

Court of Appeal

Brown and others v South West Lakes Trust and others

[2022] EWCA Civ 18

2021 Dec 8, 9;

Lewison, Dingemans, William Davis LJJ

2022 Jan 17

Occupiers' liability — Trespasser — Reservoir adjoining highway — Driver accidentally driving car off highway into reservoir and drowning — Whether occupiers of reservoir owing driver statutory duty — Whether risk of suffering injury “by reason of any danger due to the state of the premises” — Whether such risk one against which occupiers might “reasonably be expected to offer . . . some protection” — Occupiers' Liability Act 1984 (c 3), s 1(1)(a)(3)(c)

The deceased was driving her car on the highway when the car accidentally left her lane, crossed the opposite lane and a grass verge, went through a wire fence on the verge, and then down a bank into a reservoir, where she drowned. The claimants, the deceased's husband and children, brought a claim for damages against, among others, the occupiers of the reservoir and the verge between it and the fence, alleging that they had breached their duties to the deceased under section 1 of the Occupiers' Liability Act 1984¹. The judge struck out the claim, holding that the 1984 Act did not impose a duty on occupiers of land adjoining the highway to prevent cars from leaving the highway and coming onto their premises. The claimants appealed against the striking out of their claim, contending that anyone who involuntarily drove a car off the highway and into the reservoir was at risk of suffering injury on the occupiers' premises “by reason of any danger due to the state of the premises”, within section 1(1)(a) of the 1984 Act; and that such risk was one against which the occupiers might “reasonably be expected to offer . . . some protection”, within section 1(3)(c).

On the claimants' appeal—

Held, dismissing the appeal, that although the “state of the premises” in section 1(1)(a) of the Occupiers' Liability Act 1984 might include references to natural features such as a reservoir, the danger in the present case had not been “due to” the state of the premises but, rather, because the deceased's car had come off the highway and gone into the reservoir; that, in particular, the fact that the deceased had not intended to drive off the road and into the reservoir did not mean that the danger had been “due to” the state of the reservoir rather than because of the driving; that, rather, there was nothing in the “state” of the reservoir which had posed a danger to the deceased; that, further, even if it had been arguable that there had been a risk of suffering injury on the occupiers' premises by reason of any danger due to the state of those premises, it would not have been a risk against which the occupiers might “reasonably be expected to offer . . . some protection”, within section 1(3)(c), because there was nothing in the common law duties of those occupying properties bordering the highway which extended to preventing drivers on the highway from driving off the highway and onto their land; that, in particular, (i) although owners of buildings and diseased trees adjoining highways were under a duty not to permit objects or branches to fall on users of the highway, that was very different from a duty to prevent drivers from driving off the highway and (ii) although it might amount to a nuisance to create dangers for users of the highway, this would only be actionable where the danger was sufficient to deter prudent persons from using the highway; and that, accordingly, the occupiers had not owed the deceased a duty under section 1 of the 1984 Act (post, paras 37–42, 49, 50).

¹ Occupiers' Liability Act 1984, s 1: see post, para 32.

- A *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, HL(E) applied.
Decision of Judge Gore QC sitting as a judge of the Queen's Bench Division [2021] EWHC 469 (QB) affirmed in part.

The following cases are referred to in the judgment of Dingemans LJ:

- Barnes v Ward* (1850) 9 CB 392
 B *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231; [2003] QB 1008;
 [2003] 2 WLR 1138; [2003] 3 All ER 1101, CA
Goodes v East Sussex County Council [2000] 1 WLR 1356; [2000] 3 All ER 603;
 [2000] RTR 366, HL(E)
Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; [2004] 1 WLR 1057; [2004] 2 All ER 326; [2004] RTR 443, HL(E)
Keown v Coventry Healthcare NHS Trust [2006] EWCA Civ 39; [2006] 1 WLR 953, CA
 C *Okpabi (HRH Emere Godwin Bebe) v Royal Dutch Shell plc* [2021] UKSC 3; [2021] 1 WLR 1294; [2021] Bus LR 332; [2021] 3 All ER 191, SC(E)
Stovin v Wise [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801; [1996] RTR 354, HL(E)
Tomlinson v Congleton Borough Council [2003] UKHL 47; [2004] 1 AC 46; [2003] 3 WLR 705; [2003] 3 All ER 1122, HL(E)

