Neutral Citation Number: [2020] EWHC 3167 (QB)

Case No: QB 2018-000521

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2020

Before:

Dan Squires QC sitting as a Deputy High Court Judge

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Between:

Ian Mathewson	**Claimant**
- and –	
(1) Charlotte Crump **(2) Kristopher Crump**	**Defendants**

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The Claimant appeared in person
Kate Richmond (instructed by **Stephen Netherwood of Bosley & Co**) for the **Defendants**

Hearing dates: 12 and 13 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 15:30 on 20 November 2020.

Dan Squires QC sitting as a Deputy High Court Judge:

Introduction and summary of decision

1. This is a claim for breach of the Occupiers Liability Act 1957 and negligence. It arises from an accident which occurred at a property in Hove. The Claimant, a plasterer, came to the property on the morning of 16 January 2016 to quote for plastering work. The property was in the process of being converted from a bungalow to a two storey house, and the Claimant fell through chipboard on the first floor where the stairwell was being cut through. He fell to the ground floor and fractured his wrist. It was undoubtedly a nasty accident and left the Claimant with significant injuries.

2. The property was owned by the First Defendant who purchased it in 2014. At the time of the accident she was not living in the property and had not done so at any time between its purchase and the accident. From the time of the purchase until well after the accident, the property was essentially a building site while the substantial construction work was undertaken to convert the house. The work was undertaken by a construction company, CK2 Construction Limited ("CK2"). CK2 is owned by Maurice Crump. Mr Crump is the father of the Second Defendant. At the time the construction work began, the First and Second Defendant were in a relationship and they married shortly before the accident. At the time of the accident Mr Crump was thus the father-in-law of the First Defendant and father of the Second Defendant. The Second Defendant now jointly owns the property where the accident occurred, but at the time of the accident he had no legal interest in it or rights to it. He was assisting his father, along with other sub-contractors, with some of the building work at the property. He was also present when the accident occurred.

3. The Claimant's case is that the First and/or Second Defendant were "occupiers" of the property within the meaning of the Occupiers Liability Act 1957 at the time of the accident, and that they failed, as required of them by the Act, to take the care that was reasonable to ensure he, as a visitor to the property, was reasonably safe in using the premises. He also brought a claim in negligence, but it was not developed and largely overlaps with the Occupiers Liability Act claim.

4. The Claimant appeared before me in person. I wish to pay tribute to him at the outset. The claim raised legal and factual issues which were not straightforward, but despite the difficulties of appearing in a case without representation he presented his claim, and questioned witnesses, clearly, carefully and courteously throughout. As also set out below, while I did not accept all of the Claimant's evidence, I have no hesitation in rejecting the Defendants' assertion that the claim he brought was "fundamentally dishonest."

5. For the reasons set out below, I have, however, ultimately concluded that neither Defendant is liable for the injuries the Claimant suffered. I have concluded, firstly, that neither Defendant was an "occupier" of the property within the meaning of the Occupiers Liability Act 1957 at the time of the accident. At that time the occupier, in my view, was CK2 the building company that was responsible for the conversion of the property and the building work within it. I do not consider that either Defendant had sufficient control of the property to make them "occupiers" in addition to, or instead of, CK2. Secondly, I have also concluded that there was no breach of any duty of care,

even if one was owed to the Claimant. I appreciate that this outcome will be disappointing to the Claimant. He has undoubtedly suffered a significant injury which has impacted to a considerable extent on his life. For the reasons set out below, however, that injury was not one that I consider either Defendant to be liable for.

Procedural issues

6. The claim was issued on 14 December 2018 and a defence contesting both liability and quantum was served on 15 May 2019.

7. The claim came before me on 12 October 2020 for a 2 day trial, split over 3 days, to determine liability and quantum. The Claimant had been represented by solicitors but informed me that his solicitors ceased to act for him shortly before the trial. He indicated that he had sought alternative solicitors but had been unable to find anyone to represent him. He therefore represented himself. The Defendants were represented by Ms Richmond.

8. At the start of the hearing Ms Richmond suggested it might be appropriate to determine liability prior to hearing evidence on quantum, effectively splitting the trial on liability and quantum. I sought the Claimant's views and he indicated he was content to leave the matter to the court. In fairness to him, having considered matters overnight, he expressed concern about the cost of his having to travel to and from London if a separate hearing was required to deal with quantum. In the end it became possible, through sitting late on the second day, to avoid the scheduled final morning of the trial, and thus avoid requiring the Claimant having to come to London for a third day. I am grateful to Ms Richmond for agreeing to make her closing submissions at the end of the second day so as to make that possible, and for making the submissions so clearly and comprehensively.

9. I decided at the outset to accept the Defendants' submission that it would be appropriate to reach a determination first on liability and then, if necessary, to determine quantum at a separate hearing. I did so for three reasons:

    i) Firstly, I was concerned about timing. There were five witnesses giving quite different accounts of events. I was conscious that the Claimant was appearing in person and wanted to make sure he would have enough time to properly present his case and question witnesses. As I indicated, in the end it proved possible to complete the trial comfortably within the allotted time, but it was not clear that would be possible at the outset, and it may have proven difficult with detailed submissions and evidence on quantum.

    ii) Secondly, the Claimant was claiming damages of over £200,000. The case raised difficult issues on quantum both in relation General and Special Damages. I considered that the Claimant would very much benefit from legal advice and representation when it came to arguing the quantum part of the claim if that became necessary. While the Claimant had difficulty obtaining a lawyer at short notice before the current hearing, if he was to succeed on liability he would have a better prospect of securing representation and advice on quantum. I considered that would greatly assist him and the court in terms of either settling quantum or presenting the case at any hearing.

iii) Thirdly, the Claimant contended that as a result of the accident he was permanently unable to work. The most up to date medical report before me was filed by the Claimant and was dated 12 November 2018. It made clear that the Claimant's prognosis was poor if untreated, but matters could be different if certain prescribed treatment was undertaken. No up-to-date report was filed by the Claimant to indicate his current condition. No medical reports at all were filed by the Defendants. It is, of course, a matter for the parties what medical evidence, if any, they wish to rely on. It did seem to me that, if liability was determined in the Claimant's favour, it would assist the parties, and certainly the court, in determining quantum to have up-to-date medical evidence. I wanted to give the parties the opportunity to present such evidence should the Claimant succeed on liability.

10. The Defendants raised a second procedural issue at the outset of the hearing. Ms Richmond submitted that documents were included in the trial bundle that did not appear to have been provided by the Claimant by way of pre-trial in disclosure. She pointed out that the Claimant would require the court's permission pursuant to CPR 31.21 to rely on any document that had not been properly disclosed.

11. In relation to the specific documents to which objection was taken, some related to benefits the Claimant received. They were relevant only to quantum. There was therefore no need to admit them at this stage, though it is difficult to see any prejudice in admitting them if the matter proceeded to a quantum hearing. The other documents were a file note of the Claimant's previous solicitors and correspondence between his solicitors, the First Defendant and Maurice Crump. The Claimant's disclosure referred to "correspondence passing between the parties and their representatives both prior and post proceedings." Ms Richmond very fairly accepted that she did not, in fact, know whether the documents in question had been inspected by her solicitors. She was not therefore certain whether they had, in fact, been disclosed. In any event, she did not identify any particular difficulty the witnesses would encounter dealing with the documents caused if there was late disclosure. She did not object to their admission with any great vigour. Insofar as the documents, in fact, have not been disclosed, I therefore gave permission to the Claimant to rely on them pursuant to CPR 31.21.

The legal framework

12. The claim is pursued for the tort of negligence and for breach of the Occupiers Liability Act 1957 ("the OLA 1957"). It was not suggested before me that there was any difference between the two heads of claims for the purpose of this case or that there would be any difference in terms of the analysis of duty, breach, causation or loss depending on whether I approached the case from the perspective of a potential breach of statutory duty or negligence. I will examine the claim primarily under what appears to be the most appropriate cause of action, namely breach of the OLA 1957, and deal with negligence briefly at the end.

13. The key statutory provision for current purposes is OLA 1957, section 2. It provides:

> (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free

to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

> (6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

14. In order to succeed in a claim for breach of the OLA 1957, a claimant must show: (1) that they were at the material time a "visitor"; (2) that the defendant, or defendants, were "occupier(s)"; (3) that the defendant breached the "duty to take such care as in all the circumstances of the case [was] reasonable to see that [claimant would be] reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there"; and (4) that the breach of duty caused the claimant an actionable injury.

