Neutral Citation Number: [2021] EWHC 1828 (QB)

Case No: QA-2021-000074

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE
ORDER OF HHJ SAUNDERS DATED 18 MARCH 2021
COUNTY COURT CASE NUMBER: E20YY910

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2021

Before :

MRS JUSTICE FARBEY

- -

Between :

Theresa Bates	**Appellant**
- and -	
Snozone (Holdings) Ltd	**Respondent**

- -
- -

Mr Robert Smith (instructed by **Aegis Legal**) for the **Appellant**
Mr Henry Morton Jack (instructed by **DAC Beachcroft**) for the **Respondent**

Hearing date: 25 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00am on 2 July 2021

Mrs Justice Farbey :

Introduction

1. This is an appeal, brought with the permission of Stewart J, against the order of HHJ Saunders sitting in the County Court at Central London on 18 March 2021. By that order, the judge dismissed the appellant's claim for damages for personal injury (a fractured leg) sustained on the respondent's indoor ski slope at Milton Keynes. The judge rightly recognised that both the parties and their respective witnesses adopted an exemplary approach to the litigation. In particular, I agree with the judge that the honesty and thoughtfulness of the appellant shines through.

2. Before me, as below, Mr Robert Smith appeared for the appellant and Mr Henry Morton Jack appeared for the respondent. I am grateful to them for their helpful submissions.

Background

3. On 24 January 2016, the appellant and her husband were undertaking group skiing tuition at the Xscape, Snozone indoor slope in preparation for a skiing holiday. At around 3.50 pm, the appellant fell while descending the learner slope. She suffered severe pain in the left leg before being taken by ambulance to the Milton Keynes Hospital and then (two days later) to the John Radcliffe Hospital. She underwent surgery for a complex fracture of her leg, which included the fitting of reconstructive locking plates. Discharged home after 12 days, she was not able to return to full-time work for 12 months. Long-lasting consequences include wasting of the left knee.

4. On 12 December 2018, the appellant issued a claim against the respondent in the County Court seeking damages for negligence and breach of contract. A defence filed on around 11 April 2019 denied liability for the accident and denied that any breach of duty had caused injury. A reply to the defence dated 19 June 2019 brought the pleadings to a close.

5. By order dated 26 June 2019, each party was given permission to rely on expert orthopaedic evidence and on "expert ski-teaching" evidence. The appellant relied on the medical report and addendum report of Mr Simon T Moyes, a consultant orthopaedic surgeon. He concluded that the appellant's injury was likely to have occurred as a consequence of valgus bending. He was asked to give his view as to whether the appellant's injury was "more consistent with her account as to the accident circumstances or the [respondent's] account." He replied: "The injury suffered by the [appellant] is more consistent with her account than with the [respondent's] account." No medical evidence was filed by the respondent.

6. The skiing evidence gave rise to difficulties. By order dated 28 July 2020, a joint statement from the two ski-teaching consultants instructed respectively on behalf of each party was excluded from the evidence. The judge had before him a second joint statement dated 7 September 2020. By that time, the ski consultants were better informed of their role as experts. Their joint statement accepts and highlights the limits of their ability to assist the court with the factual history of how the claimant came to fall.

7. On 11 November 2020, the parties submitted a case summary and an amended List of Issues. The trial started on 23 November 2020 and lasted three days. The judge heard oral evidence from the appellant, her husband and Mr Craig Robinson who was the ski instructor taking the lesson at the time of the fall. Another of the respondent's employees, Mr Dan Moreton, also gave oral evidence. Mr Moreton had not seen the fall but was able to comment on the respondent's health and safety procedures in his capacity as an Operations Support Manager.

8. Judgment was reserved. In reaching his conclusions, the judge had the benefit of full skeleton arguments from both parties, a supplementary skeleton argument from the respondent and written closing submissions from the claimant.

9. The judgment - running to 84 paragraphs - was handed down on 15 March 2021. The judge had circulated a draft to the parties in advance. In a document dated 9 March 2021, the claimant had put the judge on notice that he would be invited on handing down the judgment to clarify a number of matters. The judge would be asked to provide to the parties certain parts of his notes of the evidence, to give further reasons for rejecting the claimant's case and to answer some specific questions about the evidence. The judge understandably refused to become involved in these requests. The judge's reasons for dismissing the claim were set out in his written, handed down judgment and could not be supplemented – by invitation of a party or otherwise – by further ex tempore reasons at an oral hearing. The request to the judge to produce his notes of the evidence is puzzling.