- D The following additional cases were cited in argument:

- Baldacchino v West Wittering Estate plc* [2008] EWHC 3386 (QB)
Donoghue v Stevenson [1932] AC 562, HL(Sc)
Edwards v Sutton London Borough Council [2016] EWCA Civ 1005; [2017] PIQR P2, CA
Great North Eastern Railway Ltd v Hart [2003] EWHC 2450 (QB)
Grimes v Hawkins [2011] EWHC 2004 (QB)
 E *James v White Lion Hotel* [2021] EWCA Civ 31; [2021] QB 1153; [2021] 2 WLR 911, CA
Kane v New Forest District Council [2001] EWCA Civ 878; [2002] 1 WLR 312; [2001] 3 All ER 914, CA
Lewis v Six Continents plc (formerly Bass plc) [2005] EWCA Civ 1805; *The Times*, 20 January 2006, CA
Liddle v Bristol City Council [2018] EWHC 3673 (QB)
 F *Ratcliff v McConnell* [1999] 1 WLR 670, CA
Staples v West Dorset District Council (1995) 93 LGR 536, CA
Targett v Torfaen Borough Council [1992] 3 All ER 27, CA
Taylor v English Heritage [2016] EWCA Civ 448; [2016] PIQR P14, CA
Veinot v Kerr-Addison Mines Ltd [1975] 2 SCR 311
White v St Albans City and District Council *The Times*, 12 March 1990, CA
Yetkin v Mahmood [2010] EWCA Civ 776; [2011] QB 827; [2011] 2 WLR 1073;
 G [2011] PTSR 1295; [2010] RTR 462, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

- Baxter v Stockton-on-Tees Corpn* [1959] 1 QB 441; [1958] 3 WLR 275; [1958] 2 All ER 675, CA
Harbinson v Department of the Environment for Northern Ireland [1983] 9 NIJB
 H *Hatcher v ASW Ltd* [2010] EWCA Civ 1325, CA
Phillips (A Child) v South Eastern Education and Library Board [2015] NIQB 91
Rimmer v Liverpool City Council [1985] QB 1; [1984] 2 WLR 426; [1984] 1 All ER 930, CA
Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] AC 736; [2018] 2 WLR 595; [2018] 2 All ER 1041, SC(E)

APPEAL from Judge Gore QC sitting as a judge of the Queen's Bench Division

By a claim form issued on 1 April 2020 the claimants, Benjamin Michael Brown, David Thomas Brown and John Samuel Brown, brought claims for damages under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 against the defendants, South West Lakes Trust, South West Water Ltd and Cornwall Council, arising out of a road traffic accident on 16 May 2017 which resulted in the death of the deceased, Hazel Brown. The particulars of claim were that the first and second defendants were negligent at common law and/or in breach of the statutory duties of care contained in the Occupiers' Liability Act 1957 and Occupiers' Liability Act 1984, and that the third defendant was negligent at common law and/or in breach of statutory duty under the Highways Act 1959 and Highways Act 1980 and/or the statutory duties of care contained in the 1957 Act and the 1984 Act.

By a judgment dated 17 February 2021 Judge Gore QC sitting as a judge of the Queen's Bench Division [2021] EWHC 469 (QB) struck out the claims pursuant to CPR r 3.4(2)(a) on the grounds that the claim disclosed no reasonable grounds for bringing the proceedings, and in so far as was necessary also dismissed the claims under CPR Pt 24 and entered summary judgment for the defendants.