15. In the present case it is accepted by the Defendants that the Claimant was a "visitor" to the property within the meaning of section 2(1) of the OLA 1957. The other issues are disputed by the Defendant. Before turning to the factual contentions of the parties on the disputed issues, I will set out the legal tests I should apply.

Who is an "occupier"?

16. The OLA 1957 does not define an "occupier". OLA 1957 section 1(1) states that the Act is intended to replace the rules of the common law "to regulate the duty which an occupier of premises owes to his visitors", and at section 1(2) it is stated that the Act "shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises." OLA 1957 section 1(2) continues by making clear that the Act does not "alter the rules of the common law as to the persons on whom a duty is so imposed … and accordingly … the persons who are to be treated as an occupier … are the same … as the persons who would at common law be treated as an occupier."

17. Whether a person is an "occupier" is thus determined by the rules of common law. The most obvious "occupier" at common law will be an owner-occupier who both owns and occupies a premises. But it is clear that being the owner of a premises is neither a necessary requirement for occupation, nor sufficient to establish it. A person can be the owner of a property without occupying it, and can occupy it without owning it.

18. The question at common law is whether an individual has a "sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises" (*Wheat v E Lacon & Co Ltd* [1996] AC 552, 577G per Lord Denning). As is apparent, there is a degree of circularity in the definition. It suggests that a person owes a duty at common law (and now under the OLA 1957) if they have sufficient control to be under such a duty. In essence the law requires a normative judgment. It asks whether a person has sufficient control over premises for it to be reasonable to impose a duty on them, to expect them to appreciate potential risks on the premises and to take reasonable care to protect those coming to the premises from such risks.

19. In *Bailey v Ames* [1999] Lex Citation 2400 Bedlam LJ (with whom the other members of the Court of Appeal agreed) held as follows on that issue:

> The extent of control is a question of fact and of degree. At common law the question who had sufficient control to be

> regarded as an occupier, was stated in Salmond on the Law of Torts (10th ed.) at page 469 by its distinguished editor thus:
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> > "In dealing with dangerous premises it is necessary to distinguish between the responsibilities of the owner and those of the occupier or possessor. Generally speaking, liability in such cases is based on occupancy or control, not on ownership. The person responsible for the condition of the premises is he who is in actual possession of them for the time being, whether he is the owner or not, for it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons."
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> This passage was cited with approval by Roxbrugh LJ in this Court in Hartwell v. Grayson, Rollo and Clover Docks [1947] KB 901 at page 917 as stating the principles of the common law. He pointed out that section 1(2) of the Occupiers Liability Act 1957 was not intended to alter the rules of common law as to the persons on whom a duty is imposed or to whom it is owed.

20. In *Wheat v E Lacon*, Lord Denning suggested that a test which requires "the immediate supervision and control and the power of permitting or prohibiting the entry of other persons" in order to establish occupation may be too narrow (579A). He continued "There are other people who are 'occupiers,' even though they do not say 'come in.'" (ibid). As was also made clear in *Wheat v E Lacon*, more than one person can be the occupier of the premises, as different people can exercise control over premises in different ways.

21. For present purposes the key issue on occupation is whether the First Defendant and/or Second Defendant were in sufficient control of the property on 11 January 2016 to be "occupiers"? Or was the sole occupier CK2, the building company undertaking substantial work at the property? It is clearly possible for a builder to become the occupier of the premises they are working on. As the authors of Clerk and Lindsell (23rd ed) write at paragraph 11-08 "where a householder hands over his premises to builders, each may well be an occupier against a visitor who is injured, with liability in one or other or both". Thus if an occupier arranges for a builder to work on their premises it is possible for both the builder and the owner to be occupiers. It is also possible for an owner to have surrendered control of premises to such an extent they can no longer be regarded as "occupiers". Only the builder is then in occupation for the purposes of the OLA 1957 at the material time. That may occur, for example, if at the time of an accident the owner was not living in or using the property, and could not reasonably have been expected to exercise control over the state of the premises and over who was and was not able to enter and in what circumstances. One of the key disputes is whether that occurred in the present case. Ultimately, as Bedlam LJ held in *Bailey v Ames*, that is an issue of the "extent of control" and is a matter of "fact and degree."

The common duty of care

22. If it is established that, at the material time, a defendant is the "occupier" of the relevant premises, and that the claimant was a "visitor", the defendant will owe a "duty of care". The duty is "to take such care as in all the circumstances of the case is reasonable to

see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there" (OLA 1957 s 2(2)).

The relevance of OLA s 2(3)(b) and s 2(4)(a) to the extent of the duty owed

23. In determining what care is "reasonable in all the circumstances" the identity of the visitor may be relevant pursuant to OLA 1957 section 2(3). Section 2(3) refers to two situations. First, "an occupier must be prepared for children to be less careful than adults" (s 2(3)(a)). Second, and of potential relevance to the present case, section 2(3)(b) provides that "an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so".

24. Section 2(3)(b) does not provide a defence to a claim of breach of the OLA 1957. Contrary to a suggestion made by the Defendants in the present case, it cannot preclude an occupier owing a duty of care. The fact that the visitor in question is a person who visits "in the exercise of his calling" may however be relevant to the contents of the duty and what is required to discharge it. A person who visits premises in the exercise of their calling is still owed a duty of care by the owner, but the steps which must be taken to discharge the duty may be different because the visitor can be expected to "appreciate and guard against any special risk ordinarily incident to [their calling]".

25. Thus in *Roles v Nathan* [1963] 1 WLR 1117 an occupier was held not to be in breach of the duty of care he owed to visitors when the visitors in question were chimney sweeps who visited his premises and who died from inhaling carbon monoxide. Lord Denning held at p 1123 that "When a householder calls in a specialist to deal with a defective installation on his premises, he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect." That does not mean the chimney sweeps were owed no duty of any sort by the occupier or that the duty could not be breached. As Lord Denning explained, the occupier might have been liable if "the stairs leading to the cellar gave way" (pp 1123-1124). But he was not liable for risks that could be regarded as "ordinarily incidental to [the chimney sweeps'] calling" and which they were expected to themselves guard against. Similarly in *Yates v National Trust* [2014] EWHC 222, Nicol J held that, had the case been pursued under the OLA 1957, an occupier could expect a tree surgeon to guard against the risks that are ordinarily incident to their work cutting trees. In *Tomlinson v Congleton Borough Council* [2004] AC 47 at paragraph 71, Lord Hobhouse gave further examples of those who could be expected to appreciate and guard against risks ordinarily incident to their skilled activities, namely "a steeplejack brought in to repair a spire or an electrician to deal with faulty wiring."

26. In the present case the Defendants submit that if, contrary to their primary case, they were "occupiers" of the property at the relevant time, the Claimant, as an experienced plasterer, should be regarded as a visitor "in the exercise of his calling". They contend that in determining what steps it was reasonable to have expected them to take to ensure the Claimant's safety, they were entitled to assume he would appreciate and guard against risks ordinarily or obviously present on premises that are in the middle of significant construction work and which an experienced plasterer would be expected to appreciate. I set out further below how I deal with that question.

27. Also relevant to the present case is OLA 1957 s 2(4)(a). It sets out another consideration relevant to whether an occupier has discharged their duty to a visitor. It provides that "where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

28. The purpose of the provision was to reverse the position at common law by which *any* notice of a risk, if it was understood by the visitor, was *per se* sufficient to preclude liability (see *London Graving Dock Co v Horton* [1951] AC 747). As section 2(4)(a) makes clear, that position was altered by the OLA 1957. Under the OLA 1957 a warning does not operate automatically to exclude a duty of care. A warning can be taken into account, however, along with the other circumstances, to determine whether the duty is discharged. It may be that in some cases, where there is a danger on premises, a warning of the danger will be sufficient to satisfy the duty owed to visitors. In other cases more may be required.

29. Section 2(4)(a) and s 2(3)(b) are obviously not mutually exclusive, and, indeed, may interact with one another. The giving of a warning and the expertise of the visitor may both be relevant circumstances in determining whether a duty has been discharged. Thus it may be that merely giving a warning would not be sufficient to discharge the duty of care owed to an ordinary member of the public, but when given to a professional, expected to have particular skills and expertise, it will be sufficient.

