Neutral Citation Number: [2023] EWCA Civ 1300

Case No: CA-2023-000245

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
HIS HONOUR JUDGE SEPHTON KC
QB-2021-MAN-000063

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 November 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE LEWIS

- -

Between:

MASTER GEORGE DAVID CLEMENTS-SIDDALL
(A Child, proceedings by his mother and Litigation Friend Susanna Mary Clements)

Appellant

- and -

DUNBOBBIN HOTELS LIMITED

Respondent

- -

Marc Willems KC and **Chloe Murray** (instructed by **Irwin Mitchell Solicitors**) for the **Appellant**
Neil Block KC (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing date: 24 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

Introduction

1. On 1 January 2017, Dr Susannah Clements was a guest at the Defendant's hotel. She had gone with her then partner, Mr Siddall, who is now her husband; and she was twenty-five weeks pregnant with their unborn child, the Appellant. While staying at the hotel she fell after using the outdoor spa pool. In the course of her fall, she struck her abdomen. In this action, which Dr Clements brings as the Appellant's mother and litigation friend, the Appellant alleges that the accident was caused by negligence and breach of duty on the part of the hotel and that the hotel's negligence or breach of duty caused him to suffer serious injury. The Appellant brings the case pursuant to the rights conferred on him by section 1 of the Congenital Disabilities (Civil Liability) Act 1976.

2. It is the Appellant's case that Dr Clements fell from the unprotected leading edge of an area of raised decking that ran alongside the spa pool, as I describe in greater detail below. After a trial of the preliminary issue of breach of duty, the Judge held that the accident did not happen in the place or in the manner alleged by Dr Clements. He found that Dr Clements had missed her footing while on the stairs from the spa pool. On the basis of that finding, he rejected the claim. However, he also held that if he had found in favour of the Appellant about where the accident happened, he would have found in the Appellant's favour on the issue of breach of duty because the leading edge of the raised decking was unguarded.

3. The Appellant now appeals on two main grounds. First, he contends that the Judge's finding about where the accident happened was not open to him because it was an agreed fact that the accident happened where Dr Clements alleged. Second, he contends that, even if the finding was open to the Judge, the Judge's finding was wrong. Relying on what the Judge said he would have found if the accident had happened where Dr Clements said, the Appellant submits that this court should substitute a finding that the accident was caused by breach of duty on the part of the Defendant.

4. For the reasons I set out below I would allow the appeal and enter judgment for the Appellant on the issue of breach of duty.

Factual and procedural background

The scene of the accident

5. The scene has been variously but consistently described, both in the pleadings and elsewhere.

6. The Particulars of Claim described the scene at paragraphs 8 to 10:

> 8. The jacuzzi was positioned above ground level and was accessed by a set of 3 steps with a central handrail running through the middle of the steps. The steps led to a raised platform/the edge of the jacuzzi.
>
> 9. To the right of the platform/Jacuzzi was a raised decking area, at a further step up from the jacuzzi level, which was 800mm

> wide and 725mm high from ground level (hereafter "The right raised decking"). There were hooks on the wall, to the right of the jacuzzi, at the edge of the right raised decking area, which were intended for spa users to hang their robes whilst they used the jacuzzi.
>
> 10. The front of the jacuzzi platform and right raised decking area were unguarded and left exposed. … The absence of a guard rail presented a drop from the edge of the right raised decking area of approximately 725 mm to the artificial grass at ground level."

7. That description was admitted by the Defence, save that it pleaded in relation to paragraph 9 of the Particulars of Claim that "the step was 804mm wide and 720 mm high" and in relation to paragraph 10 that "the drop was 720mm". Those were references to the width of the right raised decking and the drop from the top of the right raised decking to ground level. The experts ultimately agreed that the vertical distance from the top of the raised decking area was "around 720 to 725 mm." The Defence said nothing about the height from the ground of the strip between the edge of the steps and the spa pool. It will be noted that the Particulars of Claim drew a distinction between "the front of the jacuzzi platform" and "the right raised decking." The Particulars of Claim did not describe the top of the steps or the strip between the steps and the spa pool itself as "decking".

8. Dr Lemon, the forensic engineer instructed on behalf of the Defendant, provided a report for the Court based on inspections carried out in January and April 2018. He was provided with photographs which he annexed to his report as being broadly representative of the scene at the time of the accident. I attach his photographs 1 and 2. His description was:

> "3.1.3 The spa pool and the surrounding areas are shown in Photograph 1. As shown in Photograph 2, the spa pool is accessed via a series of three steps; users of those steps can derive support from a single-piece, alloy handrail.
>
> 3.1.4 Raised decks were present to either side of the spa pool; each of those decks was raised above the level of the pool water surface, so forming a single step, which extended the length of the pool."

9. It is evident that, in this description, Dr Lemon's reference to "raised decks .. to either side of the spa pool" meant the raised deck as identified in his photograph 2 to the right and left of the spa pool. This usage was also adopted by the experts in their joint statement.

10. On the basis of the evidence at trial and before us, photographs 1 and 2 provide an accurate representation of the scene at the time of the accident except that (a) the planters on the raised deck area to the right of the pool and the candleholders on the raised deck to the left of the pool were not present, (b) there were nine hooks set into the wall behind the raised deck area rather than the three shown in the photographs, and (c) there was no coat stand on the grass beside the raised deck area.

11. Other photographs showed in detail the area, about 450mm wide, between the edge of the steps closest to the pool and the edge of the spa pool itself. Between the top step and the mosaic edge of the spa pool were, first, one narrow line of decking material, then a strip of mosaic tiles, and then a gulley cover (presumably to catch and drain away water that spilled out of the pool). These were almost level, having a very slight slope (roughly 5°) to aid drainage, and abutted the spa pool flush with the top of the mosaic edge of the pool. They were distinguished by Dr Lemon from what he called "the raised decking" or, in photograph 2, "the raised deck area". It would, in my judgment, be misleading to describe the area between the steps and the edge of the spa pool as "raised decking" just because it was, like the top of the spa pool, above ground level. Its composition as described above (one line of decking material, mosaic tiles and the drainage gulley) does not fit the description "decking" in the same way as the area identified by Dr Lemon as the raised deck/decking area.

Pleadings

12. Proceedings were issued on 28 June 2021. The Particulars of Claim set out the Claimant's case clearly at paragraph 15:

> "The Claimant's mother followed. During the course of retrieving her robe and slippers from the right raised decking area she was caused to slip and fall in the following way;
>
> a. She retrieved the robe and dressed;
>
> b. She began to put on her slippers;
>
> c. As her right foot made contact with the sole of the slipper, her foot slipped forwards uncontrollably;
>
> d. Due to the edge of the raised platform and/or deck and/or steps having no guard her right foot slipped over the edge of the decking.
>
> e. She tried to reach for the handrail to the steps which was too far away;
>
> f. As she fell forwards over the unguarded edge of the right raised decking and down towards the ground level, her pregnancy bump struck the exposed edge of the second step, taking the full impact of the fall."

13. In the light of the description in paragraphs 8 to 10 of the Particulars of Claim, which I have set out above, subparagraph (f) could not sensibly be understood to mean that she had fallen anywhere other than from the raised decking to the right of the pool as shown in the photographs.

14. The particulars of negligence or breach of duty concentrated on the exposed edge of the raised decking to the right of the pool. The main allegation was that there should have been a guard rail protecting the exposed edge, though wide-ranging additional allegations were made: for example it was alleged that the hotel should have provided

rubber soled footwear and that there was a failure to instruct Dr Clements in the safe use of the spa pool. Viewed overall, there could be no reasonable doubt about where and how it was being alleged that the accident had happened.

15. The Defence, which was settled by Leading Counsel, having admitted the layout of the raised decking and the absence of a guardrail for the exposed leading edge, denied that the absence of a guardrail was a breach of duty. Paragraph 9 set out a classic non-admission of the facts alleged in paragraph 15 of the Particulars of Claim, pleading that the Defendant had no knowledge of them. The Defendant did not plead a positive case about how the accident happened, though it averred that "the surface of the decking was not slippery and it is denied that the cause of the fall was a slip as opposed to a trip or other loss of balance."