By an appellant's notice filed on 4 March 2021 and pursuant to permission granted by the Court of Appeal (Nicola Davies LJ) on 11 May 2021 the claimants appealed on the following grounds. In relation to the claim against the first and second defendants under the 1984 Act: (1) the judge had wrongly held that the claimants did not have an arguable case and/or in any event failed to find that the claimants did have an arguable case, not suitable for summary dismissal, that the risk to vehicular users of the highway of sustaining injury, not least drowning, in the reservoir due to inadvertently driving off the highway and into the reservoir was by reason of danger due to the state of the premises within the terms of section 1(1) of the 1984 Act; (2) the judge wrongly failed to address and/or to find that the claimants had an arguable case, not suitable for summary dismissal, that the first and second defendants were aware of the danger or had reasonable grounds to believe that it existed within the terms of section 1(3)(a) of the 1984 Act; (3) the judge had wrongly failed to address and/or to find that the claimants had an arguable case, not suitable for summary dismissal, that the first and second defendants knew or had reasonable grounds to believe that users of the highway such as the deceased were in the vicinity of the danger concerned or that they might come into the vicinity of the danger within the terms of section 1(3)(b) of the 1984 Act; (4) the judge had wrongly failed to address and/or to find that the claimants had an arguable case, not suitable for summary dismissal, that the risk was one against which, in all the circumstances of the case, the first and second defendants might reasonably be expected to have offered users of the highway such as the deceased some protection within the terms of section 1(3)(c) of the 1984 Act; (5) the judge had wrongly held that the claimants did not have an arguable case that the duty owed by the first and second defendants to users of the highway such as the deceased, as set out at section 1(4) of the 1984 Act, extended to providing a secure barrier and/or warning so as to prevent such users from inadvertently driving into the reservoir; (6) the judge had wrongly held that it was

A irrelevant that the deceased was an inadvertent or unintentional trespasser, when it was relevant not least in the context of the assessment that he should have performed in relation to section 1(3)(c) of the 1984 Act. In relation to the claim in common law negligence against the third defendant: (7) the judge had wrongly held that the case against the third defendant relating to its design and construction of the highway was not sufficiently pleaded, when it was in the particulars of claim; (8) the judge had wrongly held it against the claimants that the allegations in negligence against the third defendant in relation to the design and construction of the highway were not evidenced when the third defendant's application proceeded by way of a strike-out application, without the adduction of evidence by any party, such that the facts averred in the particulars of claim should be taken as true for those purposes; (9) the judge had wrongly failed to find that the case against the third defendant in relation to the design and construction of the highway (covering as it did both the layout of the road itself and the failure to install a suitable crash barrier) constituted an action for misfeasance, not non-feasance, and was legally valid.

B

C

D By a respondent's notice filed on 25 May 2021 the first defendant sought to uphold the decision on the additional grounds that: (1) the judge had been correct to find under section 1(1) of the 1984 Act that there was no danger due to the state of the premises or to things done or omitted to be done on them, and in such circumstances it was appropriate to strike out the claim against the first defendant and/or give summary judgment; (2) in so far as the judge had not also so found, he ought to have found that the claim against the first defendant should be struck out and/or summary judgment given, by application of section 1(3)(c) of 1984 Act, because the risk was not one against which, in all the circumstances of the case, the first defendant could reasonably have been expected to offer the deceased protection; and (3) in so far as the judge had not also so found, he ought to have found that the claim against the first defendant should be struck out and/or summary judgment given, by application of section 1(4) of the 1984 Act, because it would not be reasonable to have required the first defendant to do anything more to see that the deceased did not suffer injury on the premises.

E

F By a respondent's notice filed on 25 May 2021 the second defendant sought to uphold the decision on the additional grounds that: (1) by virtue of section 1(1) and (3) of the 1984 Act the second defendant had owed the deceased no duty under that Act; and (2) the claimants had no real prospect of establishing that the second defendant had been in breach of any duty which it did owe the deceased under the 1984 Act.

G The facts are stated in the judgment of Dingemans LJ, post, paras 2–14.

Robert Weir QC and James Marwick (instructed by Chris Kallis Solicitors, Plymouth) for the claimants.