30. Finally, in terms of relevant considerations that may shape the duty owed to visitors, and another matter relied on by the Defendants, is the position with regard to obvious dangers. It is sometimes said that no duty is owed by occupiers in relation to obvious dangers on premises. It may be more accurate to say, not that no duty is owed in such cases, but that even if an occupier does nothing to warn about an obvious danger, the duty has not been breached. As Kennedy LJ observed in *Cotton v Derbyshire Dales DC* (10 June 1994, CA) "it is unnecessary to warn an adult of sound mind that it is dangerous to go near the edge of an obvious cliff." Just as in some cases a warning of a danger may be sufficient to satisfy the requirement to take reasonable steps to see that a visitor to premises is reasonably safe, in other cases the very obviousness of the danger may itself suffice. If in some case it is sufficient for an occupier to place a warning sign by a cliff to discharge the duty owed to visitors, in others the obviousness of the risk posed by the cliff may be its own warning, and nothing further needs to be done to discharge the duty owed to visitors in relation to the cliff.

OLA section 2(5) and volenti non fit injuria

31. OLA 1957 section 2(5) provides that "the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor". It makes clear that the question of whether a risk is accepted is to be decided "on the same principles" as in any case where "one person owes a duty of care to another". The purpose of section 2(5) is to preserve the common law defence of *volenti fit injuria* and to make clear that it operated as a defence to statutory liability under the OLA 1957 as it would in any other case in which a duty is owed. As Coulson J held in *Geary v JD Wetherspoon Plc* [2011] EWHC 1506 paragraph 356, referring to the Clerk and Lindsell on Torts (20th edition), the statutory defence is intended to be indistinguishable from the common law defence of *volenti.*

32. The section 2(5) / *volenti* defence will operate if it can be shown that a visitor was aware of a particular risk in advance and voluntarily accepted that risk. They then cannot hold the occupier liable for the harm they suffer if the risk materialises.

The parties' evidence

Witnesses in the case

33. I heard evidence from five witnesses.

34. The first witness was the Claimant. He was born on 3 October 1959 and is now 61 years old. It is not disputed that the Claimant is an experienced plasterer who had been working, prior to the accident, in the trade for some forty years. I have no reason to doubt his skill, expertise and competence in his chosen profession.

35. I also heard from four witnesses on behalf of the Defendants:

    i) I heard from the First Defendant. She was, at the material time, the owner of 16 Fallowfield Close, Hove where the accident took place.

    ii) I heard from the Second Defendant. He was in a relationship with the First Defendant at the time of the accident and is now married to her. He now owns 16 Fallowfield Close with the First Defendant, but did not own it or have any legal right to it at the time of the accident.

    iii) I heard from Maurice Crump ("MC"). He is the father of the Second Defendant and now the father-in-law of the First Defendant. He is an experienced builder and the sole director and shareholder of a company, CK2. He would hire labourers to work for him on different projects, and the Claimant had worked for MC on two properties prior to his work on 16 Fallowfield Close.

    iv) Finally, I heard from Jeffrey Brown, a self-employed labourer. He had worked at 16 Fallowfield Close as a contractor for CK2 during the week prior to the accident.

Events prior to 11 January 2016

36. The following is an account of events prior to 11 January 2016 given by the Defendants, MC and Mr Brown. Save as indicated below, it was not disputed by the Claimant.

37. The First Defendant bought 16 Fallowfield Close in August 2014. It was then a bungalow and she planned to convert it into a two-storey house. The First Defendant was then in a relationship with the Second Defendant, but they were not married at the time. They married in December 2015, shortly before the accident.

38. From the time she purchased 16 Fallowfield Close, and at the time of the accident, the First Defendant was the sole owner of 16 Fallowfield Close. The Second Defendant subsequently became a co-owner of the property, but that did not occur until September 2018.

39. Following her purchase of the property, the Claimant had discussions with MC about CK2 doing the conversion work on the property, with the plan that eventually she and the Second Defendant would live there. MC agreed to do so on the basis that it would be a "low priority" project, with his undertaking the work between other projects. It was agreed that the Claimant would pay CK2 once the work was complete and she would be able to re-mortgage the property to raise the funds. Ultimately, the payment was made in the form of a joint purchase of another property by the Defendants, with MC and his wife as co-owners.

40. The conversion work began on 16 Fallowfield Close in February 2015 and continued, intermittently, until it was completed in December 2017. The First and Second Defendant then moved into the property. The First Defendant's evidence, which was not challenged, was that neither she nor the Second Defendant lived at 16 Fallowfield Close between its purchase in August 2014 and completion of the conversion in December 2017. Nor was it disputed that she rarely visited the property while the conversion work was undertaken, attending infrequently and then usually only when decisions were required from her about matters such as layout of the kitchen or decoration.

41. In order to assist CK2 with the conversion, various skilled and unskilled labourers were hired to work at 16 Fallowfield Close. There is no dispute that the Second Defendant, who was an electrician and general builder, worked on the conversion. His evidence is that he would work on the property in his spare time with his father between other jobs. He explained that he was not paid for that work as it was his then girlfriend's house. His precise role and in particular the nature and extent of his dealings with the Claimant was the subject of some dispute which is set out below.

42. It is the Defendants' case that it was CK2, through MC, that was responsible for undertaking and supervising the building work at 16 Fallowfield Close. While the Claimant contends that it was the Second Defendant who specifically sought to hire him to work on the property, an issue to which I will return, there is clear and undisputed evidence which indicates that it was CK2 which managed the construction project:

    i) I was shown numerous invoices from 2015, 2016 and 2017, including around the time of the accident, which show CK2 to be the "customer" obtaining building materials, roofing, a skip, an excavator and other equipment to be delivered to 16 Fallowfield Close.

    ii) I was shown a letter from the architects who produced the plans for the conversion, confirming that they met "the builders CK2" on four occasions to discuss structural and design issues in relation to the property. I was also shown a letter from a plumber confirming that he did the plumbing work at 16 Fallowfield Close, and that he communicated with and took instructions from CK2 who also provided materials and payment for the work.

    iii) I was shown a letter from CK2's accountants confirmed that CK2 used sub-contractors on an ad hoc basis who were reported to the HMRC.

    iv) CK2's builder's board was erected at the property. I was also shown some marketing material for CK2 which showed the completed work at 16 Fallowfield Close.

v) The undisputed evidence was that MC held the keys to the property and would only give them to others if they needed to be at the property for some specific reason when he could not be present.

43. It may assist at this stage to explain how the conversion work was being undertaken. That too is not disputed. The evidence before me was that the first floor was added to the bungalow without initially creating an access to the ground floor. The flooring on the entirety of the first floor was constructed as though it was permanent, and the plan was that, at a certain point in the construction process, a segment of the floor of the first floor would be cut through to create a space for the stairwell and allow access to the ground floor. The Second Defendant's evidence was that, up until that point, access to the first floor was via scaffolding on the outside of the building and through window openings. According to the evidence of both the Second Defendant and MC, the plan was to plaster the ceiling on the first floor immediately above the place where the stairwell would be located while the floor of the first floor was still entirely intact and before the opening for the stairwell was cut into it. That evidence was supported by Mr Brown who undertook general labouring work at 16 Fallowfield Close between 4 and 8 January 2016. Mr Brown also noted that a temporary scaffold tower was constructed in the house on the first floor to enable easy access to the ceiling above the area of the intended stairwell.

44. MC's evidence was that, as well as the Claimant working on two other properties with him previously, in the summer of 2015 the Claimant rendered the left side of 16 Fallowfield Close. MC's evidence was that on 6 January 2016 he then sent a text for the Claimant to come on Friday 8 January 2016 to plaster the ceiling on the first floor immediately below what would become the stairwell between the floors and before the stairwell space was cut through. It is not disputed that the Claimant did attend on 8 January 2016 and completed that plastering. That is consistent with Mr Brown's evidence as well as that of the Second Defendant and MC.

45. The plan, once the stairwell was in place, was for the rest of the first floor to be plastered. The Claimant was invited to provide a quote for that work. The evidence of the Second Defendant and MC is that it was arranged for the Claimant to meet the Second Defendant at the property on Sunday 10 January 2016 to provide the quote. According to MC and the Second Defendant, it was agreed that the Claimant would meet the Second Defendant, rather than MC, because MC was not available on the Sunday.

