention by the experts. The first of which that I deal with is the Construction Products Directive which is referred to in particular at page 218 in the answers given by Mr. Josey to questions asked of him, which is an E.U. directive dated 8th September 2002 published in the Turkish Official Gazette. It is that publication which is part of the adoption by Turkey of that directive. I was assisted by Mr. Magner in my understanding of the directive but perhaps the most salient point to be made is that Mr. Magner advises me that that directive, which came into force in 2004 but was followed by, on his advice, which I accept, what I described as a lag period, in other words was not fully enforced because the authorities allowed various trade associations time to liaise and take in the requirements of the directive, and Mr. Magner advised me that that process would mean that it was not fully in force until 2006. I repeat that I regarded Mr. Magner as independent and at all times trying to assist the court. I am prepared to rely upon that information provided to me and find accordingly, that that directive and its adoption by Turkey is not relevant to the accident circumstances of this case as its effective enforcement post-dates the circumstances of this accident. That was the C.P.D.

31 For the next directions, I turn to the joint statement as described by Mr. Magner, and that is at page 254, beginning at page 255. They are described as law 82/2634 and law 93/811. It may be appropriate if I set out Mr. Josey's opinion on those matters. Reading from the joint statement, 3.1(i) "Mr. Josey believes that law 82/2634 provides generally for the safety of customers"; (ii) "his opinion is that the use of annealed glass in the relevant location breaches what he believes to be from law 93/811 a requirement for necessary measures to be taken for the safety of customers. 93/811 is a regulation issued by the Turkish Ministry of Tourism, which on translation is as follows: 'Necessary measures have to be taken for the safety of customers and the facility'", and then (iii) "Mr. Josey is aware that the application of the regulations may not always be enforced by municipal inspectors but considers that this does not negate the obligation

to comply with them, with which all sides agree." Then Mr. Magner's opinion is as follows: (i) "My view, based upon my specialist knowledge and experience, is that laws 82/2634 and 93/811 do not form any part of the practical implementation of Turkish technical and safety standards", and (ii) "From my knowledge and practical dealings with Turkish municipal inspectors, law 82/2634 is used by the authorities to determine the tourist classification of a hotel. Neither law 93/811 nor law 82/2634 defines any practical technical requirements for a glazing installation;" (iii) "It is not considered a necessary measure within safety practice in the country that in a Turkish hotel the glass should be any different from that found at the incident scene"; and (iv) "In addition to practical implementation I am of the view that, given that the aforementioned, Turkish laws define no specific technical requirement for glazing, the issue of whether or not laws 82/2634 and 93/811 provide generally for hotel guest safety is a matter solely for legal interpretation by the court, assisted by the opinion of a Turkish lawyer"; and then dealing with paragraph 3.2(ii) – I should preface that by the introduction – "I disagree with Mr. Josey on the relevance of Turkish glazing standards to the Euro norms as follows: Mr. Josey is of the view that the glass pane concerned in the incident did not comply with the aforementioned T.S.E.N. standards. I am of the view that, as these T.S.E.N. standards provide only basic definitions of the glass types and do not yet import into Turkish standards any developing European standard that might eventually refer to human impact into glazing, these Euro norms play no significant part in Turkish state of technical knowledge and practice in relation to glazing selection in Turkish tourist establishments."

32 I accept Mr. Magner's opinion and advice and I find, therefore, that the T.S.E.N. standards do not deal with the use to be made of particular glazing and are not relevant to the setting of a local safety regulation within the *Wilson v. Best Travel* test. The T.S.E.N. standards in effect are technical requirements that have the purpose of providing clarity of terminology and further technical prescriptions that do not deal with what use a particular piece of glazing can have in a particular location. They are, therefore, not relevant. Insofar as we are left with the tourist regulations earlier referred to, I find that it is not proved by the Claimant that they set a local safety regulation for the purposes of the test I have just mentioned. I say it is not proved because the court would need the assistance of an expert to guide it as to the meaning of the words "necessary measures have to be taken for the safety of the customers and the facility". Those words are very general. They may simply be an exhortation without legal force. They may or may not apply to this hotel. Because the words are general I would need assistance from an expert as to whether necessary measures were taken in this case. I have not had the benefit of that expert assistance. I have already said the burden of proof lies with the Claimant and, unfortunately, the Claimant fails to satisfy that burden in this particular issue. I without expert evidence cannot interpret what that clause is intended to mean and does mean. I should add here that I would have been assisted by expert evidence of what were the relevant legal requirements appertaining to glazing in this hotel at the date of this accident but I conclude that I have not heard such evidence.