H There was “danger due to the state of the premises” for the purposes of section 1(1)(a) of the Occupiers' Liability Act 1984 on an ordinary interpretation of those words. That expression should not be interpreted restrictively against the natural reading of the words and against the purpose of a gateway provision designed to distinguish between activity and occupancy duties but not artificially to bar visitors' or non-visitors' claims at the outset of the analysis. That cannot have been Parliament's intention. “Danger” should be read as meaning risk of injury. Although that creates an

odd and uncomfortable tautology in section 1(1)(a) of the 1984 Act because of the addition of the words “any risk of their suffering injury on the premises by reason of any” (cf section 1(1) of the Occupiers’ Liability Act 1957), howsoever one chooses to approach it, the end result is the same, namely risk of injury by drowning. Whether it is the reservoir that constitutes the danger or the state of the premises, or whether the danger is the risk of going into the reservoir inadvertently or the risk of suffering injury as a result of going into the reservoir inadvertently, it is all linked to the state of the premises, which is that it is a reservoir full of water which is liable to, and did, drown someone who inadvertently drives into it having come off the highway.

The following cases support the claimants’ interpretation of section 1(1)(a): *White v St Albans City and District Council* The Times, 12 March 1990, *Staples v West Dorset District Council* (1995) 93 LGR 536, *Ratcliff v McConnell* [1999] 1 WLR 670, *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 and *Edwards v Sutton London Borough Council* [2017] PIQR P2. The line of obiter reasoning in *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953, paras 28–29, should not be followed to the extent that the use of the word “inherent” imports a requirement that there be fault or failing or trap in it, which is not there in the statute. [Reference was also made to *Donoghue v Folkestone Properties Ltd* [2003] QB 1008, *Lewis v Six Continents plc (formerly Bass plc)* [2005] EWCA Civ 1805; The Times, 20 January 2006 and *James v White Lion Hotel* [2021] QB 1153.]

The risk of injury was “by reason of” the danger for the purposes of section 1(1)(a). The words “by reason of” establish that there should be a causal connection between the risk of injury and the danger due to the state of the premises. It was on that limited basis that it was held by the House of Lords in *Tomlinson* [2004] 1 AC 46, paras 26–29 that the claim was barred. The risk which the plaintiff in that case faced, of injury from diving off the beach, arose only because, as a person of full capacity, he chose to dive in shallow water, and thereby “voluntarily and without any pressure or inducement engaged in activity which had inherent risk”: para 27. *Tomlinson* is an exceptional category of case where the focus is on the plaintiff’s state of mind. Respecting the “free will” of a particular claimant who has freely and voluntarily chosen to engage in an activity which is dangerous, knowing that it is dangerous, can exceptionally make it possible to say that the danger has arisen or should be attributed legally to the actions of the claimant and not the state of the premises. That is the limit of *Tomlinson*: see para 44ff. It is not a purely objective assessment. It requires an analysis of the subjective state of mind of the claimant as to whether that claimant freely chose to embrace that risk so as thereby to break the ordinary causal link between danger and the state of the premises. [Reference was made to *Targett v Torfaen Borough Council* [1992] 3 All ER 27, *Great North Eastern Railway Ltd v Hart* [2003] EWHC 2450 (QB) and *Yetkin v Mahmood* [2011] QB 827.] In the present case, the deceased was driving her car on the highway and plainly had no intention of driving off the road and into the reservoir; it is not a *Tomlinson* case. It is a case of an inadvertent trespasser who did not exercise free will in embracing the risk of drowning in a reservoir at night.