46. The Claimant stated that he could not recall such an arrangement. I was, however, provided with text messages between the Claimant and the Second Defendant on the Saturday evening and Sunday morning which suggests that an arrangement was made for the two to meet on the Sunday. The Claimant asked for them to meet before 11am as he had another appointment. The Second Defendant responded that would be difficult for him. The Claimant wrote "OK make it later will phone when I'm fin[ished]". The Second Defendant responded "Ok mate." It appears that the Claimant did not telephone later, and the meeting on the Sunday, for whatever reason, never took place.

47. As I indicated, the account of events set out above was not significantly disputed by the Claimant. There were, however, two issues in dispute in relation to the events prior to 11 January 2016. The first is a relatively minor one. It concerns whether, when the

Claimant plastered the ceiling above the intended stairwell area on Friday 8 January 2016, he accessed the first floor from scaffolding outside and through a window or whether he climbed up a ladder through the floor (the way he accessed the first floor when he fell on 11 January 2016 : see below). The Second Defendant and MC's evidence was that it was the former. The Claimant's evidence is that it was the latter. The second issue in dispute in relation to events prior to 11 January 2016, was who invited the Claimant to plaster the ceiling above the stairwell on 8 January 2016 and who invited him to come back to quote for the plastering of the rest of the first floor. Was it MC or the Second Defendant? This is part of a broader dispute between the parties as to how far, in reality, the building work was being managed and supervised by MC or how far it was the Second Defendant doing so. I will return to both those disputed issues below.

Events of 11 January 2016

48. There are key differences between the accounts given of events of 11 January 2016 as between the Claimant on the one hand and the Second Defendant and MC on the other (it is not disputed that the First Defendant was not present at 16 Fallowfield Close at the time the accident occurred and did not hear about it until later). There are, however, also a number of matters which, at the least by the time of the trial before me, were not in dispute, including the precise mechanics of the accident. I will set out the various witnesses' accounts of the events on 11 January 2016 and what is and is not disputed. I will then set out my factual findings.

49. As the Second Defendant and MC gave a more detailed account of the events, it may assist to start with their accounts. They are as follows:

    i) The Second Defendant and MC both went to 16 Fallowfield Close on the morning of 11 January 2016 at around 8.30 am. Their plan that morning was to work on forming the stairwell that was to be created by cutting out a part of the flooring on the first floor.

    ii) As set out above, until 11 January the flooring between the ground and first floor had been built across the whole of the first floor. A stairwell therefore needed to be cut out of the floor to create a two-floor house. The floor at that stage was made up of "floor joists" which are long pieces of timber roughly 20 cm by 5 cm across. On top of the floor joists was laid chipboards which are rigid sheets made of compressed wood chips roughly 2cm thick. The Second Defendant and MC's plan on 11 January was to cut out the floor joists and the chipboard of the first floor in an area measuring roughly 170 cm x 170cm to create the space for the stairwell.

    iii) After they arrived on 11 January, the Second Defendant and MC cut an access hatch in the area in which the stairwell was to be located. It was roughly 80cm by 80cm. A ladder was placed into the access resting on the ground floor. The purpose of creating the hatch, according to the Second Defendant, was to enable the ladder to be placed between the floors so as to assist in cutting out the stairwell. It meant that a person could climb the ladder and cut out the rest of the stairwell area while standing on the ladder. The purpose of the hatch was not to provide a route to access the first floor. According to the Second Defendant,

cutting out the stairwell was a two-person job as one person would need to cut and to pass materials to the other.

iv) During the course of the morning, the Claimant arrived unexpectedly at the property. By that stage the Second Defendant and MC had cut out the four floor joists in the area of the stairwell and had started cutting through the chipboard. The front door was open and the Claimant was able to walk in. The Second Defendant was up the ladder in the stairwell cutting through the chipboard and MC was on a step ladder on the ground floor when the Claimant arrived.

v) When he became aware of the Claimant's presence, the Second Defendant came down from the ladder. MC and the Second Defendant asked the Claimant what he was doing there. He said he had come to quote for the plastering of the first floor as he had not attended the previous day. The Second Defendant and MC claim they said words to the effect that it was not a convenient time for him to come; that he should have come at the weekend; that it was not safe for him to go up to the first floor at that time as they were cutting out the stairwell; and that he should return later after they had finished their work or re-arrange to come for a different day.

vi) According to the Second Defendant and MC, in addition to their warnings, it was obvious that the area immediately adjacent to the ladder on the first floor was not safe. They claim it was obvious that the stairwell was in the process of being cut out, and, if a person looked up from the ground floor at the stairwell, they would see the floor joists had been removed in the area and there were cuts in the chipboard which the Second Defendant and MC.

vii) Despite the danger and warnings, according to the Second Defendant and MC, the Claimant said that he had been "doing the job long enough" and would be "fine" accessing the first floor. He moved a safety barrier that had been placed on the ground floor out of the way and proceeded up the ladder to the first floor.

viii) If a person climbed the ladder through the access hatch and moved immediately away from the stairwell area it was possible to stand on, and walk safely around, the rest of the first floor. It appears that is what the Claimant initially did, and he walked around to examine the first floor in order to prepare a quote. After a several minutes the Claimant called the Second Defendant up so he could discuss details of the work that was required. The Second Defendant climbed up the ladder and walked around with the Claimant. After a few minutes the Claimant said he needed to return to the van. It seems, according to the Second Defendant and MC's account, that the Claimant had forgotten what he had been told about the cutting of the stairwell, or he was not concentrating, and instead of moving straight from the secure parts of the first floor to the ladder he placed his weight on the chipboard lying across the area of the intended stairwell. The chipboard gave way. That was not surprising as the chipboard had nothing to support it underneath and had already partly been cut through. The Claimant fell down from the first floor to the ground floor and hurt himself.

ix) Neither the Second Defendant nor MC saw the Claimant step on the cut-through chipboard. The Second Defendant was coming round the corner of the first floor landing and saw the Claimant as the chipboard was giving way, and the

Claimant was in mid-fall. MC was in another room on the ground floor. When MC heard the fall he went to check on the Claimant's well-being and the Second Defendant came down the ladder. The Claimant was clearly in a significant amount of pain as he had fallen some distance. He appeared to be blaming himself for the accident, saying that he "could not believe" he had fallen, and that he was an "idiot".

x) The Claimant was unable to drive himself because of the injury, MC therefore took him to hospital.

50. The Claimant gave a different account of the accident. It was as follows:

i) The Claimant arrived at 16 Fallowfield Close at around 11am on 11 January 2016 to meet the Second Defendant to provide a quote for plastering the first floor of the property. The Claimant could not recall whether he was supposed to have met the Second Defendant the day before. Nor could he recall whether he had texted to arrange to come on the 11 January.

ii) When the Claimant arrived only the Second Defendant was at the property and not MC. The Claimant could not recall what the Second Defendant was doing when he arrived. As the Claimant was there to provide a quote for the plastering of the first floor he proceeded to climb the ladder through the access hatch to the first floor. The Second Defendant was aware that the Claimant had climbed the ladder and did nothing to stop him or warn him of any danger. In his witness statement the Claimant initially stated that he could not recall a safety barrier on the ground floor. During cross-examination he stated there was no barrier.

iii) The Claimant walked around the first floor for about 10 minutes. He then called the Second Defendant up as he wanted to discuss how to finish up the plasterwork reveals around a window. The Claimant went to go back down and just before he reached the ladder the flooring collapsed beneath him and he fell down to the concrete floor on the first floor. The Claimant contends that at no time prior to the fall was he told not to climb to the first floor, or given any warning or other indication that it was not safe and that he should take particular care.

iv) The fall was some considerable distance and the Claimant was in excruciating pain as it appears he broke the fall with his wrist/hand. He cannot recall what he said afterwards or whether he blamed himself for the fall. After the accident the Second Defendant telephoned his father who came and took the Claimant to hospital. It is the Claimant's case that MC was not at the property at the time of the accident, and only arrived afterwards when his son called him.

Events after the accident

51. It is clear that the fall was a serious one and the Claimant fractured his left wrist. He had an operation on his wrist the day after the fall and was not discharged until the fourth day. He needed two further operations in the following months. In 2018 the Claimant was seen by a consultant hand surgeon who noted the Claimant was in continuing difficulties and recommended two further operations. The surgeon's

prognosis was that, without such operations, the Claimant condition, and the impairment he suffered as a result of the accident, would become permanent.