16. Negligence and breach of duty were denied and the particulars of negligence and/or breach of duty were addressed in turn. The following points are relevant:

    i) In response to the allegation that the Hotel failed to carry out a risk assessment of the spa pool area, the Defence pleaded at paragraph 11(b): "Denied. … Further and in any event, the surface of the decking did not present a slipping hazard and the drop at the edge of the decking was obvious."

    ii) In response to the allegation that the Hotel failed to place a suitable handrail and/or guard along the exposed edge of the right raised decking area, the Defence pleaded at paragraph 11(d): "Denied. … Further and in any event, the raised decking area was clearly defined and the edge was clearly visible. This area did not form part of a circulation route and/or in any event a barrier was not reasonably required."

    iii) In response to the allegation that the Hotel failed to have in place suitable hand rails on either side of the jacuzzi steps to guard against the risk of slipping and/or falling from the right raised deck area, the Defence pleaded at paragraph 11(e): "Denied. The relevance of this allegation is not understood as it is not alleged that the Claimant's mother slipped near the Jacuzzi steps."

    iv) In response to the allegation that the Hotel failed to provide clear warnings to Dr Clements of the risk of her slipping and/or falling from the unguarded raised deck area, the Defence pleaded at paragraph 11(j): "Denied. There was no significant risk of slipping and/or of falling. In any event, such risk of falling that may be proven was obvious and did not require a warning."

    v) In response to the allegation that the Hotel failed to provide Dr Clements with any instructions on the safe use of the pool, the Defence pleaded at paragraph 11(q): "Denied. The Claimant has not pleaded what instructions it is alleged should have been given. The surface of the deck was safe. The edge of the decking was obvious."

17. The Defence pleaded contributory negligence in the most generalised terms possible by paragraph 13:

> "If necessary, and if which is denied the Claimant establishes that his injuries were caused by his mother's fall, the Defendant

> will say that the Claimant's injuries were caused or contributed to by the negligence of his mother in tripping, slipping or otherwise falling in such a manner and for such reasons as may be proven."

18. The position on close of pleadings can therefore be summarised as being that the Claimant's version of events was clear in alleging that Dr Clements had fallen from the exposed leading edge of the decking to the right of the spa pool and steps. The Hotel understood that to be the Claimant's case. It did not admit that the accident happened where or how the Claimant alleged but, while putting the Claimant to proof, it advanced no positive case about where or how the accident happened save that it denied that the accident was caused by a slip as opposed to a trip or other loss of balance. In support of that denial, it averred that the surface of the decking did not present a slipping hazard and was safe.

Witness statements

19. The only direct witness to Dr Clements' fall was Dr Clements herself as Mr Siddall was not looking in her direction at the relevant time.

20. Dr Clements' account as set out in her witness statement dated 5 June 2019 was:

> "20. We both climbed out of the Jacuzzi by way of the steps and walked over to the hangers on the wall. Andrew put on his robe and set off back down the steps. I then put on my robe. When putting on my slippers I may have put my left foot in first. I remember putting my right foot into the slipper in a step-like way, so that the ball of my right foot took my weight as it went into the slipper. My right foot in the slipper slid across the decking, similar to how one slides on ice. As my right foot slid forward, my left knee bent and my body started to form a lunge position. The point at which I put on the slippers is depicted by the yellow X in Exhibit SMC3.
>
> 21. At all times I was facing towards the edge of the decking. As my foot slipped I recall desperately trying to reach for the rail with my right hand to steady myself but the rail was too far away. My hand hit nothing but air.
>
> 22. I remember thinking that there was nothing I could do to prevent this, as my right foot, followed by my body went over the edge of the decking. The direction in which I slipped is shown by the yellow arrow in Exhibit SMC3.
>
> 23. The floor and footwear offered no grip as my foot slid across the floor. There was no rail to protect against going over the edge and nothing close for me to grab or hold on to so that I could prevent myself from falling.
>
> 24. My pregnancy bump landed hard on the edge of one of the steps. This meant that as I fell the whole impact of the fall

> was taken by my bump. It hit the edge of the step with such a 'whack', I screamed out. I instantly felt certain that I would lose my baby."

21. On a photograph annexed to her statement as SMC3, Dr Clements marked with a cross the point on the raised area to the right of the spa pool from which she had fallen. That point was consistent with the description in her witness statement.

22. Mr Siddall provided a witness statement dated 28 September 2021. His account of the moments of and immediately after the accident was:

> "18. I can recall hearing Susanna scream behind me. I turned quickly and could see her on the floor in the foetal position by the decking. I asked her what had happened and whether she was OK. She told me she had slipped and fallen off the decking, she was clutching her stomach and she told me that she was in pain. I rushed in to the indoor spa area but could not see any staff. I called out for some help and went straight back outside to help Susanna."

23. The Defendant served witness statements from Mrs Angela Dunbobbin, who with her husband was the co-owner of the hotel, and Ms Corrie Bainbridge, who was employed at the hotel as a spa therapist. Neither had witnessed the accident.

24. Mrs Dunbobbin said in her witness statement, which she made in November 2019, that her first recollection of speaking to Dr Clements was in the bar after Dr Clements had returned from hospital. She had no recollection at all of speaking to her in the Spa after the accident. She did not give any evidence in her witness statement that Dr Clements had given her a description of the accident.

25. Ms Bainbridge's witness statement was also made in November 2019. In it she said that when she first came across Dr Clements she was on the floor crying and saying that she had fallen and hurt her bump. Ms Bainbridge asked her how she had fallen "but she didn't really tell me what had happened she just kept on repeating that she had fallen and hit her bump, she didn't say how."

Expert evidence

26. The experts agreed that the facts of the accident were a matter for the Court. Therefore, while it may be said that they concentrated mainly (but not exclusively) on the raised deck area, their reports provide no information relevant to the grounds of this appeal.

Documentary Evidence

27. An Accident Report Form was completed, dated 1 January 2017. On its front it said that the accident had occurred at 1.50 pm in the outside garden area. Against the rubric "How the accident took place – include the cause if known" the entry stated "Slipped coming down steps from hot tub. Partner came got help. Found her on the floor." Against the rubric "Details of any injury suffered by the person involved" the entry stated "informed us that she had hit her bump when fell." The judge held that these

entries were made by Ms Bainbridge. She had not mentioned the form or making the entries on it in her witness statement.

28. On the back of the Accident Report Form were handwritten notes, which the judge held were two separate entries in Mrs Dunbobbin's writing. The first entry said:

> "Spa informed lady had placed robe onto hooks with slippers on (white ones from bedrooms). Girls checked she was ok we thought she should go to A&E – lady went to Penrith, reported all ok but would have follow up scan with own team"

The second entry said:

> "AD spoke to in bar to make sure she was ok said she would go to her midwife and get checked again as hospital advised."

29. There was a typed note produced by the Defendant that is the subject of controversy. Mrs Dunbobbin did not mention it (or making it) in her witness statement. It said:

> "1st January 2017
>
> @ 2.00 called to garden spa by Corrie Bainbridge.
>
> Found Mrs Clements sat on chair in reception being attended to by Danielle and Paul. Sat up, upset and tearful. Explained she had fallen down the steps on the outside garden Jacuzzi, when explained what had happened she informed us that she has slipped on the steps coming down and hit her bump quite hard on the left hand side, I informed Mrs Clements that I think we should call an ambulance to take her to hospital, so we could have her bump checked out and make sure she was ok, Mrs Clements said she would rather call a midwife triage number that she has and speak to the midwife first and then follow their instructions, we moved Mr & Mrs Clements into the Lavender treatment room and lowered the bed so she was able to rest and relax first, before attempting to go to her room and call the midwife team.
>
> I met the couple in the corridor and escorted them to the lower staircase, when asked how the accident happened she said she had worn the white bedroom slippers and had come out of the jacuzzi and put them on walked down the steps and slipped, landed at the bottom steps.
>
> When her husband came to inform Corrie that his wife had fallen, Corrie went to the garden and found Mrs Clements sat on the grass at the bottom of the stairs.
>
> Called Mr & Mrs Clements @ 3.15pm and asked if everything was ok, Mr Clements informed me that his wife was on the phone trying to contact the midwife services, asked if there was

> anything we could do and to let us know if they required anything. P Mc informed me that he had seen the couple leave the building and go to the car park @ 3.30pm."

30. A note prepared by the midwife at Penrith Hospital was dated 1 January 2017 and timed at 3.10 pm. It said that Dr Clements had attended following a fall "approx 1 hour ago." It recorded "Abdomen soft on palpation – slight tenderness over left side where landed against the jacuzzi step." It is otherwise uninformative about how the accident happened.

31. On 17 August 2017, Dr Clements emailed the hotel. I shall call this "Dr Clements' First Document". By this time the Appellant had been born and had been diagnosed with microcephaly. Dr Clements wrote:

> "On New Year's Day we used your outside hot tub I was wearing the slippers and dressing gown that were provided in our hotel room. I had hung the dressing gown on a hook by the hot tub and taken off the slippers at the same time. It had been raining. The slippers were wet. After using the hot tub, I put the dressing gown and slippers back on and took a step. The combination of wet slippers on top of the wet hot tub ledge was like walking on ice. I slipped. I fell off the ledge, my pregnant bump hit a step on the way to the floor.
>
> …
>
> I did not see any signs telling me not to wear slippers on hot tub ledge. Due to the position of the clothes hooks it felt only natural to take off the dressing gown and slippers on the hot tub level."