A The risk of driving into the water was one against which, in all the circumstances, the occupiers of the reservoir might reasonably be expected to have offered protection, as required under section 1(3)(c) of the 1984 Act. It is of essential importance to recognise that the deceased was an inadvertent trespasser. There is a much higher expectation that some protection will be offered against a lawful user of the highway who unintentionally leaves the highway and so becomes an inadvertent trespasser than against those

B who are deliberately trespassing: see *Veinot v Kerr-Addison Mines Ltd* [1975] 2 SCR 311 and *Clerk & Lindsell on Torts*, 23rd ed (2020), paras 11-66–11-67. Whether an occupier may reasonably be expected to offer non-visitors some protection is not answered by asking, at a higher level of generality, whether all occupiers of land near the highway need to have in place barriers or the like. It does not lead to automatic liability being imposed

C on all homeowners in respect of all buildings and walls adjacent to the highway. The question is site- and fact-specific: see the wording of section 1(3)(c)—“in all the circumstances of the case”. In the present case, the first and second defendants are occupiers of a very large reservoir; the expanse of water was very close to the road which was curved, had a 60 mph speed limit, and had no crash barrier installed by the highway authority; and there was a history of accidents at the site.

D The occupiers owed a duty to users of the road pursuant to section 1(4) of the 1984 Act. As with section 1(3)(c), the duty is to take such care as is reasonable “in all the circumstances of the case”. Those circumstances are not yet fully established and such a fact-sensitive judgment on breach will be entirely dependent on the evidence to be adduced. Under both subsections the assessment at trial would invite a balancing exercise to be performed by

E the court. In short, breach is a paradigm triable issue. [Reference was made to *Tomlinson* [2004] 1 AC 46, para 34, *HRH Emere Godwin Okpabi v Royal Dutch Shell plc* [2021] 1 WLR 1294, para 127, *Liddle v Bristol City Council* [2018] EWHC 3673 (QB) and *James v White Lion Hotel* [2021] QB 1153, paras 78–79, 83.]

F The third defendant’s construction/design of the road, in relation to both the tightness of the bend and the absence of a crash barrier, constitute positive acts (see *Targett v Torfaen Borough Council* [1992] 3 All ER 27), not omissions (cf *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057), such that a duty of care is owed on an entirely conventional *Donoghue v Stevenson* [1932] AC 562 basis. [Reference was also made to *Kane v New Forest District Council* [2002] 1 WLR 312, para 27.]

G *Matthew White* (instructed by *DAC Beachcroft LLP*) for the first defendant.

“Danger” in section 1 of the Occupiers’ Liability Act 1984 does not mean risk of injury. Not every risk is a danger. Not every danger is a danger due to the state of the premises. The danger could be caused by choice, as in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, or by inadvertence, as in the present case. The presence of water does not mean that there is a danger due to the state of the premises: see *Tomlinson*, paras 25–29, 69. In that case, there was risk to the plaintiff due to the state of the premises but that was not the operative risk: those premises were dangerous but it did not matter because of what the plaintiff in that case chose to do. The present case is on all fours with *Tomlinson*, save that the deceased did not choose to go

into the lake. She chose to drive her car, an activity which involves risk. That a particular risk has eventuated which is not what she intended is no different from the fact that the plaintiff in *Tomlinson* did not intend to break his neck when he struck the bottom of the lake. Neither the plaintiff in that case nor the deceased in the present case intended what happened. There is thus no rational basis for distinguishing the present case from *Tomlinson*.

There is no logical reason to determine that it is only the free choice of an individual which means that danger does not arise from the state of the premises but from what the individual does. It is a false dichotomy to say that a risk of injury was caused by choice or it was caused by a danger due to the state of the premises. The risk of injury is either by reason of danger due to the state of the premises or it is not. The question is whether there is a risk of injury due to danger caused by the state of the premises. The claimants are wrong to attempt to separate the need to show that the “danger” was “due to the state of the premises”.

Danger caused by the state of the premises means either some sort of defect or some sort of latent problem which is known about or ought to be known about by the occupier but is not reasonably known about by the visitor or non-visitor: see *Tomlinson*, para 53, *Baldacchino v West Wittering Estate plc* [2008] EWHC 3386 (QB) at [64], [70], and *James v White Lion Hotel* [2021] QB 1153, para 18. [Reference was also made to *Donoghue v Folkestone Properties Ltd* [2003] QB 1008, para 33, and *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953, para 13.]