52. MC's evidence is that immediately after the operation he and the Claimant exchanged texts. Initially the texts were about the Claimant's condition. On 14 January 2016 at 19:57, after he was discharged from hospital, the Claimant sent a text to MC that read:

> "Hi mate out but def worse than what I thought cant lift fuck all for six week, do it early could rip the tendons and make it worse, worried sick now, can't we make a claim through your public liability and have a divvy up between you and me. going to quacks in the morning. i will pop and see ya later."

MC stated that he considered the text to be a suggestion that he make a "fraudulent claim" on his insurance, and that he did not respond to it. The Claimant stated that he could not recall sending the text, but I have been provided with a copy of it and have no reason to doubt it was sent. The Claimant denied that the text was seeking to encourage MC to make a fraudulent claim.

53. In the following days, the Claimant and MC exchanged texts about the Claimant attending 16 Fallowfield Close as the Claimant remained keen to provide a quote for the plastering work of the first floor. On 19 January 2016, the Claimant texted MC and said he would come the next day with another individual who would "do it with me", referring to the plastering, and that he, the Claimant, would provide a quote. On 21 January 2016 MC texted and asked for the quote to be sent by text. The Claimant provided a quote of £3,250, and, when asked to break it down, he texted to explain the number of days the work would take on the basis that "there will be two of us". In cross-examination the Claimant stated that he intended to have two other people undertake the plastering, rather an himself and another individual, as his arm was still in a sling and he was in severe discomfort at that time. MC's evidence was that he understood that the Claimant was suggesting he would undertake the work, with one other person to help him. In the event MC decided not to give the work to the Claimant as he had received a better quote and he hired another plasterer.

54. Sometime later the Claimant contacted solicitors, Russel Worth. On 14 April 2016 they sent a letter to CK2's accountants addressed to CK2. The letter enclosed a "Claims Notification Form". It was the wrong form and had clearly been sent in error as it related to another case. It referred to an accident said to have occurred on 3 January 2016 involving a woman who slipped in a shop. According to MC he did not understand why he had been sent the form related to the woman. He stated that he rang Russel Worth back shortly afterwards but said they did not appear to want to engage with him.

55. It appears, however, that was further contact between MC and Russel Worth. There was also before me a file note from Russel Worth dated 29 June 2016 which stated that a call was taken from the owner of "CK2" described as a "third party" who was recorded as saying "they were never instructed to work on the property and was helping free of charge". The call handler, Alec Hancock, asked if this could be put in writing. On 13 July 2016 a letter was sent by Russel Worth, written by Mr Hancock, again addressed to CK2 at their accountant's address which referred to the conversation on 29 June 2016. It stated "you advised us that you were never instructed to work on the property and you were helping free of charge. This writer made a request for you to put this in

writing and we have not received the same. We cannot take instructions and we will have to take procedurally (sic) to seek the information we require."

56. MC stated that he could not recall the conversation described in the 29 June 2016 file note, and that the only conversation he could recall with Russel Worth was the one shortly after receiving the incorrect form in April 2016. He stated that the letter of 13 July 2016 was not passed on by his accountant and he had not seen it at the time. There was no further correspondence from or to Russel Worth on the papers before me. I will deal with the contact with Russel Worth further below.

57. On 1 October 2018 a different firm of solicitors who had been instructed by the Claimant, Healys, wrote to the First Defendant. They set out the Claimant's account of the accident and his basis for a claim against her. The letter asked who the First Defendant considered was the "occupier" of 16 Fallowfield Close on the day of the accident.

58. The First Defendant responded to Healys on 30 October 2018. She stated in evidence that she wrote the letter herself, following discussions with the Second Defendant, and did not have the benefit of legal advice. In the letter the First Defendant wrote "I have spoken to my husband … who was present at the property on the date your letter refers to. I set out his version of events below." She then wrote that the Claimant and her husband "had arranged to meet at the property on Sunday 10th January after 11am, so that [the Claimant] could price up a plastering job for my property. However, this did not go ahead and [the Claimant] unexpectedly turned up at the property on Monday 11th January." The letter continued by setting out a description of events broadly consistent with the Second Defendant's account set out above, save that there was no mention of MC being present at the time of the accident. MC is first mentioned after the accident where it is said "my father-in law drove [the Claimant] to A&E." There was no response to the question from Healys about who was the "occupier" of the premises. The First Defendant explained that she had not had legal advice at the time and was not aware of the answer to that question. The significance of the letter is dealt with further below.

Factual findings

Issues in dispute

59. As set out above, much in the case is not significantly disputed. That is so, in particular, in relation to the purchase of 16 Fallowfield Close and the nature of the building words prior to 11 January 2016.

60. The key disputed issues in the case can be summarised as follows:

    i) Was it MC or the Second Defendant who invited the Claimant to work on the property in January 2016? Linked to that question is the issue of the respective roles of the Second Defendant and MC/CK2 in the construction work at 16 Fallowfield Close. In particular, was all the work, and the contractors who worked at the property, being managed and supervised by MC/CK2, or was the Second Defendant doing a significant amount of management of contractors and work on his own?

ii) When the Claimant attended the property to plaster the stairwell ceiling on 8 January 2016, did he access the first floor through the hatch as he did on 11 January 2016 or through an outside window?

iii) When the Claimant arrived at the property on 11 January 2016 was MC there or only the Second Defendant?

iv) Prior to and at the time that the Claimant ascended the ladder to the first floor, was he warned of the danger of doing so by the Second Defendant and/or MC, and/or should that danger have been obvious to someone with his experience, skills and expertise?

61. There are also factual disputes in relation to events after the accident, in particular what was meant by certain text messages sent by the Claimant, how particular correspondence was understood and in some cases whether it was received. Those matters cannot, in themselves, be determinative of the Defendants' liability for the accident which preceded it, but they may assist in determining factual disputes in relation to events before and at the time of the Claimant's accident on 11 January 2016.

Findings on events leading up to the accident and the accident itself

62. My factual conclusions on the matters in dispute leading up to and at the time of the accident are as follows.

63. First, as to who invited the Claimant to work on the property in January 2016, there is certainly support for the Defendants' contention that the invitation to the Claimant to plaster the stairwell ceiling on Friday, 8 January 2016, was given by MC not the Second Defendant. There is also support for the contention that it was MC not the Second Defendant, who had overall responsibility for the management and supervision of the works at 16 Fallowfield Close:

i) The arrangements made for the Claimant to attend at the property on 8 January 2016 would appear to have been between MC and the Claimant. There was an exchange of texts between them on Wednesday 6 January about the work which culminated in the Claimant writing "OK cheers see ya fri!". There was no evidence before me of exchanges with the Second Defendant.

ii) There were also a significant number of texts in the weeks after the accident between the Claimant and MC including the Claimant quoting for further plastering work at the 16 Fallowfield Close. That evidence is certainly indicative of it being MC who was in charge of the building work, and that it was him, not the Second Defendant, who was the one dealing with the Claimant as an independent contractor.

iii) It is also significant that, on 14 January 2016, in the immediate aftermath of the accident, the Claimant wrote to MC to suggest he make a claim on his insurance. I am not convinced that the Claimant was suggesting a fraudulent claim. While suggesting a "divvy up" might imply the Claimant was seeking to induce MC to make a claim, I am not convinced that the Claimant believed that a claim against CK2 would be dishonest. Indeed, as set out below, on the Defendants' analysis, CK2 was the "occupier" of 16 Fallowfield Close at the material time

and the correct respondent to any claim arising from the accident. The fact that the Claimant contacted MC in that way so soon after the accident does, however, suggest that he considered that CK2 was responsible for the building project and thus should be liable for the accident.

iv) There was a large body of evidence that CK2 was the "customer" for materials for the building project between 2015-2017, its building sign was placed outside the property and it dealt with the architect, plumber and other sub-contractors.

64. In light of the above, I accept the Defendants' contention that overall management of the conversion, including liaising with sub-contractors such as the Claimant, lay primarily in the hands of MC and not the Second Defendant. I accept that in terms of the invitation to the Claimant to work at the property, and subsequently to provide a quote, that came primarily from, and was the responsibility of, MC. That is particularly clear from the texts after the accident in which the Claimant and MC were discussing the Claimant's provision of a quote to plaster the rest of the first floor, and without any apparent involvement of the Second Defendant.