32. Mrs Dunbobbin replied the next day, saying:

> "We take such matters seriously at out hotel and will of course investigate thoroughly the comments you have made and also let you know our findings. … Please rest assured that we will give this our full and undivided attention during the investigation."

33. Dr Clements prepared a further document setting out what she said had happened. She sent this document to the Hotel or their insurers on 5 December 2017. I shall call it Dr Clements' Second Document. She illustrated it by including two photographs, one showing the layout of the spa pool area at the tine of the accident and another showing changes that had been made. Her account was:

> "This is how I remember sequence of events leading to fall/during fall...
>
> I was wearing hotel provided slippers.
>
> It had been raining. Surface of hot tub and grass were wet.
>
> I walked through wet grass to get to hot tub.

Slippers became wet.

I walked up the steps of hot tub.

I then went onto the ledge on the right side of hot tub to hang up dressing gown on hook provided. (1)

and took slippers off at same time.

Used hot tub.

On leaving hot tub I went to ledge on right side to retrieve dressing gown and slippers.

I put on dressing gown and slippers. I took a step whilst still on ledge (position 2). I slipped.

Tried to reach for hand rail It was too far.

I fell off edge of ledge.

My Bump broke the fall by hitting the middle step (3) on my fall down. I landed on the grass.

I feel the fall may have been avoided if:

1. I hadn't worn slippers (i.e There was a sign advising not to use slippers on the level of the hot tub.)

2. There was a hand rail that was within reaching distance when I slipped.

3. It had not been raining beforehand.

4. I had not gone on wet decking to the right of the hot tub. Having wet decking with a 4 foot drop without a reachable handrail in my opinion is dangerous.

Changes they have made since... (photo taken from their website)

[photo]

1. removed step on right side

2. placed objects on ledge on right side

3. removed hooks to put dressing gown

note these changes seem designed to prevent people going onto the ledge (2) that I fell from. If the set up of the hot tub had been like this I would not have used the ledge. I would have got out

> of the hot tub holding onto the hand rail. This looks a much safer set up.
>
> It is also my understanding that they no longer provide slippers, although this may need confirming."

Case summary

34. In due course, an Agreed Case Summary was negotiated by the parties pursuant to an order of the Court made on 23 September 2022. The purpose of such a document is well-known. CPR PD29 5.7(1) provides that:

> "1) A case summary:
>
> (a) should be designed to assist the court to understand and deal with the questions before it,
>
> (b) should set out a brief chronology of the claim, the issues of fact which are agreed or in dispute and the evidence needed to decide them,
>
> …
>
> (d) should be prepared by the claimant and agreed with the other parties if possible."

35. The order directing the parties to produce a case summary in this case did not direct them specifically to identify the issues of fact that were agreed or in dispute, but the parties did so anyway. The case summary included the following:

> "Background
>
> 1.3 It is agreed between the Parties, in Paragraph 9 of the Particulars of Claim and Paragraph 7 of the Defence, that the upper section of the raised decking area was between 720mm and 725mm in height and that there were hooks on the wall, to the right of the Jacuzzi which were intended for spa users to hang their robes whilst they used the Jacuzzi.
>
> 1.4 The single witness account of the fall is provided by the Claimant's Mother, Ms Clements, and the exact circumstances leading up to and how the fall occurred are in dispute, however, it is agreed that after using and exiting the Jacuzzi Ms Clements fell from the raised decking area.
>
> …
>
> 3. Issues in dispute
>
> 3.1 The Parties respective positions are set out in the Statements of Case. Breach of Duty is denied. The Parties have opposing views as to whether the departure from the Architect's

> original design, absence of plans for the revised decking design, adherence to Building Regulations or construction requirements, installation of the raised decking area around the Jacuzzi without a suitable safety barrier and the later addition of the right sided steps, all presented a hazard for guests using the Jacuzzi. The Parties disagree as to the reasonable and effective provision of suitable footwear for the guests using the outdoor Jacuzzi. The series of events leading to and including the fall are also in dispute."

Skeleton arguments

36. While acknowledging that the court would be required to make findings of fact as to the circumstances of Dr Clements' fall, the Claimant's opening skeleton reiterated the position that she fell forwards over the unguarded edge of the right raised decking and down towards the ground level: paragraph 8. Later in the skeleton the Claimant highlighted that "the edge of the right raised decking area was unguarded" and that "there was no guard and/or handrail and/or grab rail within reach to enable [Dr Clements] to avoid falling over the unguarded edge of the right raised deck area." The summary of the Claimant's case on breach of duty at paragraph 18 was:

> "The D breached its duty to the C by failing to take reasonable steps to avoid SC's accident, which was foreseeable, by:
>
> a. Failing to identify the need for a guardrail along the exposed edge of the right raised deck area during the original design and installation process;
>
> b. Failing to identify the need for a guardrail along the exposed edge of the right raised deck area during later modifications to the jacuzzi area;
>
> c. Failing to conduct adequate risk assessments of the jacuzzi area that would have identified the need for a guard rail to guard against accidents of the type that SC suffered;
>
> d. Failing to ensure that SC was provided with suitable footwear that would have mitigated the likelihood of falling from the exposed edge."

37. Each of these was then analysed and developed in greater detail in the following paragraphs. The Claimant's case on causation was succinctly summarised at paragraph 55 as "Fundamentally, had there been guarding in place along the exposed edge of the right raised deck, the accident would have been avoided. This is a position accepted by all experts: … ."

38. The Defendant's skeleton included the following:

> "2. The Court, of its own volition, ordered that breach of duty be tried as a preliminary issue [1/289]. Notwithstanding this, it is only right to say at the outset that the Judge trying the

issue of causation will need to take the manner of fall, nature and place of any impact and the force of impact into account. It will therefore be necessary to make express findings on these matters. The Claimant has included the Claimant's medical causation reports in the bundle.

…

Background Facts:

3. There is an agreed Case Summary, an agreed Chronology and an agreed Trial Timetable.

…

5. Mrs Clements and Mr Siddall went to the outdoor jacuzzi area. This is shown clearly in the various photographs - see for example [1/389 and 393]. She alleges that she climbed the steps from the lawn and moved to her right to hang her robes on the ornamental taps and leave her slippers in the area. She and Mr Siddall then spent a short time in the spa bath. Mrs Clements retrieved her robe, put her slippers on and alleges that she slipped and fell over the edge of the platform at the point marked on [1/393]. Various accounts are recorded as to the mechanism of this fall and will be explored in evidence. There were no witnesses.

6. The Defendant contends that it is improbable a. that Mrs Clements slipped and b. that a slip would have resulted in her falling forwards.

7. The voluminous allegations can probably be distilled into 3: that the decking was slippery, that the slippers were slippery when wet; that there was no barrier at the edge of the decking. It is denied that the decking was slippery, that the slippers were slippery when wet, or that there was a reasonable requirement for a barrier.

…

9. It is the Hotel's case that the spa pool and surrounding area were reasonably safe for use by lawful visitors. … It is difficult to envisage a less slippery surface, or a less slippery combination of footwear and surface. The area where Mrs Clements allegedly slipped and the edge over which she fell did not reasonably require guarding. This was an unfortunate accident that occurred without negligence on the part of the Hotel.

10. The most likely cause of the fall was Mrs Clements walking too close to the edge of the platform and/or tripping,

> stumbling or otherwise losing her balance for reasons unconnected to the design of the spa bath. Thus she was wholly the author of her own misfortune. Further, if she did somehow slip and fall forwards she must have been careless. The Hotel will make detailed submission on these issues after the evidence is complete."

The hearing

39. The opening submissions, evidence and closing submissions were heard over two days, commencing on 16 January 2023. The judge then reserved his judgment overnight and gave it on the morning of the third day.

40. Early in the course of the Claimant's opening, the Judge said "The issue in this case, I think as Mr Block fairly summarises in his [written opening skeleton], is was it slippery? Was there a barrier?"

41. Soon thereafter, Dr Clements was called to give her evidence and was duly cross-examined by Mr Block KC. The section of cross-examination that is relevant to the issues in this appeal started with Mr Block asking Dr Clements to indicate where on the raised decking she had been standing when she put on her robe and slippers after using the spa pool, which Dr Clements said was near to the area where she had placed the cross on the photograph she had exhibited to her first witness statement. He then took Dr Clements to the Accident Report Form, directed her to the words "slipped coming down steps from hot tub" and informed her of his understanding that Ms Bainbridge would say she wrote down what Dr Clements had told her. Dr Clements's response was that she had never said she slipped down the steps.