10. In his judgment, the judge set out that the claim had been brought in negligence, contract and under the Occupiers' Liability Act 1957. He observed that the duties owed by the respondent to the appellant in each cause of action were equivalent. Citing relevant case law, he held that, in the context of this case, the burden lay on the appellant to prove that (a) the respondent exposed her to a foreseeable risk of injury over and above the inherent risk of injury in the sport of skiing and (b) the respondent failed to take reasonable care. The judge's summary of the legal position is not in dispute. The appellant does not argue that he has made any misdirection of legal principle. As for the facts, the judge stated that the principal matter for his determination was "the mechanics leading up to the accident itself."

11. The judge observed that the appellant was aged 57 at the date of the accident. She had not skied for 35 years. She had previously undertaken only three skiing holidays. She was, as Mr Robinson described her, an "advanced beginner." The purpose of taking a series of four lessons was to improve her skiing skills and refresh the techniques that she had learned many years before in advance of a planned skiing trip abroad.

12. At the time of the accident, the appellant was taking part in lesson 4 which had begun at approximately 3 pm and was due to last until 4 pm. She was skiing on the learner slope. She had already made approximately six runs down from the top of the slope.

13. The appellant's evidence before the judge was that lessons were taking place on both sides of the learner slope which was in use by a mix of snowboarders and skiers. It appeared to her to be "just a total free for all." Instructors were concerned only with their own lessons: there was no one in charge of ensuring that the slope as a whole was safe. She said that the overrunning of lessons added to the overcrowding on the slope itself, as did certain features of the slope's defective infrastructure which I shall not set

out but which included a broken down lift. She felt that there was "no clear slope to ski down." She had waited for a clear run before starting to ski down the slope for her final run of the day. As she was completing a turn to traverse the slope, an out-of-control snowboarder almost caused her to fall and then fell right near her. As a result, she wobbled and the end of her ski clipped a "snowdrift" adjacent to a padded pillar which divided the learner slope from a second slope. Her case was that (in simple terms) snow had accumulated like a drift around the pillar because the respondent had not properly smoothed down the snow on the learner slope by "grooming" the snow in accordance with its own timetable for doing so.

14. The clipping of the snowdrift had caused her to wobble and fall. The weight of her right leg landed on the left leg and pushed her leg into a dip that had at some stage formed in the snow as a result of the movements of snowboarders which had disturbed the surface of the slope.

15. The appellant's husband had never previously skied but took part in the four lessons with a view to accompanying the appellant on the holiday. He did not witness the accident but said that the learner area was busy.

16. Mr Robinson's account of the mechanics of the accident was that the appellant had skied directly into the pillar. The judge rejected this part of his evidence. Mr Robinson said that he did not recall any problem on the slope. He did not recall anything that might have caused the appellant to fall. His recollection was that the slopes were "even." He described the appellant as being "nervous" about other people on the learner slope and about the slope being busy. He had to explain to her that she could not afford the luxury of waiting for a clear run because the environment of the indoor slope was the same environment she would experience on holiday.

17. The judge summarised the respondent's case in the following terms:

> "the defendant says that… this was a simple skiing accident considering the inherent risks occurring in skiing and that, in any event, the slope was well-maintained and kept safe such that it could not be in breach of its admitted duty of care ."

18. The judge concluded:

> "55. The…evidence leads me to the view that the Claimant was a naturally nervous skier in view of her level of experience (demonstrated by her comments to Mr Robinson at the top of the slope) and that the most likely scenario is that she lost control of her skis after having nearly been struck by a snowboarder - this being entirely consistent with an unfortunate skiing accident - an expression Mr Robinson uses in his witness statement… The evidence is insufficient to place liability on the Defendant.
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> 56. I, therefore, find as a fact, that, although the Claimant did not ski face on into the pillar due to loss of control, the evidence demonstrates that she did not lose control by virtue of a defect in the slope but rather it was an incidental fall unrelated to any defect - a common event in skiing.