65. It would, however, be wrong to regard the Second Defendant as simply another "sub-contractor" working on the property, and dealing with the Claimant in the same way as any other sub-contractor might. It is clear the Second Defendant had a greater role. It was he who was to meet the Claimant at the property on 10 January 2016 so the Claimant could view the property in order to provide a quote, and, after the accident, it is notable that the Claimant texted both MC and the Second Defendant about picking up tools he had left at the property. None of that is surprising. The property was owned by the Second Defendant's girlfriend, and by the time of the accident they were married. It is apparent that the Second Defendant intended to live in the property once work was complete and did a considerable amount of work on it. I consider it likely that, while MC was responsible for the overall management of the conversion work, his role and that of the Second Defendant were not clearly demarcated, and the Claimant will have had discussions and received directions about the work from the Second Defendant as well as MC.

66. I am also not convinced that the Second Defendant never worked on the property without his father being present, as was, at times, suggested by the Defendants. In the Second Defendant's witness statement he stated that "I was never on site without [MC] being there but my dad sometimes worked without me being there." During the hearing, however, the First Defendant's evidence was that the Second Defendant was "very rarely", rather than never, at the site on his own. In oral evidence the Second Defendant stated that was referring to occasions in which he might have visited with the First Defendant to look at the property without MC being there and when it was arranged for him to meet the Claimant at the property on 10 January 2016, but that was not to undertake work. In MC's evidence, however, he stated that his son would work on the property alone when "doing electrics" and the Second Defendant accepted that he might work on his own if his father "popped out". I consider that the Second Defendant did, at times, work on the property on his own. I accept, however, the Defendants and MC's evidence that it was rare for the Second Defendant to do so, and that primarily he worked for and under the supervision of his father.

67. Second, as to whether the Claimant accessed the first floor of the property on 8 January 2016 through the access hatch, as he did on 11 January, I consider that he could not

have done so. The evidence of the Second Defendant and MCs' evidence, supported by Mr Brown, was that as of 8 January 2016 the floor on the first floor was still in place over what was to be the stairwell. That seems very likely to be correct, and that the whole purpose of having the Claimant plaster the ceiling above the stairwell on the Friday 8 January 2016 was that it was easier to do so with the floor in place and before the stairwell was cut out the following week. I consider that on 8 January, the Claimant accessed the first floor via scaffolding on the outside of the house.

68. Third, when the Claimant arrived at the property on 11 January 2016, was MC there or only the Second Defendant? That was not a question I found easy to answer. The Claimant was adamant that MC was not there. MC and the Second Defendant were equally adamant that he was. I consider that it is likely, on the balance of probability, that MC was there, but, as I indicate below, that it not something I am able to conclude with great certainty.

69. I reach the conclusion for the following reasons:

i) To my mind the most significant factor that suggests MC was likely to have been present on the morning of 11 January 2016 was the nature of the building work being undertaken at that time. As set out above, I accept that on the morning of 11 January the stairwell was being cut out. I think it unlikely that the Second Defendant was undertaking that work on his own. While I do not believe the Second Defendant never worked at the property on his own, I accept that was rare. From the description given to me of the work required to cut the stairwell (cutting through and removing floor joists and the chipboard over a reasonably large area of 170cm x 170 cm) it seems unlikely the Second Defendant was doing that work entirely on his own. From his evidence it appears the Second Defendant is primarily an electrician, though he does do general building work. It seems unlikely he would doing a job of that sort without any assistance. It seems most likely he was doing the work with MC.

ii) In seeking to suggest that MC was not present, the Claimant focused his attention on the letter written by the First Defendant to Healys in October 2018. He noted that her account of the accident and the events leading up to it made no mention of MC and there was no suggestion MC was present. It was stated that the Second Defendant was "in the process of cutting out the new stairwell" when the Claimant and arrived and that the Second Defendant advised the Claimant "it was not safe to come up", but it was not said MC was there or made similar statements. MC is first mentioned when it is said that he drove the Claimant to A&E. It does seem odd, if MC was present and that he too was working on the stairwell, and he too warned the Claimant not to go up the ladder, that that was nowhere mentioned in the letter. That said, I accept that the First Defendant did not have legal advice at the time and may not have considered MC's role, or that of CK2, to be significant. I do not attach great significance to the fact MC was not mentioned in any detail.

iii) The Claimant also suggested that it was implausible that if MC was present in the property and was managing the construction, that the Claimant would have called the Second Defendant up to the first floor to discuss the work required. Instead, he would have spoken to MC. I am not convinced that is correct. The Claimant's evidence was that he called the Second Defendant up to discuss how

he wanted the reveals around a window to be done. As set out above, I consider the Second Defendant played an active role in the building work, and, given that he was to live in the house, I find it perfectly plausible that he, rather than MC, would have had that kind of discussion with the Claimant even if MC was there and had overall responsibility for the building project.

iv) I was also able to observe the Claimant, the Second Defendant and MC giving evidence and to assess their credibility when doing so. I gave some limited weight to that. Assessing credibility simply through demeanour is notoriously difficult. While I found all of the witnesses in the case to be generally straightforward, as set out further below, in relation to events after the accident in particular, I did consider some of MC's evidence not to be credible and the same was true of some of the Claimant's evidence, but I did find more of the Claimant's evidence implausible than that of the other witnesses. I give some weight to that general question of credibility when determining whether or not MC was present when the Claimant arrived on 11 January 2016, and other factual issues in dispute.

70. Fourth, as to the danger of the Claimant ascending the ladder to the first floor, I consider that he was warned of the dangers and that, furthermore, the danger should have been obvious.

71. That is because:

i) The evidence that on the morning of 11 January 2016 the stairwell at 16 Fallowfield Close was in the process of being cut out was not seriously disputed. I accept that evidence was true. I also accept the account given of the state of the stairwell when the Claimant arrived. It too was not disputed. It was thus not disputed that the floor joists had been removed, cuts had been made to the chipboard and a relatively small hatch had been made in the chipboard.

ii) It seems to be implausible that the Second Defendant and MC (or indeed the Second Defendant alone if MC was not there) would not have said anything or provided any warnings to the Claimant of potential dangers about his ascending the ladder. It was obviously not safe for anyone to walk on the chipboard that had been cut through in the stairwell area. Given that the Second Defendant was in the middle of cutting the chipboard when the Claimant arrived, I find that it is unlikely he would have provided no warning to the Claimant about climbing up through the hatch and accessing the first floor, not least because the hatch had not been built for that purpose.

iii) I also consider that the danger of placing his weight on the chipboard should have been obvious to someone with the expertise and experience of the Claimant. Having attended on Friday, 8 January 2016 to plaster the stairwell ceiling he would have been aware that the floor had been complete on that day, but that when he came on Monday 11 January the stairwell was then in the process of being cut out. He would have been able to see that the floor joists had been removed and the cuts in the chipboard which the Second Defendant was in the middle of making. It should have been obvious to him that it would be dangerous to place his weight on the chipboard.

iv) No doubt because he was aware of the danger, when the Claimant headed up the ladder initially, he moved directly onto the part of the floor that was secure. Whether because he had not heeded the danger properly, forgot about it, or it simply slipped his mind, he trod on the chipboard when he came to make his way down. He did not deny that after he fell he blamed himself for the fall. I consider that is because he recognised, at the time, he had been foolish to step on the chipboard in the stairwell given the obvious risk that posed and the warning he had been given.

v) I consider that the most plausible explanation of what happened is that the Claimant was made aware of the potential risk of accessing the first floor, and that that risk, in any event, would have been obvious to him. He decided to take the risk as he did not want to have to return to give a quote on another occasion. He believed he would be "fine", and indeed that would have been the case if he had not placed his weight on the chipboard. The fact he placed his weight on the unsupported chipboard when descending, in my view, was not the result of a failure to warn him or because the danger was somehow a hidden one. It occurred because, for whatever reason, he was not sufficiently careful, or was not concentrating sufficiently, when he attempted to come down the ladder.

Findings on events after the accident

72. In the light of the above, it is not necessary to say very much about the events after the accident as they have only limited relevance. I will deal with them briefly as they played some limited role in my views of the various witnesses' credibility and to some of the factual mattes in dispute.