42. Without more, Mr Block took Dr Clements to the typed note, which he said that Mrs Dunbobbin would "tell you was made pretty contemporaneously" and that "you explained to her that you'd fallen down the steps on the outside garden jacuzzi and you explained that you'd slipped on the steps coming down and hit your bump quite hard on the left hand side." Once again Dr Clements responded that she "never told anyone that [she] fell down the steps because [she] didn't fall down the steps: [she] fell off the ledge." She repeated that she fell off the ledge and that her bump had taken the full impact of her fall.

43. Continuing along the same line, Mr Block put to Dr Clements that Mrs Dunbobbin's recollection, which she had recorded in the typed note, was that she asked how the accident happened "and you said you'd worn wet bedroom slippers and had come out of the jacuzzi, put them on and walked down the steps and slipped, landing at the bottom of the steps." Having accepted that she had thought and said that the slippers had caused her to slip, she once again refuted the suggestion that she had fallen down the steps.

44. It is convenient to note here that, as I will explain later, the premise on which Mr Block put each of these documents proved to be materially inaccurate: see [57] and [101]ff below.

45. Mr Block then moved to Dr Clements' First Document. He asked her why she used the phrase "took a step". Her response was that when she wrote the document she was not thinking about litigation: she just wanted to get the point across and so did not go into

detail, which was why it was differently worded from the account in her witness statement. The point was that there wasn't a rail, there wasn't a sign and there was an exposed edge. She explained that the hotel had said they would contact their insurance company and do a safety report. At a later date she had asked to see that report and had been refused and advised to see a solicitor.

46. Mr Block then went to Dr Clements' Second Document. She said she had not consulted solicitors when she sent it but had been waiting for the outcome of the hotel's safety report. She understood that her Second Document would be considered by the hotel's insurer and that she "had to give a pretty accurate assessment of what had happened." Once again Mr Block suggested that "taking a step" was different to "losing my footing whilst putting on my right slipper." Her reaction was that she had still wanted to keep it simple and so had kept using bullet points, that she felt putting too much detail in would distract from what she wanted to say, and that what she clearly remembered was sliding forward "in that lunge position." When pressed on whether her account had changed she said "I stepped into the slipper but it's more of a communication, so I've always known that I slipped forward and I slipped while I was putting my foot into the slipper and I kind of simplified it. So, I think on reflection, you're probably right that this isn't written in a legal, accurate way. This is a kind of, its written to communicate the points I wanted to communicate at that time." She maintained that explanation when pressed again by Mr Block, in the course of which she said that she was "quite nervous" and accepted that there was an apparent difference between the account in her Second Document and her witness statement.

47. Mr Block then moved to a letter from her solicitors, Irwin Mitchell, in February 2018, which was consistent with her account at trial. When asked if she accepted that this was the first time that she had notified the hotel's insurers of having slipped as she was putting on slippers, Dr Clements gave an answer that briefly became confused, whereupon she asked for a glass of water as the Judge interrupted to say that he was trying to take a note of what she was saying. Water was provided and her evidence continued. With that exception her answers were clear and coherent. She explained again her recollection that she slipped while putting her foot in the slipper.

48. Mr Block then put to Dr Clements that it was difficult to understand why two people (Ms Bainbridge and Mrs Dunbobbin) who were said to have made contemporaneous notes of what Dr Clements had said – "leaving aside whether it was a slip on steps or ledge" – did not record anything "that could begin to describe, "I was putting my slippers on and lost my footing"; and that Dr Clements's First and Second Documents were not consistent with her current account. He then asked "why is that and why is it that it suddenly comes to your mind 13 months later as being what happened?" Dr Clements said that she stuck with her recollection, to which Mr Block said "Well, I think you may find that we accept you fell forwards, but we do not accept you slipped."

49. The final section of Mr Block's cross-examination returned to the nature of the investigation that Dr Clements thought the hotel was carrying out. Her response was that "it could have been an investigation, but they said they did a safety report." She then repeated her evidence that the hotel had said they would investigate fully, that she had later phoned the hotel, and that she had been told that the report had been received but that she could not see it and was advised to consult a solicitor.

50. A review of Mr Block's cross-examination, which I have summarised above, reveals that he concentrated on the mechanism of Dr Clements' fall, namely whether or not she had slipped while putting on a slipper or had fallen after taking a step. He was scrupulous in not putting a positive case. He did not at any stage challenge her evidence that she fell from the raised deck area save implicitly by his reliance upon the Accident Report Form and the typed note. Even towards the end of his cross-examination he concentrated on the mechanism rather than the location of the fall, "leaving aside whether it was a slip on the steps or the ledge."

51. After Dr Clements, the Claimant called Mr Siddall, who duly verified the contents of his statement. He was not cross-examined on paragraph 18 of his witness statement, which I have set out at [22] above.

52. The first witness called by the Defendant was Mrs Dunbobbin. At the outset, having verified her witness statement, she was asked to prove the typed note. She said she had written it on 1 January 2017 and had not had an opportunity to read it before the day of the hearing. In cross-examination she confirmed that, when asked about her first recollection of speaking with Dr Clements it was in the bar after she had been to Penrith Hospital. She did not remember seeing her lying down in a treatment room and did not remember talking to her at that earlier stage. In her witness statement she said that by the time she met Dr Clements in the bar she was aware that her staff had been informed of the accident and that Ms Bainbridge had made a record in the accident book.

53. Initially she said that she had completed the typed note at around 2pm, but soon changed her evidence to it having been in the afternoon after 2pm. She then said that, having been prompted, she now remembered seeing and talking to Dr Clements in the spa reception area, but accepted that she was struggling.

54. A little later, the following exchange occurred:

> "All right, later on in this statement you say, "I met the couple in the corridor, escorted them to the lower staircase. When asked how the accident happened, she said she's worn the white bedroom slippers and come out of the Jacuzzi, put them on, walked down the steps and slipped."

Mrs Dunbobbin replied:

> "Yes, I walked her to the staircase; the bottom of the staircase is the one that's in the hotel so, it was through the corridors, around the hotel and Mrs. Clements was staying on the top floor. So, I escorted her, went with her to the bottom of the staircase so then she proceeded up to her bedroom."

55. Mrs Dunbobbin gave no evidence either in her witness statement or her oral evidence to say that the explanations about the happening of the accident given in the first and second substantive paragraphs of the typed note were based on information given by Dr Clements to her personally, as opposed to being what Dr Clements was reported to have said to someone else or what someone else had assumed who had reported the information to her. She was cross-examined about apparent errors in the typed note, to which I will return later, and at the end of her cross-examination, when Mr Willems KC

asked if it was possible that she had created the document in August 2017 as a reaction to Dr Clements' First Document, she replied that she honestly could not say.

56. It is not necessary to rehearse other parts of Mrs Dunbobbin's evidence in the light of the judge's finding that she had no reliable recollection of the events of the day and that he treated her evidence with considerable caution, though he entirely accepted that she was an honest witness who would not say or record anything she knew to be inaccurate or untrue.

57. When Ms Bainbridge gave evidence, she verified her witness statement. In cross-examination she repeated that she had *not* got the information in the Accident Report Form from Dr Clements. Unsurprisingly, the Judge felt unable to rely upon the Accident book as reliable contemporaneous evidence that Dr Clements gave the account set out in it. There was therefore no evidential basis for the suggestion in Mr Block's cross-examination of Dr Clements that the information in the Accident Report Form came from her.

58. On the morning of the second day of the hearing, 17 January 2017, the Court heard the evidence of the experts, Mr Sandell and Dr Lemon. At the start of the short adjournment it was anticipated that the parties would next make their submissions. However, on the court reassembling, Mr Block applied to adduce further evidence in the form of a photograph of a computer screen showing what he called "metadata" under the main heading "N Y D Mrs Clements Spa". The photograph was attached to an email timed at 12.10 pm that day from Mr Dunbobbin, who until that moment had played no part in the hearing. The text of the email stated:

> "Not sure it's going to change anything but we have got back to the office and found Angela's typed account of what happened. As you can see the document was created on 01/01/2017 at 14.54 and finished 15.38. Angela did create it on the day."

59. Mr Willems pointed to difficulties with the document, including that the new document was produced by someone who was not a witness in the case, that there was no witness statement, and that it raised questions which put him in difficulties – including whether the new information related to any document that was in the bundles. He also drew attention to a letter from Clyde & Co, the Defendant's solicitors, which stated in January 2022 that the hotel had "confirmed that they do not have any further information other than what has already been provided as they changed computer and email and no longer have access to earlier information." Rather than objecting to the admission of the document, Mr Willems suggested that the Court could look at it and decide whether any weight should be given to it. The Judge admitted the document and agreed to hear submissions about the weight to be attached to it. He then moved to submissions, agreeing with counsel that they should describe the raised deck area as "the deck".

60. Mr Block started by saying that:

> " "… the first issue to resolve is where, when and in what circumstances she fell and that issue it seems from the evidence is probably between she was on the raised ledge and fell over the edge or she fell on the steps."