> 57. Moreover, from the location of where the Claimant finished after the accident, it seemed to me from the evidence (particularly from Mr Robinson which I accept) that the Claimant was situated much nearer to the pillars. This is shown on the photographs where an "X" is located and so [the Claimant's] account is less likely to be accurate. This is again consistent with the Claimant skiing much closer to the pillar than she has claimed.
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> 58. I also consider that it must not be forgotten that this accident did not take place on the main slope. It was on the learners slope where, as can be seen from the photographs, learners would only ascend using the travelator on the right. It is intended as a gentle teaching slope (with a much lower gradient) to eliminate the risk to students learning to ski. The accident took place near the top and the experts agree that, due to gravity, a 'snowdrift' of the type described by the Claimant is less likely to form as snow tends to move downwards.
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> 59. Finally, I accept that Mr Moyes' medical report supports the contention that the Claimant's account is more consistent with the injuries that she suffered. I agree that this was unchallenged but where, as here, the precise mechanics of the accident are open to debate, in my view that is not crucial. Indeed, I note that the Defendant's original position was that the claimant skied into a pillar, but this was not maintained from the evidence. "

19. The judge's primary conclusion was, therefore, that the appellant suffered an unfortunate accident. He then went on to consider whether, even if he were wrong about this, the respondent was in breach of its duty of care. The appellant relied on three aspects of the evidence to establish a breach of duty:

> (i) The respondent's inadequate risk assessment in relation to overcrowding and grooming;
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> (ii) Overcrowding on the learner slope; and
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> (iii) The absence of a 6 pm groom on the night before the accident in breach of established safety procedures.

20. The judge dealt with each of these factors in turn. In summary, he held that (i) defects in the respondent's risk assessment were not decisive in the context of this case; (ii) on the evidence before him, the learner slope had not been overcrowded; and (iii) the grooming regime could not have been responsible for the fall because the failure to carry out a 6 pm groom was mitigated by a groom on the following morning.

21. He concluded:

> "81. I have the utmost sympathy for the Claimant who suffered a very serious injury whilst enjoying what should be, and is, an extremely enjoyable activity… However, as she is fully aware,

> skiing is a sport with inherent risks where it is common to fall whatever the level of ability - more so for a person of her level of ability. I cannot find…that the Claimant was exposed to a foreseeable risk of injury over and above the inherent risk in the sport of skiing. In the circumstances the claim cannot succeed.
>
> 82. I also find that the steps taken by the Defendant in relation to the condition and maintenance of the slope were sufficient albeit that matters of record-keeping and risk assessment requires substantial improvement…."

Therefore, as I have indicated, the judge dismissed the claim.

22. Permission to appeal was granted on 15 grounds. Each of those grounds may be characterised as amounting to a criticism of the judge's factual and evaluative conclusions, focusing on the judge's reasoning in various parts of the judgment.

23. At the outset of the hearing, Mr Smith clarified the appellant's case which was that a pile of banked up snow caused the appellant's fall; a dip in the snow had caused her injury. He told me that he would not pursue an argument that the fall was caused by the restricted space in which the appellant claims to have found herself at the time of the fall.

The principles of appellate restraint

24. Both parties agreed that, by virtue of CPR 52.21(1), this appeal is not a rehearing but is limited to a review of the judge's decision. The appeal stands to be allowed only if the judge's decision was (a) wrong; or (b) unjust because of a serious procedural or other irregularity (CPR 52.21(3)). There was however disagreement in two respects as to the approach the court should adopt on an appeal that challenges elements of the judge's assessment of the evidence and his factual findings. I shall turn to these two issues before considering the merits of the appeal.

The need for a transcript of proceedings before the judge

25. In the appellant's notice, her solicitors indicated that a transcript of the proceedings before the judge was awaited from the court and that it would take about 2 months to be supplied. A transcript had not arrived by the time of Stewart J's order (26 April 2021). The appellant had however provided a bundle of documents which caused Stewart J to direct that the requirement for an appeal bundle was dispensed with and that no further papers needed to be filed for the purposes of the appeal hearing. Mindful of Stewart J's order, the appellant's solicitors did not pursue the transcript of proceedings.

26. Mr Morton Jack submitted that an appeal on the facts without the transcript of proceedings was bound to fail. It was essential for this court, sitting in an appellate capacity, to assess the whole of the evidence before the judge (both written and oral) if the judge's findings of fact were to be called into question. Memories fade so that the respondent in resisting the appeal cannot be expected to recall what was or was not put to witnesses in cross-examination. The court does not have before it a full account of the evidence that the judge would have considered in reaching his findings of fact. It

would be wrong for the court to indulge the appellant's dissection of the judge's reasoning without the ability to fit that analysis into the overall context of the evidence. The duty lay on the appellant to make good her grounds of appeal by providing the court with a transcript of the evidence. The failure to do so amounted to a breach of the appellant's duty in CPR 52BPD 6.4(2)(g) to file those documents which she considered would assist the appeal court. No duty lay on the respondent to ensure that the transcript was put before the court.