73. I did not find credible the Claimant's evidence that he had no recollection of sending the text message on 14 January 2016 to MC suggesting the latter make an insurance claim. As set out above, I am not convinced he was seeking to encourage the perpetration of a fraud, in the sense of not believing that such a claim could properly be made, but I think it unlikely he has no recollection of sending the text. Similarly I did not find it credible that when he sought to give a quote to MC for the plastering of the first floor after the accident, the Claimant was proposing the work would be done by two people excluding himself. The texts are clear – they refer to one individual who would do the work "with me" and to the work being done by "two of us". That language would not have been used if the Claimant intended to arrange for two *other* people, and not himself, to do the work.

74. I also did not find credible MC's evidence of his interactions with Russel Worth solicitors after the accident. I accept that he received an incorrect note about an accident in which he had no involvement in April 2016, and may have spoken to Russel Worth solicitors at the time. I do not, however, consider it credible that he did not make the phone call referred to in the File Note of 29 June 2016, that he has no recollection of it or that he did not receive the letter of 13 July 2016.

75. There was no suggestion that the Russel Worth File Note of 29 June was forged and it seems overwhelmingly likely that the reference to the owner of CK2 calling and stating that "they were never instructed to work on the property and was helping free of charge" was to a call made by MC. I also find it unlikely that MC's accountants would not have passed on the letter from Russel Worth dated 13 July 2016 asking him to confirm the

contents of the phone call in writing. If, as I find, MC made the phone call and received the letter I do not find it credible that he has not recollection of doing so. He gave detailed evidence of other events in 2016, and I do not accept that speaking to and hearing from a solicitor about the accident would have completely slipped his mind. That said, I do not consider anything turns on the matter beyond a relatively small impact on MC's credibility. Even if MC did say in 2016 that CK2 were not instructed to work on the property, he clearly now accepts that they were instructed, and the evidence in support of that is clear.

Application of factual findings to the issues in the case

76. In order to succeed in his claim under the OLA 1957 the Claimant must show (1) that one or both of the Defendants were "occupiers" of 16 Fallowfield Close at the time of the accident on 11 January 2016 within the meaning of the OLA 1957; and (2) if one or both were occupiers they breached the "common duty of care" to take such care as in all the circumstances was reasonable to ensure that the Claimant would be reasonably safe using the premises for the purposes he was permitted to be there. If the Claimant could otherwise establish liability, (3) an issue arises as to whether he willingly accepted the relevant risk. (4) I will also deal briefly with the tort of negligence.

(1) Were one of both of the Defendants "occupiers" at the material time?

77. As set out above, whether a person is an "occupier" within the meaning of the OLA 1957 depends on whether they have sufficient control over a premises for it to be reasonable to expect them to appreciate potential risks on the premises and to take reasonable care to protect those coming to the premises from such risks. As I noted, it is clearly possible for a builder undertaking construction work on premises to become the "occupier" of the premises, in addition to or instead of the owner. The question will ultimately be one of fact and degree as to the extent of control the builder and/or the owner are exercising.

78. Turning to the First Defendant, in my view it is clear she was not the "occupier" of 16 Fallowfield Close at the time of the accident. It is true that she was the owner of the property, having purchased it in August 2014. At no stage between that date and December 2017, however, did she live in the property. It was not disputed that she rarely visited the property between 2014-2017 while the building work was being undertaken, and when she visited it was only to make limited decisions about details of decoration, kitchen lay out etc. She did not, in my view, have sufficient control over the premises while the property was being converted, and specifically in January 2016, for it to be reasonable to expect her to appreciate potential risks on the premises and to protect visitors from those risks. She was not therefore the "occupier" of the property at the material time for the purposes of the OLA 1957.

79. It is not surprising that the First Defendant was not the "occupier" in my view. The scale of the building work required to convert a bungalow into a two storey house was not much different from the building of a new house. The First Defendant left that building work, and control of the premises, to professional builders. While they were in the process of undertaking the conversion of the property she did not have sufficient control or supervision over the property to ensure that sub-contractors or other visitors

were safe, and could not reasonably be expected to ensure their safety. That responsibility lay with CK2.

80. As to the Second Defendant, he was not at the material time the owner of the property and had no legal rights in relation to it. Unlike the First Defendant he did regularly visit the property in order to undertake building work, and was present at the time of the accident. I nevertheless do not consider him to be the "occupier" of the property.

81. As set out above, it was apparent from the evidence before me that responsibility for the management and supervision of the building work lay with CK2. CK2 liaised with the architects, arranged and paid for delivery of materials, had their builder's sign at the premises and engaged and paid sub-contractors. CK2 had the keys to the property and control over who entered. Ultimately, the Second Defendant's role was that of a sub-contractor. He may have had a greater involvement in the project than other sub-contractors, given that the property was owned by his girlfriend and then wife, and there may have been times when he worked on the property on his own. I do not, however, consider that meant he became the "occupier" of the premises. He did not have sufficient control over the property to owe a duty to keep visitors safe.

82. The work on the property, and the property itself, was controlled by CK2. It was CK2, in my opinion, as the company responsible for the conversion work who had the obligation to appreciate the potential risks at the premises and take reasonable care to protect visitors. I do not consider that the First or Second Defendant had sufficient control over the property to be regarded as separate and additional occupiers.

(2) Was there a breach the "common duty of care"?

83. In the light of my conclusion above that neither of the Defendants were occupiers of 16 Fallowfield Close at the material time, it is not strictly necessary to determine the question of breach. I will, however, go on to do so as I heard evidence on the issue and in case I am wrong on the question of occupation.

84. I do not consider that, if either Defendant was in occupation of the property at the material, they breached the duty of care owed to the Claimant. As set out above, I consider that it is likely that the Claimant was warned about the risk of ascending the ladder though the hatch to the first floor when he arrived on the morning of 16 January 2016, and, furthermore, I consider that the risk would have been obvious to someone with the Claimant's skill, expertise and experience.

85. Both the provision of a warning and the Claimant's particular professional skills are matters I am entitled to consider in determining whether sufficient care had been taken to see that the Claimant was reasonably safe (see OLA 1957 ss 2(3)(b) and 2(4)(a)). In my view it would have been obvious to the Claimant when he arrived that the stairwell between the floors was in the middle of being cut through and that it was not safe to stand on the chipboard in that area. I also consider he was warned it was not safe. I consider that was sufficient to discharge the duty of care owed to a visitor with the Claimant's skills and experience of building construction.

86. I do not consider that the Defendants were obliged to do more. They were not obliged, in my view, physically to stop the Claimant ascending or take further steps to block off the area. I do not consider that the accident happened because of a breach of any duty

owed by the Defendants. It happened because the Claimant, having moved off the ladder in the correct direction when he ascended to the first floor, allowed the obvious risks to slip his mind or was not concentrating sufficiently when he came to descend. He placed his weight on the chipboard when it was not safe to do so, but I do not consider that to have been the result of a breach of any duty owed to him by the Defendants.

(3) Voluntary acceptance of risk and contributory negligence

87. In the light of the above I also consider that the Defendants have a defence pursuant to OLA 1957 s 2(5) on the basis that the Claimant willingly accepted the risks inherent in ascending the ladder to the first floor.

88. I consider that when he ascended the ladder the Claimant was aware of the risk if he were to place his weight on the chipboard in the stairwell area. He wished to give the quote for plastering and did not want to have to return at some later time. He chose to take the risk believing he would be able to avoid it. As set out above, he did successfully avoid it when he ascended the ladder, but unfortunately he did not do so when he came to descend. That was a risk that he voluntarily assumed and cannot therefore hold the Defendants liable for it.

(4) Negligence

89. The claim was pleaded in negligence as well as for breach of the OLA 1957. It was, however, primarily argued before me pursuant to the latter, and very little said by either party about negligence. I can deal with the matter briefly.

90. In principle it might be possible for the Claimant to succeed in negligence even if he could not establish that either Defendant was an "occupier" within the meaning of the OLA 1957. That would, however, require him overcoming the considerable hurdles to establish a duty of care for a failure to warn, i.e. for a pure omission. Given my conclusions that, even if one or both of the Defendants were "occupiers" there was no breach of the duty imposed under the OLA 1957, it is unnecessary for me to consider whether a duty of care was owed at common law. Even if such a duty were owed, it would not have been breached for the same reasons that I found no breach of any duty owed under the OLA 1957.