61. He acknowledged that the Defendant had merely put the Claimant to proof, but turned to what he described as consistency between the Accident Report Form and the typed note, which he submitted should be weighed against the evidence of "the fall from the deck". In analysing Dr Clements' various accounts, he concentrated on the development of the mechanism of the fall i.e. whether a slipper had any involvement in her slipping or falling. He made detailed submissions on whether the slipper was involved at all, whether there was a slip or some other reason for falling and whether the fall happened before or after Dr Clements took a step.

62. Mr Block then turned to the location of the fall, saying:

> "… there's an issue as to whether it's the steps or the deck, if it's the steps you have the difficulty of having no evidence as to what caused the fall, certainly that any deficiency in the design of the steps was relevant to the fall. The evidence is that generally speaking steps are less slippery than flat surfaces because one is stepping down onto them rather than forwards. So if you were to find that it was the steps then we say that a breach of duty is not made out. If it's the ledge then the decision for the Court is whether it actually matters whether she slipped, tripped or fell and whether she should've been protected from whatever the mechanism of fall by a barrier and my strong suspicion is that when you carefully analyse the case you will see that other than the issue about whether she slipped on the deck is the central issue."

63. It is to be noted that, once again, Mr Block was scrupulous in not advancing a positive case, though it was implicit in his submission that the court should find that Dr Clements fell down the steps. He made no submissions that there should be a finding of contributory negligence.

64. Mr Willems started his submissions on behalf of the Claimant on the basis that the mechanism of the fall did not matter, because "here, we have somebody who falls over an edge, a level edge from the deck and in fact whether she slipped -", at which point the judge intervened "Or down the steps, that is the issue" and Mr Willems replied "Or down the steps, and I will come to that, yes." The judge then asked Mr Willems to concentrate on whether the fall was on the deck or down the steps, which Mr Willems duly did, making submissions about why Dr Clements' evidence should be preferred. He did not take the point that is now taken on this appeal, namely that it was not open to the judge to find that Dr Clements had fallen down the steps because it was an agreed fact that she had fallen from the raised deck area.

65. The Judge then adjourned to the next day, when he gave judgment.

The judgment

66. The judgment is clear and concise. The judge set out Dr Clements' version of events and that "the defendant submits that Dr Clements' account cannot be accepted, because shortly after the accident, she has given other inconsistent accounts." He then set out the Accident Report Form, the typed note, the note made by the midwife at Penrith Hospital, Dr Clements' First Document (which he incorrectly said was sent on 17

October 2017), and Dr Clements' Second Document, each of which I have set out above.

67. The judge held that he could not rely upon the Accident Book as reliable contemporaneous evidence that Dr Clements gave the account set out in it. Turning to the typed note, having found that Mrs Dunbobbin was an honest witness but had no reliable recollection of the events of 1 January 2017, he accepted her evidence that she made the typed note on that day. His reasons for doing so were expressed to be:

> "It seems to me probable that the hotel owner would wish to keep a contemporaneous record of the events surrounding a potentially serious accident. There is a wealth of circumstantial detail in the file note that suggests that it contains the contemporaneous recollections of the maker, for example, that after a conversation with Dr Clements, she was moved to the treatment room. Dr Clements herself gave evidence that she was taken to a treatment room which seems to me to corroborate the account in the file note. I doubt whether such detail would or could have been recorded 8 months after the accident had occurred."

68. The judge then turned to the "metadata". While accepting that he should give careful consideration to the weight he should give to the metada, mentioning the correspondence about the inability to give further disclosure that I have set out at [59] above and the absence of a witness statement supporting the data, he said:

> "Nevertheless, I conclude that the most likely explanation for the metadata is that they relate to the file note in question. The title of the document to which the data refers is "NYD Mrs Clements Spa" which I take to mean, "New Year's Day Mrs Clements Spa". The times at which the document was created and edited are broadly consistent with the contents of the file note. It is improbable, in my view, that Mr & Mrs Dunbobbin are sufficiently adept at information technology to produce bogus metadata that just happens to support the defendant's case. In my view, the most likely explanation for the file note is that Mrs Dunbobbin created it on New Year's Day 2017, shortly after the accident that Dr Clements suffered."

69. The judge concluded that the Penrith Midwife's note was made at 3.10pm, shortly after Dr Clements and Mr Siddall had left the consultation. He therefore found that they attended on the midwife a little before 3.00 pm.

70. Turning to the evidence of Dr Clements, he was highly critical at [18] of the judgment:

> "When she was challenged about the fact that her email of December 2017 suggested she took a step before she slipped, which is contrary to her current case, she told me that she was not thinking about litigation when writing the emails, instead, she was seeking to get her point across. I found her explanation unconvincing. In my view, the emails do not simplify her case

> in order better to make a point. Instead, they advance a materially different factual account. The fact that she put forward a different account from the one she currently insists is accurate, reflects either upon her honesty or her credibility. I found that, when asked difficult questions, Dr Clements gave responses that were not coherent, to the extent that, at one stage, I had to intervene and ask her what she meant. When it was put to her that Ms Dunbobbin had asked her about the accident, Dr Clements did not deny the suggestion, she explained that the slippers she was wearing had caused her to slip, but she did not directly address the record contained in the file note, which continues after the reference to slippers, that Dr Clements "put them on, walked down the steps and slipped, landed at the bottom steps". Having regard to these matters, and in particular, having regard to her demeanour in the witness box, I have come to the conclusion that I must treat Dr Clements's evidence with great caution."

71. Turning to the evidence of Mr Siddall, the judge said that:

> "He did not witness Dr Clements's fall and he has no recollection of what was said to whom about the accident after the event."

He did not refer to paragraph [18] of Mr Siddall's witness statement, which had not been challenged.

72. In the light of this review of the evidence, the judge set out his findings as follows:

> "21. I find that, after she had emerged from the jacuzzi, Dr Clements moved onto the right-hand deck to retrieve her robe and slippers.
>
> 22. I find that Dr Clements put on her slippers without incident. I reject her account that her right slipper slipped out of control. This account is inconsistent with the accounts that she gave on the day of the accident and in her emails of 17 August 2017 and 5 December 2017. I accept the evidence of Mr Cotterill and Dr Lemon that the decking was highly slip resistant. In my view, there is no reliable evidence that proves that the use of these slippers, on this highly slip-resistant surface, gave rise to a risk of slipping. There is no reliable expert evidence that suggests that the account that the claimant now gives is likely to have occurred.
>
> 23. I find that Dr Clements missed her footing when she was on the stairs. In my judgment, the most likely explanation for Ms Dunbobbin's note that "She informed us that she slipped on the steps coming down" and "When asked how the accident happened, she said she had worn the white bedroom slippers and had come out of the jacuzzi, and put them on, walked down the steps and slipped, landed at the bottom steps" is that Dr Clements

> was asked what had happened and her reply was recorded. The most likely explanation for Dr Clements' reply is that this is what actually happened. It follows that I reject Dr Clements' account that she fell from the right-hand deck.
>
> 24. There is, in my judgment, no evidence that the stairs were not reasonably safe for use by the claimant. There is no reliable evidence that the wearing of bedroom slippers contributed to the happening of the accident.
>
> 25. I conclude, therefore, that this accident was an extremely unfortunate accident for which, in my judgment, the defendant is not liable."

73. Those findings determined the outcome, but the Judge went on to consider what his decision would have been if he had concluded that Dr Clements had fallen from the right-hand raised deck. His ruling was that:

> "27. In my judgment, that deck constituted an obvious traffic route. The hooks on the wall at the back of the right-hand deck invited guests to hang their robes in a position, access to which was by way of the right-hand deck. I find that, at the material time, there was no coat stand, such as was subsequently provided, on which to hang robes. Guests were likely to, and did, walk on the right-hand deck in order to access the hooks and to access the jacuzzi in the event that there were several guests already in it. It is entirely conceivable that guests might be present who had taken alcohol or who had spent too long in the hot water and suffered from light-headedness. In my view, it was obvious that guests using the right-hand deck may come into close proximity to the drop from the deck down to ground level.
>
> 28. The drop of 720mm was, in my judgment, such as to give rise to a foreseeable risk of injury. In my view, it required to be guarded in order to keep visitors reasonably safe. I note that BS6180 requires that an edge exceeding 600mm in height should be guarded. Such a guard would have prevented Dr Clements from falling onto the steps, had she fallen from the right-hand deck as she alleges.
>
> 29. The defendant advanced the defence provided by section 2.4(b) of the Occupiers' Liability Act 1957. The evidence about who bore the responsibility for the works undertaken in 2015 was extremely confusing. What was entirely absent was any evidence that the defendant had satisfied itself that, whoever was responsible for the work, was competent and that the work had been properly done. In those circumstances, the defence would not have availed the defendant."

Ground 1: was the location from which Dr Clements fell an issue that was properly before the Judge?