27. Mr Smith submitted that the respondent's approach failed to deal with its own duties to the court. CPR 52BPD 6.4(2)(g) enables the court to have all those documents which "any party" (i.e. not only the appellant) considers would assist the just disposal of the appeal. If a transcript were critical to my task, the respondent ought to have raised the matter with the appellant. The first the appellant knew of the respondent's position was when Mr Morton Jack's skeleton argument was served - which was very close to the hearing and in breach of the requirement to serve all documents at least 7 days before the appeal (CPR 52BPD 6.6). The appellant's advisers had followed the directions of Stewart J but, if a transcript was required, I should adjourn the appeal as a matter of fairness.

28. In *Amin v Amin (Dec'd)* [2020] EWHC 2675 (Ch), Nugee LJ sitting in the High Court considered the well-trodden ground of appellate constraints in considering and overturning a judge's findings of fact. In relation to the need for a transcript, he held at para 23:

> "It is for the appellant to demonstrate on appeal that the trial judge has erred in a factual conclusion. In general that can only be done by showing either that there was literally no evidence in support of his conclusion, or that his decision was one that no reasonable trial judge could have come to (cf *Perry v Raleys Solicitors* [2019] UKSC 5 at [52]). It seems to me impossible to do that without having regard to the totality of the evidence before him; and that it follows that it is insufficient to point to documentary evidence, however plain it appears to be on its face, where it is said that oral evidence was heard which was relevant to the question. Unless it is accepted, which in this case it was not, that the oral evidence added nothing of relevance, I think that means that it is likely to be impossible to mount an appeal successfully on pure questions of fact without a transcript of the relevant parts of the evidence."

29. I would not accept, as Mr Morton Jack seemed to urge, that this passage of *Amin* is authority for the proposition that in every appeal in which the appellate court is invited to consider a judge's factual findings, the appellant is bound to produce a transcript of the evidence before the judge. The touchstone, as Nugee LJ makes plain, is whether the judge heard oral evidence which was relevant to the grounds of appeal. Any broader proposition would sit uneasily with the overriding objective in CPR Part 1 and with CPR 52.42 which enjoins the parties to produce to the court only what is relevant to the particular appeal. It would also be inconsistent with Nugee LJ's careful language which indicates that an appeal is "likely" to be impossible on pure questions of fact without a transcript.

30. In my judgment, *Amin* does not set down a hard and fast rule about transcripts. It does emphasise that a party cannot challenge a factual finding without providing all the relevant material which will, if a party says that a finding of fact is unsustainable, be likely to include the transcript of proceedings. In the present case, however, Mr Smith disavowed that he was asking the court to regard particular factual findings as unsustainable on the evidence as a whole. He recognised what he called the "head wind" faced by an appellant who seeks to impugn findings of fact (including the inferences to be drawn from the primary facts) and the evaluation of facts found.

31. The target of his challenge was instead the building blocks of the judgment which (he submitted) revealed fatal self-contradictory findings and inconsistencies. While I could not be asked to carry out an evaluation of the evidence afresh, it lay within my power to ask "whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'" (*Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] B.C.C. 1031 para 76; citing *Regina (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079 para 64). In the circumstances of the present case, the key document was the judgment below which should be analysed in light of the parties' pleadings and the significant planks of the evidence which (in a case where the honesty of witnesses was not an issue) emerged from the written evidence without the need for a transcript.

32. In light of the way that Mr Smith circumscribed his challenge to the judge's conclusions, there can be no requirement for a transcript in this case. If the court required a transcript of the full proceedings in every appeal raising factual matters in any way, it would present the spectre of appellate judges becoming more not less involved in the trial judge's tasks of fact-finding and evaluation of evidence. That cannot be in the interests of the administration of justice. This court took the view, when granting permission to appeal, that the documents already in the bundle were sufficient for the fair disposal of the appeal. If the appellant had applied to introduce what would have been lengthy transcripts, there would have been uncertain legal and forensic benefit with increased costs for the parties. No criticism may be levelled at the appellant's advisers for following a proportionate approach in accordance with the overriding objective as mirrored in Stewart J's order. I would reject Mr Morton Jack's submission that the entire appeal is bound to fail for want of a transcript.