Fundamental dishonesty

Criminal Justice and Courts Act 2015

91. The Defendants invite me, in addition, to dismiss the claim pursuant to Criminal Justice and Courts Act 2015 section 57.

92. Section 57 provides:

> "Personal injury claims: cases of fundamental dishonesty
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—

> (a) the court finds that the claimant is entitled to damages in respect of the claim, but
>
> (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.
>
> (2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed."

93. I do not dismiss the claim pursuant to section 57 of the Criminal Justice and Courts 2015:

    i) Firstly, I have not found the Claimant to be "entitled to damages" for the purpose of section 57(1)(a). Section 57 does not therefore apply.

    ii) Secondly, the Defendants' pleaded case on dishonesty does no more than "reserve the right to plead" that the claim with regard to "severity of … injuries, the level and degree of … pain and suffering and loss of amenity, together with the amount of his pecuniary losses, are fraudulently untrue". The pleadings were not amended to make an assertion of fraud, and, in any event, the case before me proceeded only on the question of liability. I made no finding in relation to the quantum sought, whether on the dishonesty of the claim or otherwise.

94. It may, however, assist to deal with the question of "fundamental dishonesty" as it is potentially relevant to the issue of costs.

CPR rule 44

95. Ordinarily in personal injury claims, claimants enjoy "qualified one-way cost shifting" ("QOCS") which limits the claiming of costs against them (see CPR rule 44.14). If, however, a claimant's claim were to be found to be "fundamentally dishonest" a costs order could be enforced against them with the permission of the court pursuant to CPR rule 44.16(1). As the Court of Appeal held in *Howlett v Davies* [2017] EWCA Civ 1969, [2018] 1 WLR 948, it is not necessary for a defendant to formally plead "fundamental dishonesty" in response to a claim for it to be open to the Court to make such a finding, provided that the claimant had adequate warning of the potential conclusion of fundamental dishonesty and a fair opportunity to deal with it (see in particular *Howlett v Davies* paragraphs 30-33). In the present case, the issue of "fundamental dishonesty" was raised in the Defendants' skeleton and it was put to the Claimant during the hearing that parts of his evidence was untrue. In my view, the question of "fundamental dishonesty" for the purpose of CPR 44.16 is therefore properly before the court and the Claimant had a fair opportunity to deal with it.

Legal framework

96. The meaning of "fundamental dishonesty" in this context was explained by Newey LJ (with whom the other judged agreed) in *Howlett v Davies* at follows:

> "16. As noted above, one-way costs shifting can be displaced if a claim is found to be "fundamentally dishonest". The meaning of this expression was considered by His Honour Judge Moloney QC, sitting in the County Court at Cambridge, in *Gosling v Hailo* (29 April 2014). He said this in his judgment:
>
> '44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
>
> 45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.'
>
> 17. In the present case, neither counsel sought to challenge Judge Moloney QC's approach. Mr Bartlett spoke of it being common sense. I agree."

97. In *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB) at paragraphs 57-59, Julian Knowles J referred to a number of County Court cases that had considered CPR r 44.16(1) and the meaning of "fundamental dishonesty".

98. In *Meadows v La Tasca Restaurants*, Unreported, HHJ Hodge QC at Manchester County Court, said at paragraph 18:

> "approach to lies told by a party to litigation. If a lie is told merely to bolster an honest claim or defence, then that will not necessarily tell against the liar. But if the lie goes to the whole root of the claim or defence, then it may well indicate that the claim or defence (as the case may be) is itself fundamentally dishonest."

99. In *Rayner v Raymond Brown* Group, Unreported, HHJ Harris QC at Oxford County Court, said at paragraph 10:

> "Fundamental dishonesty within the meaning of CPR 44 means a substantial and material dishonesty going to the heart of the claim - either liability or quantum or both - rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case …"

100. In *Menary v Darnton*, Unreported, HHJ Hughes QC at Portsmouth County Court, said at paragraph 11:

> "The use of the word 'dishonesty' in the present context necessarily imports well understood and ordinary concepts of deceit, falsity and deception. In essence, it is the advancing of a claim without an honest and genuine belief in its truth. [F]or present purposes, fundamental dishonesty may be taken to be some deceit that goes to the root of the claim. The purpose of the phrase is twofold: first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot sensibly be said to be fundamentally dishonest; they do not go to the root of the claim. Second, the fundamental dishonesty is related to the claim not to the claimant. This must be deliberate on the part of those who drafted the Civil Procedure Rules. It is the claim the defendant has been obliged to meet, and if that claim has been tainted by fundamental dishonesty, then in fairness, and in justice and in accordance with the overriding objective, the defendant should be able to recover the costs incurred in meeting an action that was proved, on balance, to be fundamentally dishonest."

101. In order to establish that the Claimant has pursued a "fundamentally dishonest" claim, it must be shown there was dishonesty which goes to the root or heart of the claim, or to a part of it. Dishonesty which is merely incidental or collateral to the claim will not suffice. Dishonesty for these purposes is subjective. It does not matter if the Claimant was unreasonable in believing in the veracity of his claim. Provided he genuinely believed in the veracity of all the core aspects of his claim, it will not be fundamentally dishonest. In essence a claim will be dishonest if the person putting it forward does not believe that some core aspect of it (whether concerned with liability or quantum) is true.

Application to present case

102. The Defendants did not suggest that the Claimant's account of the accident and the events immediately surrounding it was fundamentally dishonest. They put their case on "fundamental dishonesty" in three ways. It was submitted, orally and in writing, that the Claimant was dishonest (i) in relation to his prior knowledge of the property; (ii) his conduct shortly after the accident, and (iii) the claimed extent of the Claimant's claimed losses.

103. In relation to those matters:

i) As to the Claimant's prior knowledge of the property, it was pointed out by Ms Richmond that in his witness statement the Claimant failed to mention that before the accident he had been to 16 Fallowfield Close twice previously, including the week before. It was not, however, put to him in cross-examination that that omission was dishonest. When asked about the previous times he had visited the property, he readily accepted he had visited and did not appear to have any intention to conceal the visits. Furthermore, and to be fair to the Claimant, the entire section of his witness statement dealing with liability, including the accident itself, was two pages long. The omission of details of his earlier visits to the property are more likely, in my view, to be the result of brevity of the statement than any deliberate attempt at concealment.

ii) The events immediately after the accident on which Ms Richmond relies was the message sent to MC by the Claimant on 14 January 2016 suggesting he make, what was said to be, a fraudulent claim on CK2's insurance and his contact with MC about the quotation for the plastering. As set out above, I did not find it credible that the Claimant had no memory of sending the text on 14 January 2016, or that, in the texts following the accident, he was suggesting that two other individuals (not including himself) would do the plastering work. Those are not, however, matters that go to the root or core of the claim. As set out above, I do not consider that a suggestion that CK2 make a claim on its insurance is itself indicative of fraud. There is a good argument that CK2 was, in fact, that correct defendant in this claim and there is no basis for me to conclude that any suggestion of a claim against CK2 was necessary fraudulent. In any event, while it might have been improper in the text of the Claimant to seek to persuade MC to make the claim on the basis that he would "divy [it] up", it is hard to see how that is dishonesty going to the core of the claim which is that the Claimant was injured as a result of a breach of duty by the First or Second Defendant.

iii) As to matters concerning the Claimant's losses, Ms Richmond, accepted she could not pursue that as an allegation of dishonesty as the trial did not determine any issues related to quantum or the Claimant's claimed losses.

104. In my view the Claimant genuinely believed he had a proper claim against the Defendants. That, of course, is not necessarily sufficient. A person may genuinely believe they are entitled to compensation, but nevertheless put forward a case which at its core is not honest. That has not, however, occurred in the present case. The core aspects of this case on liability are the claims that one or both of the Defendants were the "occupiers" of 16 Fallowfield Close, and that they failed to take reasonable care to ensure the Claimant was safe when he visited on 11 January 2016. I did not find either aspects of the case to be established, but I do not doubt that the Claimant genuinely believed both those aspects of his claim. Insofar as there were other aspects of the case in which I did not accept of the Claimant's evidence, I do not consider those go to the core or heart of the case and do not consider it to be a fundamentally dishonest claim.

Conclusion

105. For reasons set out above, I consider that no relevant duty was owed to the Claimant by either Defendant, and that, in any event, if a duty were owed it was not breached in the

circumstances of this case. I therefore do not find the claim for damages to be made out.