74. The first thing to note is that, although in closing submissions to the judge below Mr Willems did not take the point that is now taken that it was not open to the judge to find that Dr Clements fell elsewhere than from the raised deck area, no objection is taken by the Respondent to the point being taken for the first time on appeal. We have therefore heard the parties on Ground 1 and will decide it.

75. There is a second preliminary point that should be addressed head on. Mr Block submitted that Ground 1 is a lawyer's construct and that no one at the time of the trial viewed the Defendant as having accepted that Dr Clements fell from the raised ledge and not on or by the stairs. He pointed to the fact that no objection was taken as the issue of the location of the fall surfaced during closing submissions or at any stage during the hearing below as indicating that those acting for the Claimant did not believe at the time that the issue of location was the subject of agreement and not for the judge to decide. Mr Willems rejected this interpretation of events. He frankly recognised that he could and perhaps should have objected at the time; but he told us that he was taken by surprise by the development of the point which, he says, explains his failure to do so.

76. Without seeking to apportion responsibility or blame, I confess to being surprised that experienced, reputable and highly competent leading counsel, as Mr Willems undoubtedly is, would not react at some point as it became evident that Mr Block was putting the location of the fall in issue and the judge appeared to accept his doing so. However, I accept Mr Willems' explanation. In similar vein, it might be thought surprising that the equally experienced, reputable and highly competent Mr Block did not intervene when the judge formulated the issues at the start of the hearing without reference to the location from which Dr Clements fell. I would accept that such things happen in contested litigation and that a court should be astute not to attribute undue significance when they do happen in a normal case such as the present appears to be. It remains necessary to analyse the facts that I have set out above to determine whether it was agreed as a matter of fact that Dr Clements fell from the raised deck area and, if so, what the implications of the emergence of the issue and its resolution by the judge without objection from Mr Willems may be.

The principles to be applied

77. It is perhaps convenient to start with general principles about the formulation of issues in adversarial litigation. These are not new and can be summarised by reference to established authority:

    i) It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points raised by the other: see *Al-Medeni v Mars UK Ltd* [2005] EWCA Civ 1041 at [21] per Dyson LJ;

    ii) Statements of Case play a critical role in identifying the issues to be determined. That is not to say that a trial judge may not permit a departure from a pleaded case where it is just to do so, although in such a case it is good practice to amend

the pleading, even at trial: *UK Learning Academy Limited v Secretary of State for Education* [2020] EWCA Civ 370 at [47] per David Richards LJ;

iii) The function of the judge is to adjudicate upon the issues identified by the parties alone: *Al-Medeni* ibid;

iv) Adherence to the issues that have been identified by the parties (in particular by the pleadings) prevents the trial from becoming a disorderly free-for-all: *Dhillon v Barclays Bank* [2020] EWCA Civ 619 at [19] per Coulson LJ;

v) The task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after truth: *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2020] UKSC 24, at [242].

78. Case management in accordance which the overriding objective should always be directed to ensuring that the issues for the court to decide are identified and that there should be clarity both about what is agreed and what is not agreed between the parties. Such an approach is essential to dealing with any case proportionately, expeditiously and fairly. To that end, issues and matters of agreement or disagreement may be identified and refined by pleadings and, thereafter, by case summaries, lists of issues and even skeleton arguments. The functions of case summaries have already been identified: see [34] above. As in the present case, they will typically be negotiated and drawn up (or, as necessary, refined) after the close of pleadings and the exchange of witness evidence, both lay and expert, at a time when the parties can and should liaise to ensure that the future conduct of the case is expeditious and fair. Also, as in the present case, it is typical for such case summaries to have a section specifically devoted to identifying what remains in issue. In addition, it is entirely routine and good practice in an appropriate case for lists of issues to be prepared with may provide further refinement of what is in issue. Finally, the parties have another opportunity to identify matters that are or are not in issue in their opening skeletons for trial. The end result of these procedural steps should be that an objective observer can identify what are the issues that the judge is to decide in order to resolve the case.

79. The CPR makes additional provision for the making and withdrawing of admissions, with a new version of CPR 14 being introduced on 1 October 2023. Common to both the new and the old versions is that a party may admit the truth of the whole or any part of another person's case by giving notice in writing and that the permission of the court is required to withdraw an admission so given.

80. In the present case, the pleadings taken alone did not remove the location from which Dr Clements fell from the issues to be decided. The general non-admission in paragraph 9 of the Defence left matters in issue that were not specifically admitted elsewhere and there was no specific admission in the Defence that either said or necessarily implied that the Defendant admitted that Dr Clements fell from the raised deck area. That said, the language used in the Particulars of Claim, which I have set out above, drew a clear distinction between the decking (meaning the raised decking) and what was described in the Particulars of Claim as the jacuzzi platform. The Claimant's description of the scene in the Particulars of Claim was admitted by the Defence, which went on to address the allegations specifically by reference to that description and language. Mr Block attempted to persuade us that some of the references to the decking in the Defendant's

response to the allegations of negligence referred to the raised deck area and some to the jacuzzi platform. I am unable to accept that submission. On any reasonable objective reading of the Defence and the allegations in the Particulars of Claim to which it was responding, the relevant distinction was between the raised deck area and elsewhere.

81. Similarly, Mr Block attempted to persuade us that the phrase "raised decking area" as used in the Case Summary meant the whole of the area surrounding the spa pool and that only the phrase "upper section of the raised decking area" in paragraph 1.3 was a reference to the area from which the Claimant alleged that Dr Clements had fallen. On that basis, he submitted that the phrase "it is agreed that … Ms Clements fell from the raised decking area" in paragraph 1.4 was a reference to falling *either* from what the parties have consistently described as the raised decking area (i.e. from where Dr Clements said that she had fallen) *or* the jacuzzi platform.

82. I am unable to accept that submission. First, as I have explained above, it is at best a strained use of language to describe the jacuzzi platform as a "raised decking area". Second, the case summary was negotiated and agreed after exchange of pleadings, witness evidence and experts' reports, all of which used the phrase "raised decking area(s)" or its equivalent to denote the raised decks to either side of the spa pool and not the area between the steps and the edge of the spa pool itself. Third, although paragraph 1.4 of the Case Summary said that "the exact circumstances leading up to and how the fall occurred are in dispute" and the issues in dispute listed in paragraph 3.1 included that "the series of events leading to and including the fall are also in dispute", neither paragraph stated that the location from which Dr Clements fell was in dispute. Fourth, as it emerged, the challenge to Dr Clements evidence that she fell from the raised right-hand decking was not that she had fallen from what had been called the jacuzzi platform. Rather, it was that she had lost her footing on the stairs: see [41], [42], [48], [60], [6264], and [64] above.

83. Once the Case Summary is read in the context of the pleadings, the witness statements, and the experts' reports, I would conclude that there is only one reasonable interpretation of paragraphs 1.4 and 3.1 of the Case Summary. It is that the point at which Dr Clements fell over the edge was not in dispute and was the point consistently identified by the Particulars of Claim and Dr Clements' witness statement with its annotated photograph showing the leading edge of the raised deck area to the right of the pool, a distance of about 720 to 725 mm. What remained in dispute was the exact circumstances leading up to and how the fall occurred i.e. whether Dr Clements took a step before falling and whether or not she slipped or otherwise lost her balance.

84. The skeleton arguments for the trial reinforce this conclusion. The Claimant understandably concentrated on the absence of guarding along the edge of the raised right deck area. The Defendant's skeleton at paragraph 2 identified as issues on which findings would have to be made because they would have to be taken into account at a later date if and when considering causation, namely "the manner of the fall, nature and place of any impact and the force of the impact". Taking these in turn, (a) "the manner of the fall" most obviously refers to the mechanism of the fall (i.e. whether Dr Clements slipped or fell for some other reason); (b) the "nature and place of any impact" refers to where and how she landed and not the place from which she fell; and (c) similarly "the force of the impact" refers to where and how she landed and not the place from which she fell.

85. Paragraph 5 of the Defendant's skeleton is consistent with this approach because it refers expressly to exploring in evidence "the mechanism of this fall" and not the place from which she fell, as is made clear by paragraph 6 which identifies the two areas of contention as being (a) whether she slipped and (b) whether a slip would have made her fall forwards.

86. Furthermore, I regard paragraph 7 as inconsistent with the Respondent's present case: it identifies the allegations with which the Defendant had to deal at trial, which include whether there should have been a guardrail but do not include the location from which Dr Clements fell. That is reinforced by paragraph 9 which distinguished between "the area where Dr Clements *allegedly* slipped" and "the edge over which she fell" not requiring guarding.

87. I would therefore hold that the judge was right in his understanding and simplified characterisation of the issues of which he was seized as "was it slippery? Was there a barrier?"