Reviewing a judge's reasoning

33. There was some dispute about the threshold for appellate intervention in an appeal focused on the quality of the judge's reasoning. Mr Smith submitted that the interests of justice require every judgment to achieve a degree of cogency which the judgment below lacked. I should not look only at the outcome of the case but should scrutinise the "building blocks of the reasoned judicial process" (*Glicksman v Redbridge Healthcare NHS Trust* [2001] EWCA Civ 1097 para 11 per Henry LJ; cited with approval in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112 paras 41 and 42 per Males LJ with whom Peter Jackson LJ and McCombe LJ agreed). In the present case, those building blocks contained obvious errors which undermined the judge's overall conclusions.

34. Mr Smith submitted that the way in which the judge dealt with individual elements of the evidence was readily apparent from the judgment itself. An analysis of the judgment reveals a flawed approach to various strands of evidence amounting to errors of law. The assessment of these errors does not depend on any advantage enjoyed by the trial judge.

35. Mr Morton Jack submitted that I am not in the same position as the judge who heard oral evidence. The judge had relied on sufficient evidence in relation to each relevant issue to justify his conclusions and the overall outcome of the case. Mr Morton Jack variously described the appellant's focus on detail as "cherry-picking" and "forensic."

36. On questions of fact, appellate judges have long been enjoined not to usurp the function of the trial judge to form an opinion of the evidence of the witnesses called by the parties and, on the basis of that opinion, to make findings of fact. It is when the trial judge has not "taken proper advantage of…having seen and heard the witnesses" that a matter "will become at large for the appellate court" (*Thomas v Thomas* [1947] AC 484, 488 per Lord Thankerton). The appellate court must be "convinced by the plainest of considerations" before finding that the trial judge has formed a wrong opinion of a witness (*Yuill v Yuill* [1945] P 15,19 per Lord Greene MR). Appellate intervention in matters of fact will be warranted where the court is satisfied that the trial judge has gone "plainly wrong" (*Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600, para 62).

37. There is no need for a judgment to identify or explain every factor which weighed with the judge in his appraisal of the evidence (*English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 para 19). Nevertheless, it is well-established that a failure by a judge to give adequate reasons may itself be a ground of appeal. That is because fairness demands that the parties, especially the losing party, should be left in no doubt why they have won or lost. A duty to give reasons also concentrates the mind such that, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not (*Simetra Global Assets Ltd v Ikon Finance Ltd*, above, para 39; citing *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381).

38. As Mr Smith submitted, the appellate process could be rendered ineffective if the appellate court were unable to ascertain whether or not a judicial decision was plainly wrong. That appellate function operates through the court's ability to discern the building blocks of the reasoning process carried out by the trial judge. It is one thing for an appellate court to avoid "duplication of the trial judge's efforts" (*Anderson v City of Bessemer* (1985) 470 US 564 (1985), 574-575; cited with approval in *McGraddie*, above, para 3 per Lord Reed). It is another thing for an appeal court to condone a judgment that does not explain why the judge prefers one case over another (*Simetra Global Assets Ltd v Ikon Finance Ltd*, above, para 39).

39. An appellate court will be careful to distinguish between a well-founded reasons challenge and an attempt (under the guise of a reasons challenge) to enter the territory of the trial judge. As expressed in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed… An appellate court should resist the temptation to

> subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

40. The question whether the appellant was asking me to engage in "narrow textual analysis" played a prominent part in the parties' respective submissions.

The grounds of appeal

41. By the time of the hearing before me, Mr Smith had refined his challenge so as to group his fifteen grounds into a somewhat smaller number of points. I shall follow Mr Smith's lead in dealing with the first five grounds of appeal together. Grounds 1-5 deal overall with what Mr Smith called "the foundation stone upon which the building blocks of the Judgment were set", namely Mr Robinson's evidence. In particular, Mr Smith relied on one sentence of the judgment in which the judge said the following about Mr Robinson:

> "Even putting aside the evidential difficulties of his account that the Claimant skied directly into the pillar (which the Defendant appears to have abandoned and which must, on the evidence, be wrong), I note that he says, at paragraph 19 of his witness statement that '(*he does) not recall there was any problem on the slope or anything that might have caused Mrs Bates to fall*'".

42. Mr Smith asked me to construe this passage as meaning that the judge put aside the evidential difficulties of Mr Robinson's account of the mechanics of the fall in the sense that he disregarded those difficulties and put them out of his mind. The judge had therefore failed to have regard to a relevant factor. This key error led the judge to illogical and inconsistent findings in other parts of the judgment.