33 It would be right to point out that, in the history of the case management of this case, there was an application for an expert in Turkish law which came before His Honour Judge Armitage, Q.C. on 23rd July 2007. The order of the court appears at page 37 in the bundle and the order made was that that application was refused. This court has no

information before it as to the nature of the argument pursued by the solicitor who made the application (I presume it was the Claimant's solicitor), nor has this court any evidence of the reasons for the refusal, and it would be unwise of me to speculate further what they may have been. Further, it is right to record that the Claimant's counsel during the course of this trial launched a fresh application for leave to rely upon a Turkish expert's report but then, on further consideration, withdrew that application; and thus the state of affairs is that this court has no assistance on the Claimant's side with regard to the legal requirements that may exist with regard to local safety regulations in Turkey, and that is a particular significant failing.

34 So what am I left with? It appears that the Defendant's report of Mr. Magner is sought by the Claimant to sustain a finding of the existence of a local safety regulation with regard to the use of logos or stickers - glazing manifestations, in this case. I must, therefore, refer back to Mr. Magner's first report for the source of the argument. It is contained in paragraph 3.24 through to paragraph 3.26. and 3.27, and the Claimant's counsel's argument relies upon, in particular, paragraph 3.25 wherein Mr. Magner refers to surveys that he has undertaken between 1990, over a substantial period of time he explained that to be, from 1990 to the present day, involving a number of Turkish resorts. I have already said he visited sites on about 20 occasions and he added in his evidence that on each occasion he would not only look at the particular hotel but 15 to 20 of the other hotels of varying ratings. He reports in this paragraph that the survey indicates some support for the presence of only one high level sticker on glazing panels in this type of application. "My observations indicate that up to 60 per cent of installations display a single sticker, broadly classifiable at adult height, although the dimension itself varied noticeably. The no sticker situation was also observed on occasions in around 20 per cent of establishments. The remaining 20 per cent displayed both adult and child height stickers." Then at paragraph 3.26 he says this, "In terms of glazing manifestation, my observations of Turkish technical custom and practice indicate that, in the absence of formal requirements or recommendations for the placement of such stickers, the balance of probabilities favoured a single high level sticker." Then he opines that the matter is one for the court as to what actually happened in this case and he says, "If the court finds that there was no sticker on the pane concerned, this was a minority position but one which is evident within the range of Turkish technical practice", and at 3.27 "Alternatively, the court may prefer the documentary evidence from the hotel that stickers were used, in which case this also lies within the range that observe technical practice in Turkey." I think the conclusions to paragraphs 3.26 and 3.27 indicate to me that which Mr. Magner was trying to do to assist the court. Those paragraphs are meant to indicate the range of practice with regard to the use of glazing manifestation in Turkey and that is all, and I reach that conclusion not only from my reading of those paragraphs but also from the cross-examination and my own questions of the expert when he gave evidence, and certainly my own questions made plain to him that I was searching for whether the results of the survey could in themselves justify the inference that there was a local standard that supported the use of stickers on panes of glass. It is right to record that there was something of a debate between the expert and myself on how the court might be able to use the survey results, which debate involved an attempt by me to formulate the expert's opinion but my own formulation was something in the end he was not happy with, and in the end Mr. Magner said to me that the survey results in his opinion were

no more than the revelation of what he personally had found to be Turkish practice in hotels. I repeat that I was impressed by Mr. Magner's independence and helpfulness throughout his evidence and I form the conclusion that, if with the benefit of his undoubted expertise and experience, he had formed the view that his survey supported the existence of a local standard, he would have said so, he would have told me, and the fact that he did not, suggests such an inference cannot be drawn from his survey.

35 I conclude my deliberations on the survey results in this way, that they do not form a basis from which I can reasonably infer the existence of a local standard so as to require the use of glazing manifestations on panes of glass of the nature we are dealing with in this case. The survey described in Mr. Magner's report has every quality really of anecdotal evidence. It is not specific as to location where the survey was carried out. There are no details as to particular findings. There are no documents to back up the survey. It occurred over a period of time and I know not on what particular dates each investigation was made. The evidence has every hallmark of being that which I find it to be, just a description of the range of Turkish technical practice. It therefore falls short of evidence of a legal requirement with which the hotel must comply.

36 I now turn to make findings, applying the law to the evidence, as follows. Insofar as the alleged breach of the Package Tour Regulations is concerned, I find the breach not proved. I find that the Claimant has not proved to me the existence of a local safety standard or regulation applicable to the use of glazing manifestations. Insofar as lighting is concerned, the same is my conclusion, that there is no evidence of what is the local safety standard, so a breach cannot be proved. The same has to be said of glazing. There is no evidence of what is the local standard and, therefore, a breach cannot be proved. There is a conclusion reached by the experts that the frequent occurrence of four millimetre annealed glass may support a conclusion that that is the standard, but that is a matter of speculation and I find I cannot establish that the Claimant has not proved to me what that standard is with regard to glazing. Whether you take the criticisms made by the Claimant of this particular pane of glass individually or collectively, the result is the same. In other words, because the Claimant has failed to prove what the standard was, a breach is not made out. I have already said that I prefer the opinions, advice and conclusions of Mr. Magner to those of Mr. Josey. That there are legal requirements on these matters is probably likely in Turkey, but in my view those are matters that could have been found out, as I have already said, and should have been put before this court

37 I have already held that the Claimant fails to prove that the tourist board regulations have been breached, for that would require expert evidence and I have seen none, and the Consumer Product Directive is not relevant to this case, nor are the technical regulations which I have earlier referred to.