88. For these reasons I would hold that, at the commencement of the trial, the point at which Dr Clements fell over the edge was not in issue between the parties. That does not automatically conclude Ground 1 in the Appellant's favour. It is necessary to examine how the judge came to give a decision on an issue that was not originally before him.

89. In my judgment the progression emerges clearly from the facts that I have summarised above. It is plain that Mr Block recognised that he was not entitled to put a positive case, because his pleading was limited to putting the Claimant to proof; and, as I have said, he was scrupulous in his respect for that limitation. He used the Accident Report Form, the typed note and Dr Clements' First and Second Documents to challenge Dr Clements' credibility in advancing the account of the mechanism of the accident as set out in her witness statement. Even on the basis that the location from which Dr Clements fell over the edge was agreed, he was fully entitled to tax Dr Clements with the suggestion that these documents demonstrated that her account of the mechanism of how she came to fall had changed with time; and he was entitled to put to her that the raised decking area was not slippery even when wet. Equally, Dr Clements was fully entitled to respond by saying that she had not fallen down the steps and had not told anyone that she had done so. That did not of itself re-open the issue of where she fell. His reference to the typed note was more problematic because it included reference to the suggestion that she had slipped and fallen on the stairs rather than on the non-slip decking. However, he did not put to her that she had not fallen from the raised deck area, which he should have done if he was re-opening that issue. His references to Dr Clements' First and Second Documents went to the distinction that the Defendant drew between slipping while putting on a slipper and slipping or falling after taking a step. He did not use it to suggest that Dr Clements had not fallen over the edge of the raised deck area. In my judgment, Mr Block was concentrating throughout on the mechanism that led to the fall, even though he referred late on to "leaving on one side whether it was a slip on steps or ledge."

90. After Dr Clements had given her evidence, there was nothing in the rest of the evidence to indicate that there was a live issue about where she had fallen over the edge. It was not until the Defendant's closing submissions that the existence of an issue was identified: see [60] to [63] above. I have already accepted that Mr Block was scrupulous in not putting forward a positive case; but I consider that he was wrong to raise in

closing submissions an issue of fact about where Dr Clements fell over the edge. Had Mr Willems objected at that point, I consider that the Judge would have been bound to hold and would have held that (a) the point from which Dr Clements fell was an agreed fact and (b) it was too late to re-open that issue.

91. The fact, however, is that Mr Willems did not object either immediately or when making his submissions. To the contrary, he adopted the judge's suggestion that the issue was live and made submissions on it.

92. It is this absence of objection and willingness to address the newly introduced issue that has caused me the greatest difficulty on Ground 1: should it preclude the Appellant from asserting in this appeal that the judge was wrong to accept the issue and to decide it? Although I consider that the issue is finely balanced, I have come to the conclusion that it should not.

93. First, I accept Mr Willems' assurance that he was taken by surprise. It is not necessary to resort to phrases such as "in the heat of battle": it was, in my judgment, surprising that the issue should be reintroduced as and when it was.

94. Second, I consider that allowing the issue to be raised was prejudicial to the Claimant as its admission put the cross-examination in a different light, namely one that shines not just on the mechanism of the fall but also on where Dr Clements was when she fell over the edge. Seen in this light Mr Block's references to the Accident Report Form and the typed note may be seen as advancing a positive case as to location, which it was not (or should not have been) open to him to do. It renders the attack on Dr Clements' evidence and credibility much wider than it should have been. While the conduct of this trial could not be described as a disorderly-free-for all, the late admission of the issue means that the evidence of the witnesses was given and heard on one basis (i.e. that the place where Dr Clements fell over the leading edge was agreed), but subsequently came to be challenged on a different basis (i.e. that it was not).

95. It is true that Mr Willems has not asserted that he would have run the case differently had the issue been out in the open from the outset. Such assertions, even if they come from leading counsel, always need to be viewed with critical circumspection. What matters, in my judgment, is that admitting the issue at that late stage changed the shape and balance of the case and, even without any assertion from Mr Willems, it is in my judgment easy to see how the emphasis of examination, cross-examination and submissions may have been different had the issue been taken openly and transparently from the outset.

96. Finally, admitting the issue enabled the judge to rely upon the typed note as evidence of the location from which Dr Clements fell which, for reasons I shall explore under Ground 2, was a flawed exercise that acted materially to the Appellant's disadvantage.

Conclusion on Ground 1

97. Singly and cumulatively, these reasons mean that the decision to admit and decide the issue was procedurally unfair and wrong, notwithstanding the absence of objection at the time.

98. I would therefore allow the appeal on Ground 1. However, in case I were wrong in my conclusion on Ground 1, I will also deal with Ground 2.

Ground 2: if the point was open to him, was the judge wrong to find that Dr Clements missed her footing when on the stairs.

99. The Appellant acknowledges the high bar that he must surmount before this Court will overturn a finding of primary fact made by a trial judge. So do I. The Judge must be shown to be "plainly wrong", or to have reached a conclusion that no reasonable judge could have reached on the available evidence, or to have reached a conclusion that was rationally unsupportable: see *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817 at [29]-[39] for a convenient summary, which I bear in mind but does not need to be set out in full here.

100. The essence of Ground 2 is that there was no reliable evidence to support the judge's finding that Dr Clements missed her footing when on the steps. There are three main criticisms of the judgment. First, it is said that the judge's reliance on the typed note was flawed and wrong. Second, it is said that his criticisms of Dr Clements' evidence are demonstrably wrong. Third, it is said that he failed to take account of Mr Siddall's unchallenged evidence in paragraph 18 of his witness statement.

The typed note

101. The judge attached considerable significance to the typed note, holding that it was made contemporaneously and concluding that it was a reliable record of what Dr Clements said when asked what had happened. He based this on his assessment that Mrs Dunbobbin was honest and would not write down something she knew to be inaccurate or untrue.

102. Since Ms Bainbridge had not witnessed the accident and had said that Dr Clements had not told her what had happened, neither she nor the Accident Report Form could provide any evidence about how the accident had occurred. Since Mrs Dunbobbin was found by the Judge to have no reliable recollection of the events of 1 January 2017, there was no evidence other than the typed note (on the judge's finding that it was made contemporaneously) to which he could turn. However, one consequence of the absence of supporting evidence (either witness or otherwise) is that the typed note had to be assessed as it stood and on its own terms.

103. The first and, to my mind, the most significant point about the typed note is that it does not say that Dr Clements told Mrs Dunbobbin what had happened. The first extract on which the Judge relied was "She informed us that she has slipped on the steps coming down." In context it is not self-evident that Mrs Dunbobbin was using the word "us" to mean a group of people which included Mrs Dunbobbin or, more generically, those to whom Dr Clements spoke. The second extract was "When asked how the accident happened, she said she had worn the white bedroom slippers and had come out of the jacuzzi, and put them on, walked down the steps and slipped, landed at the bottom steps." Once again, and in context, it is not self-evident that this passage of the note recorded something that Dr Clements said to Mrs Dunbobbin. The judge somewhat avoided the issue by saying that "the most likely explanation for Mrs Dunbobbin's note … is that Dr Clements was asked what had happened and her reply was recorded." There are three related difficulties with this approach. First, it does not specify that Dr

Clements was speaking to Mrs Dunbobbin in relation to either extract or what the source of the information may have been. It is therefore not possible to be satisfied that the source of information can be traced back to Dr Clements. Second, it is known that Ms Bainbridge put an account into the Accident Report Form that said Dr Clements had slipped coming down steps from the hot tub without that being what she was told by Dr Clements. It is therefore apparent that the genesis of an account involving falling on the stairs existed without being based on an account from Dr Clements. Third, Mrs Dunbobbin gave no evidence either in her witness statement or when giving evidence that these extracts represented what she had been told by Dr Clements. While such evidence may have been of limited value given the judge's finding that, by the time of trial, she had no reliable recollection of the events of 1 January 2017, the absence of any substantiating evidence is complete.

104. The second significant feature when assessing the reliability of the typed note is that it contains clear and significant factual errors: it records things that simply cannot be correct. While not seeking to go behind the judge's finding that Mrs Dunbobbin was an honest witness who would not record anything that she knew to be inaccurate or untrue, Mr Willems pointed to demonstrable errors in the typed note, which in his submission undermine the judge's confidence in the note's accuracy. On the basis, which is accepted, that the Penrith midwife's note was made at 3.10 pm, Mr Siddall cannot have told Mrs Dunbobbin at 3.15 that Dr Clements was on the phone trying to contact the midwife, since they had already seen her. Equally, the hotel employee identified as P Mc cannot have seen the couple leave the building to go to the car park at 3.30 pm as they would by then have been at Penrith or on their way back. These timing errors are the more perplexing if, as the judge found, the note was typed up on the day; and they are completely inexplicable if, as the Defendant submitted, the metadata demonstrated that the typed note was first created at 2.54 pm and last modified at 3.38 pm that day. It is one of the regrettable consequences of admitting the late evidence described as "metadata" that these clear discrepancies were not and cannot now be resolved. All that can be said is that Mrs Dunbobbin was demonstrably an inaccurate historian when making her note; and that her error as to timings undermines any rational suggestion that the document was made at the time suggested by the "metadata". Other questions are perhaps less important, such as the order of the paragraphs, which does not suggest chronological compilation. In the context of an appeal against a finding of fact it would not be right to place weight on these lesser unresolved questions and I do not do so.