43. I do not accept that this passage of the judgment should be interpreted as Mr Smith submitted. The sentence is infelicitously drafted but a fair reading is that the judge rejected part of Mr Robinson's evidence (his account of the mechanics of the fall) and accepted another part of his evidence (about the condition of the slope). In my judgment, the judge intended to (and does) convey that, even accepting the appellant's case that Mr Robinson's account of the fall should be rejected, other parts of Mr Robinson's evidence were reliable and supported the respondent's case.

44. Mr Smith's submission falls into the error of assuming that the judge should have rejected the entirety of Mr Robinson's evidence because he rejected one part of it. It was open to the appellant to submit to the judge that he should treat Mr Robinson's evidence with caution on the basis that one key aspect of his evidence was flawed. However, as Mr Morton Jack submitted, the weight to be attributed to the various aspects of a witness' evidence was a matter for the trial judge. Nor does it follow that, having rejected Mr Robinson's account of the fall, the judge was bound to accept the appellant's account (as Ground 4 contends). There is no reason for this court to interfere and the "foundation stone" of the appellant's submissions is not in my judgment a sound one.

45. Mr Smith submitted that the judge had elsewhere relied on the very part of Mr Robinson's evidence that he had rejected, namely his description of the fall, so that

there are internal conflicts between various parts of the judgment. He criticised the judge for concluding that the fall was "an unfortunate skiing accident" in para 55 of the judgment (which I have quoted above) on the basis that that is the overall description given to the fall by Mr Robinson (in para 22 of his witness statement). That overall description cannot stand in so far as it flows from Mr Robinson's discredited assertion that the appellant skied into a pillar.

46. In my judgment, there is no substance to the appellant's complaint. Para 22 of Mr Robinson's witness statement is to the effect that the fall was an accident and not due to any wrongdoing by the respondent: it does not deal with the mechanics of the fall. There was ample evidence on which the judge could have concluded that the fall was an accident. There is no lack of logic or consistency by the judge.

47. Mr Smith submitted that the judge was wrong to assert that Mr Robinson's evidence that he did not recall any problem on the slope or anything that might have caused Mrs Bates to fall went unchallenged. The challenge was effectively embedded in the appellant's evidence that the fall was caused by a problem of banking in the snow near the pillar. In my judgment, the judge was best placed to assess the nature and degree of the challenge to Mr Robinson's recollection. Nor does it follow that the judge ought to have rejected Mr Robinson's evidence that there was no problem on the slope because he had rejected his account of the mechanics of the fall.

48. The judge found as a fact that immediately before the accident the appellant was distracted by an out-of-control snowboarder. The appellant's evidence was that the snowboarder caused her to wobble. The judge found this to be a "significant factor in this accident" – a finding which the appellant does not seek to challenge. In my judgment, there was ample evidence to conclude that the appellant's fall was an accident and was not caused by any defect in the snow.

49. For these reasons, Grounds 1-5 do not succeed.

50. Ground 6 seeks to impugn the logic of para 57 of the judgment which I have quoted above and which relates to photographs exhibited to the appellant's witness statement on which she marked with a cross her recollection of the location of the accident. Mr Smith submitted that the judge in para 57 found in effect both that the claimant was wrong as to the location (i.e. in parts of her evidence) and also that she was correct as to the location (i.e. accepting that she had placed the cross in the right place) – which is self-contradictory. In addition, the judge had preferred Mr Robinson's account of the location having earlier rejected his account of the accident – a further contradictory feature of the judgment.

51. I accept that para 57 of the judgment lacks clarity. Reading para 57 in a freestanding manner, I do not understand what point or points the judge is making. I do not understand why the cross on the photographs should be held against the claimant when she herself had marked the photos. I do not understand why the finding that the accident took place near the pillar – which was what the appellant wanted the judge to find – should be held against her. I do not however regard this lack of clarity as fatal to any of the judge's conclusions on the legal questions which he had to decide. It does not mean that the judge was wrong to conclude that the appellant's fall was an accident rather than the product of a defect in the respondent's snow. The judge gave (and was entitled to give) other reasons for reaching that conclusion that do not depend on what

he says in para 57. For this reason, Ground 6 does not warrant intervention by this court.

52. Ground 7 criticises the judge for finding that the appellant lost control while participating in a "hazardous sport" where "injuries are commonplace events." In support of this Ground, Mr Smith submitted that the only relevant evidence before the judge about the frequency of skiing injuries came from Mr Robinson. He had confirmed that there had been no similar accidents at the respondent's site in his three years of employment. His evidence could not reasonably support a conclusion that skiing injuries are commonplace.