38 I next turn to the second limb of the *Wilson v. Best Travel* test which I have paraphrased as the reasonable tourist test. I have heard little evidence on this point. There is evidence from both Mr. Archer and Mr. Large as to what subjectively they expected from the hotel by way of safety standards, but I am concerned with an objective test.. So far as the five star rating is concerned that applies to this hotel, I am satisfied, based on the information I have been given by Mr. Magner that the five star

rating is not concerned with health and safety but only the level of amenity provided in the room or hotel, I find that the five star rating really is of only limited assistance on this issue. I accept that it may have led to an expectation by a customer of some health and safety provision but, again, I have to deal with this on the basis of objectivity and, trying to be objective, the reasonable customer would take with a good deal of caution what one particular tour operator's star rating implied on the issue of health and safety.

39 I have heard no evidence of complaints being made to the hotel about this pane of glass or the panes of glass in the lounge. I have heard no evidence of any other untoward incident concerning the panes of glass. Applying the objective test of a reasonable tourist, I find that this is not a case where such a tourist would have refused to stay at this hotel because of the glazing issues.

40 I next turn to the breach of implied terms, either on the basis of pre-selection or with regard to the continuing duty of the Defendants to use reasonable skill and care in the provision of their services, i.e. the services at the hotel. With regard to pre-selection, accepting as I do that that is an alternative way for the Claimant to mount a claim against the Defendant, I reach the conclusion, firstly, that I have heard no evidence from the Claimant attacking the delegation of the selection process to Trust Accommodation Limited and whoever they chose to use. There is no expert evidence that I have heard that such delegation was unreasonable. I do not know but I assume that it is a common practice on the part of tour operators to delegate that duty. So the delegation itself I find not to be proved to be unreasonable, not to be proved to mark a lack of reasonable skill and care.

41 In terms of the issue of has the selection of this hotel been proved to have been a failure to exercise reasonable skill and care by the Defendants,, the answer is that it has not been proved for this reason. In order to prove a lack of skill and care, the Claimant would have to show a non-compliance with the local safety standard or regulation, and that the Claimant has failed to do. Even if the selection process were deficient, it cannot give rise to a breach of the implied term unless there is a failure to comply with the local safety standard, and I have found that that has not been proved. Causation on this aspect of the claim is simply not made out.

42 So pre-selection fails, I conclude. The alternative basis of putting the implied term cause of action is for some general failure of skill and care during the continuance of the holiday, but that again has to be evidenced by a failure to comply with local safety standards and, therefore, for the same reasoning as I have already referred to, by reason of the failure to prove what the local safety regulations were, that fails too.

43 I am asked by Claimant's counsel to consider an alternative ground of attack that is based upon the dicta of Richards LJ, in the *Evans* case at paragraph 24. It is stated, "In the present case there was no evidence to support the pleaded claim of non-compliance with local safety regulations, and that way of putting the case was not pursued at trial. In my view, however, it was still open to the Claimant to pursue the claim on the other basis pleaded in the Amended Particulars of Claim. What was said in *Wilson v. Best Travel Limited* 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." Richards LJ, therefore provides me with guidance that in some circumstances, despite compliance, there may well still be a breach of the regulations or the implied term. My difficulty is that the circumstances which would give rise to the exercise of the discretion are not set out in the remainder of the judgment, which then really continues down a different avenue of enquiry with regard to whether a duty of care was owed at all in that case. I am left to conclude that, if the discretion exists – and I am not seeking to challenge that it does exist – it would have to be in exceptional or unusual circumstances and I find that this case on its facts does not fall within either of those descriptions. I therefore decline the invitation to exercise a discrete discretion in this case.

44 Finally, I should say this, that the editors of *Butterworth's Encyclopaedia of Personal Injury* have suggested that outwith the regulations there will be cases which are so obvious so as to attract liability, and in counsel for the Claimant's written open argument he gives the example of a tourist being scalded by hot water coming out of a shower that is so obviously lacking in safety compliance as to demand liability to attach to those facts. I see the argument and it may well be that there are such cases where liability may follow, but I do not find that this is one of those cases where the facts so obviously call for liability to attach; I do not.

45 Those are my findings and conclusions on the facts and the law that apply in this case, the result of which is that, sadly for the Claimant, this claim fails. I say that because she has my sympathy because she has sustained a very unpleasant injury. Unfortunately, she does not prove that that injury is as a result of a breach of contract by the Defendants in this case. That is my judgment.