Dr Clements' evidence

105. The judge had the advantage seeing Dr Clements give evidence, which we have not had. We have the advantage of a transcript, which the judge did not have. While treating the availability of a transcript as an advantage, I bear in mind at all times that there are sometimes nuances or matters that may be observed in the course of a trial that do not emerge from a reading of the transcript.

106. The judge came to the conclusion that he should treat Dr Clements' evidence with great caution for the reasons he gave in [18] of the judgment. In order to review his conclusion, I have read all of Dr Clements' evidence (as I have read all of the other evidence except that I have not read every word of the experts' oral evidence).

107. First, the judge found unconvincing her explanation for the discrepancy between the terms of her email of December 2017 (which said "I took a step whilst still on the ledge (position 2). I slipped.") and her current case. Her explanation was that she was not thinking about litigation when writing the emails (i.e. both her First and Second Documents), instead she was trying to get her point across. The Judge took the view that the emails did not "simplify her case in order to make a point. In fact they advance a materially different factual account."

108. Dr Clements' explanation was more detailed than the judge allowed. She explained that, when she sent her First Document she was not thinking of making a claim, that she was "really chuffed" when the hotel said that they would investigate the comments she had made, and that she wrote her Second Document when she contacted them later and was told she could not see the report and was advised to see a solicitor. There was material corroboration of her account, to which the judge did not refer, in the hotel's reply to her First Document: the hotel did say that they would investigate thoroughly and that they would let Dr Clements know the findings: see [32] above. There was no evidence to contradict her account that she was told that the report had been received but she could not see it and that she sent her Second Document after that. To my mind, it is highly material that neither her First Document nor her Second intimated a claim and Dr Clements, though it is accepted on all sides that she is intelligent, is not a lawyer. The only material difference between the account she gave in 2018 and the account subsequently given by her solicitors in correspondence, by the pleadings and by her written and oral evidence was that originally she said she took a step after putting on the slippers whereas later she said that she slipped as she was putting on the slippers. Although this became an almost obsessive focus of attention for the Defendant, and was appropriate to be investigated at trial, I am quite unable to accept that the discrepancy could justify the judge's observation that "the fact that she put forward a different account from the one she currently insists is accurate, reflects either upon her honesty or her credibility."

109. The judge did not say that he found Dr Clements to be dishonest and, having reviewed the case overall, I am unable to detect any basis upon which he could have done so. Certainly it is no part of the Respondent's case that Dr Clements was anything other than entirely honest.

110. The judge then said that "when asked difficult question, Dr Clements gave responses that were not coherent, to the extent that, at one stage, I had to intervene and ask her what she meant." It is true that on one occasion Dr Clements gave a confused answer in the course of which she asked for a glass of water, during which the judge said he was trying to take a note of what she was saying: see [47] above. I am unable to identify any other responses to questions (difficult or otherwise) that were not reasonably coherent and am unable to identify any basis upon which the Judge could reasonably have made the observation that he did. It seems clear to me that he has materially mistaken the quality of her evidence and that his mistake has materially affected his overall conclusion about the weight to be given to her evidence and the eventual outcome.

111. The judge then said that "when it was put to her that Ms Dunbobbin had asked her about the accident, Dr Clements did not deny the suggestion, she explained that the slippers she was wearing had caused her to slip, but she did not directly address the record contained in the file note, which continues after the reference to slippers, that Dr

Clements "put them on, walked down the steps and slipped, landed at the bottom steps". I leave on one side, for the moment, the criticisms of the typed note outlined above. On any view the judge's criticism is misplaced. Dr Clements first accepted that she had spoken to somebody, though she did not specify and was not asked whether that somebody was Mrs Dunbobbin. Having dealt with the reference to slippers she answered directly the point of concern to the judge, saying: "I did not say to anybody that I fell down the steps because I didn't fall down the steps."

112. The judge finally had regard to Dr Clements' demeanour in the witness box. Here he had an unassailable advantage; but it is regrettable that he did not give any details of the demeanour that he had in mind and none was proposed by the Respondent. All that this court can say is that there is no sign in the transcript that Dr Clements was exhibiting unacceptable characteristics or demeanour. As a general observation, she addressed all questions that were asked of her, including those relating to the Accident Report Form and the typed letter which, for the reasons I have explained, were put to her on what proved to be a false basis.

113. Taken overall, I am driven to the conclusion that the Judge misjudged the quality of Dr Clements' evidence and that his criticisms of her evidence cannot be justified.

Mr Siddall's evidence

114. The judge said that Mr Siddall could give him no help on the crucial issues and, in particular that "he has no recollection of what was said to whom about the accident after the event." This was not correct. His witness statement included paragraph 18, which I have set out at [22] above and which was not challenged, and a brief mention of a conversation in the evening of 1 January 2017, the details of which he could not remember. Neither in evidence in chief nor in cross-examination was he asked about what was said to whom about the accident after the event. He therefore gave no further evidence on the point.

115. What the Judge appears to have overlooked is that paragraph 18 of Mr Siddall's witness statement included that Dr Clements had told him that she had slipped and fallen off the decking, which in context meant the raised deck area. The significance of this is that it was direct evidence of Dr Clements' first account of her accident, which was entirely consistent with her case at trial about where she fell. Once the account in the Accident Report Form is placed on one side and the difficulties with the typed note are brought into focus, the significance of Mr Siddall's evidence is, if anything increased. On the assumption that it was properly open to the judge to take and determine the question from where Dr Clements had fallen, the Judge was wrong to say that Mr Siddall was unable to help on the issues that were crucial to his decision. If, as appears to be the case, the Judge took no notice of Mr Siddall's evidence and therefore gave it no weight, he did not provide any rational basis for doing so and his conclusion was wrong.

Conclusion on Ground 2

116. In my judgment, the Appellant has made good the central criticisms of the judge's findings and supporting reasoning. There was no reliable evidence that Dr Clements had ever said that she fell on the stairs and so the central tenet of her cross-examination (that she had given such an account successively to Ms Bainbridge and Mrs Dunbobbin)

and the central evidential basis for the judge's finding (the typed note) was flawed. On the other side, the judge's criticisms of Dr Clements' evidence, which formed the second main basis for his overall conclusion, were not justified and (with the conceivable exception of the judge's entirely generalised and unspecific comment on her demeanour) wrong. Third, the Judge failed to give any consideration to Mr Siddall's evidence or, if he did, gave no reason for rejecting it.

117. Nor did the Judge give any reasoned consideration to the likelihood of Dr Clements failing to take hold of the handrail that was immediately adjacent to her if, as he found, she missed her footing on the stairs. Her consistent account, which was not inherently implausible, was that she had tried to reach the handrail but that it was too far away. The judge gave no reason for rejecting that part of her evidence; nor did he consider the implications for the case as a whole if that aspect of her evidence was correct.

118. It is exceptional for this Court to allow an appeal on the basis that a judge's finding on the facts was plainly wrong. This is one of those exceptional cases; and it should not be taken as an encouragement to others to try to appeal where the stringent test for this Court to intervene is not met. Here, on the question of the location of the incident, the judge relied almost exclusively on a contemporaneous note which was manifestly on its terms unreliable. He failed to have regard to the unchallenged evidence of one witness, and dealt inadequately with the evidence of another, Dr Clements. The judge himself considered that he could not accept the evidence of other witnesses as to where the incident occurred. In the circumstances, and exceptionally, there was no logical basis for his finding that the incident occurred on the steps. The only consistent, and in some respects unchallenged, evidence was that the incident occurred on the raised decking, from which Dr Clements fell. There was no rational basis on which the judge could find otherwise.

119. I therefore find myself driven to the conclusion that, assuming the point was open to him, the judge's conclusion that Dr Clements lost her footing on the stairs was plainly wrong and should be reversed. He should have found that she fell from the raised decking area. Had he done so, he would have found the Defendant to have been in breach of duty in failing to guard the leading edge of that area and, in my judgment, would unarguably have been right to do so.

120. I would therefore allow the appeal on Ground 2.

Lord Justice Lewis

121. I agree.

Lord Justice Moylan

122. I also agree.

ANNEX A

Photograph 1
The incident locus at the Appleby Manor Hotel, Appleby.

Photograph 2
The incident locus, with the raised deck area and the steps to the pool level indicated.