53. I am not persuaded by Mr Smith's point. The appellant accepted – as she was bound to do – that skiing is a risky sport. If she meant anything other than that it carries the risk of physical injuries, she should have made this clear to the judge. He was in my judgment entitled to say that the injury was a consequence of the appellant's participation in a risky sport – which is really all that he meant.

54. Under this Ground, the appellant goes on to challenge the judge's findings at para 54 of the judgment that (i) she had been skiing for most of the day before the accident such that (ii) she was "undoubtedly tired" and that (iii) it is a well-known saying in skiing circles that "the most dangerous run is the final run of the day." It is said that none of these matters was put to the appellant or raised at trial.

55. The judge expressly recognised that the appellant's age and tiredness "had not been raised in any specific way at the trial." However, the findings and observations in this part of the judgment must be read in context. The appellant was a beginner (albeit an advanced beginner) who had not skied for over three decades. The judge found as a fact that she was nervous. On her own evidence, she lost her balance and fell when coming close to a snowboarder. The factors set out in para 54 are not determinative but rather form part of the broader picture - which was that the appellant had suffered an accident. For these reasons, Ground 7 does not warrant the court's intervention and does not succeed.

56. Under Ground 8, Mr Smith emphasised that Mr Robinson said in his witness statement that the appellant "seemed confident and happy" immediately before the accident. He submitted that this written evidence was inconsistent with other parts of Mr Robinson's evidence to the effect that the appellant was nervous. The judge was not permitted to find that the appellant was nervous on the basis of such contradictory evidence.

57. This ground of appeal does not withstand scrutiny. First, Mr Robinson's witness statement does not say that the appellant seemed confident immediately before the accident. The effect of his witness statement is that the appellant had waited for a gap before making her final run but had seemed confident when she set off on that run. That is not the same as saying that she was confident in confronting the snowboarder. Secondly, Mr Robinson sets out clearly in his witness statement that the appellant had been reluctant to start her earlier runs because she was concerned about the presence of other people on the slope – from which the judge was entirely justified in inferring that she was a nervous skier. The appellant may disagree with the way in which the judge has analysed the evidence but mere disagreement is insufficient to warrant this court's intervention. Ground 8 is dismissed.

58. Under Ground 9, Mr Smith submitted that the judge was not entitled to conclude that the fall was an "incidental fall" when neither party had put its case in that way. The respondent's evidence was that the appellant had skied into a pillar (an account rejected by the judge). The appellant's evidence was that she clipped a bank of snow (also rejected by the judge). By concluding that the fall was incidental, the judge had dismissed the claim on a basis not advanced by either party. Such an approach was impermissible because the judge was bound to adjudicate only on issues raised by the parties (*Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041 para 21) and in accordance with the parties' respective pleaded cases (*Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287 para 35).

59. The phrase "incidental fall" appears in the amended List of Issues for the judge to decide. Item 1(b) of the List says: "Did she suffer an incidental fall unrelated to any defect within the surface of the slope?". Even if the respondent did not use the phrase "incidental fall" in its defence, there was no suggestion by anyone that the appellant was (for example) pushed. The alternative to a fall caused by the respondent's breach of duty was inevitably that the appellant suffered an accident. It was at all material times the respondent's case that the fall was not related to any defect of the slope and so it is somewhat captious to say that the respondent was debarred from asking the judge to conclude that the fall was an accident. The difference between "incidental fall" in the List of Issues and "unfortunate accident" (the phrase used by the judge) is not clear to me. It cannot be argued that the judge was not entitled to regard the appellant's fall as an unfortunate accident. I am not persuaded that the judge went outside the bounds of the parties' evidence and pleadings by reaching that conclusion (whether described as incidental fall or unfortunate accident).

60. As I have already mentioned, the question of an "incidental fall" was contained in the List of Issues. It was explored at trial and was the subject of closing submissions. The appellant had an adequate opportunity to deal with the matter and Mr Smith has not put forward any instance of prejudice which arose in the way the respondent presented its case to the judge. Ground 9 does not succeed.

61. Under Ground 10, Mr Smith contended that the judge's conclusion that the accident was an "incidental fall" was not consistent with the unchallenged orthopaedic evidence. It involved the judge making a factual finding of his own motion and on a basis not put forward by either party (relying again on *Al-Medenni,* above). The appellant was not aware that Mr Moyes' evidence was open to rejection by the judge and was deprived of the opportunity of dealing with it.

62. As quoted above, the judge in para 59 of his judgment indicated that Mr Moyes' evidence was not decisive in a case where the mechanics of the fall were in dispute. The judge was correct. Mr Moyes said that the appellant's injury was more consistent with her account of the circumstances of the accident than the respondent's account. It is hard to know what this brief comment means. It does not convey that the fall was more likely to have been caused by clipping a ski on a snowbank than by skiing into a pillar: that is not what it says. Nor can the respondent possibly be regarded as conceding that that is what Mr Moyes meant.

63. The mechanics of the fall and the cause of the injury were for the judge to decide on all the evidence. Nothing in Mr Moyes' evidence that I have seen compelled the judge to accept the appellant's account of how she came to fall or sustain injury. I accept Mr

Morton Jack's submission that as the judge did not accept the respondent's account of the accident as advanced by Mr Robinson, the fact that the claimant's injuries were more consistent with her account than with an account the judge disregarded was not crucial to the judge's findings. It is something of a leap for Mr Smith to say that the judge was exceeding the ambit of the parties' pleaded cases by doing so. This Ground does not succeed.

64. Grounds 11-15 were only briefly expressed in the appellant's grounds of appeal and skeleton argument. They were not at the forefront of Mr Smith's oral submissions. Under Ground 11, he submitted that the judge entirely failed to have regard to the expert ski evidence with its emphasis on "functional smoothness" as the test for whether the slope was safe. I am not persuaded that anything in the Joint Statement of Experts about "functional smoothness" is sufficiently specific or useful that it could advance the appellant's case. I do not think that the absence of analysis of "functional smoothness" in the judgment makes any difference to any material issue.

65. Under Ground 12, Mr Smith submitted that the judge failed to have regard to the expert ski evidence in relation to the appropriate standards "in terms of risk assessment, numbers and grooming and the [respondent's] breaches in respect of the same." Under Grounds 13-15, he contended that the judge failed to have regard to or address the appellant's arguments on the respondent's breach of duty, failed to give adequate reasons "on the breach issue" and was wrong in law to "apparently hold that there was no evidential burden imposed on the [respondent] to demonstrate that it had exercised reasonable care as an occupier."

66. These grounds of appeal each concern the appellant's case on the respondent's breach of duty. It is plain that the appellant's subjective view is that the learner slope was overcrowded with no one person taking responsibility for the overall safety of skiers. That subjective view may be understandable but it does not represent the test for the respondent's liability for the fall. The appellant accepts that, by undertaking the ski lesson, she undertook the risks inherent in skiing. Those risks are bound to include the use of a ski slope by people other than her. The judge was entitled to conclude, on the numbers placed before him, that there was no overcrowding: he accepted the ski consultants' joint evidence in this regard. Although Mr Smith did not emphasise the point, I am not persuaded that in this case the mix of snowboarders and skiers in itself should have led the judge to conclude that the respondent had breached its duty of care.

67. Nor was the judge wrong to conclude that the appellant had failed to discharge her burden of proving a defect in the snow surface. He was entitled on the evidence before him to conclude that the snow would have been groomed on the morning of the lesson so as to make the learner slope safe. He was entitled to conclude that the appellant's inability to give a specific description of the snowbank near the pillar meant that she had failed to discharge her burden of proof in relation to whether the bank was likely to have caused her to fall. I do not think that Grounds 11-15 advance the appellant's case and they are each dismissed.

Conclusion

68. In summary, the grounds of appeal contend that there are defects of reasoning in the judgment which mean that it cannot stand. I agree with the respondent that the appellant's criticisms do not amount to a fair reading of the judgment as a whole. The

dissection of the judgment – in Mr Smith's written and oral submissions – means that the arguments made on behalf of the appellant at times appeared to lose sight of the overall picture. I would decline to substitute my own discretion for that of the judge by a narrow textual analysis.

69. Finally, Mr Smith requested that, if I were to decide that the provision of a transcript of proceedings would advance matters, I should adjourn the appeal for the appellant's solicitors to obtain one. I do not think that a transcript would have progressed the appellant's grounds of appeal. In any event this court is entitled to hold a party to the formulation of the written grounds. I would have held that it was not open to the appellant to "change horse" by moving the focus away from the architecture of the judgment.

70. I see no reason for this court to interfere with the judge's decision. Accordingly this appeal is dismissed. I cannot leave this judgment however without acknowledging that the appellant suffered terrible pain and longstanding consequences from the fall. Nothing in this judgment detracts from my considerable sympathy for her.