The cases relied on by the claimants (*Ratcliff v McConnell* [1999] 1 WLR 670, *White v St Albans City and District Council* The Times, 12 March 1990, *Edwards v Sutton London Borough Council* [2017] PIQR P2 and *Staples v West Dorset District Council* (1995) 93 LGR 536) did not expressly consider the question of whether there was danger due to the state of the premises and were decided on another basis. [Reference was also made to *Grimes v Hawkins* [2011] EWHC 2004 (QB).]

Further, any risk is not one against which it would be reasonable to expect any occupier, and in particular the first defendant, to offer protection, under section 1(3)(c) of the 1984 Act. *James v White Lion Hotel* [2021] QB 1153, *Veinot v Kerr-Addison Mines Ltd* [1975] 2 SCR 311 and *Barnes v Ward* (1850) 9 CB 392 are distinguishable.

Julian Horne (instructed by BLM) for the second defendant.

The submissions of the first defendant are adopted.

The reference to the “state” of the premises in section 1(1)(a) of the Occupiers’ Liability Act 1984 is important. It directs inquiry as to the particular characteristic of the premises at the relevant time, beyond simply their ordinary nature or existence, which poses a particular risk of danger. The question is whether the premises are in a dangerous state: see *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, paras 26–29.

The court should be concerned about the possibility of a wider liability for other occupiers of land adjacent to the highway. It is significant that, if the claimants are right that the second defendant, as a landowner, owed the deceased a duty under the 1984 Act, every occupier with land bordering the highway will, at the very least, have to think about whether they need to put up a barrier. The wider context does matter. There are miles and miles of highway and much of it is adjacent to things which could potentially cause

A injury. Landowners are assuming that that is not a problem unless there is a particular hidden danger or a defect or something unnatural or unusual or inherently dangerous about that land. If the claimants are right, that would mean that all of those occupiers would have to think about whether the mere existence of the features of their land might pose a risk to people who come off the highway. That should not be the law.

B *Tom Panton* (instructed by *Weightmans LLP*) for the third defendant.

In order to succeed in its claim against the third defendant the claimant must establish that no reasonable highway authority in 1967 would have created the bend in question or failed to erect crash barriers. It must be shown that the differential between the actual radius of that particular bend and the suggested “absolute minimum” in Memorandum No 780—Design of Roads in Rural Areas was such as to constitute a danger. On causation, it must be shown that it was that differential, not merely the bend, which caused the fatal loss of control. There is no sufficient pleading of the detail of the claim against the third defendant, nor any identification of which part of Memorandum No 780 had been breached by the design and construction of the highway. [Reference was made to *Great North Eastern Railway Ltd v Hart* [2003] EWHC 2450 (QB).]

D *Weir QC* in reply.

The difficulty with the first defendant’s submission that there is a distinction between danger and risk is that the Occupiers’ Liability Act 1957 does not use the word “risk” but only the word “danger”. The court would be expected to use or to understand the word “danger” to carry the same meaning in the 1957 Act and the Occupiers’ Liability Act 1984. It would be somewhat surprising if that were not Parliament’s intention. The 1957 Act invites the ordinary meaning of “danger”, which is risk of injury: see *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, 79–80, para 26.

E In *Tomlinson*, the injury was caused by the exercise of the plaintiff’s free will to perform an activity with inherent danger, which danger materialised. It was about causation. There are very special circumstances to the *Tomlinson* criteria: see paras 27, 44. *Donoghue v Folkestone Properties Ltd* [2003] QB 1008, *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953 and *Grimes v Hawkins* [2011] EWHC 2004 (QB), on which the first defendant relies, are conventional applications of *Tomlinson*. The present case is materially different from *Tomlinson*. The reservoir was a danger and there was an obvious danger if one inadvertently fell in and drowned. See also *Taylor v English Heritage* [2016] PIQR P14, paras 21, 24, 28–30, where it was held that a sheer drop which has no barrier is a danger.

G *White* in reply.

Taylor v English Heritage [2016] PIQR P14 supports the proposition that, in order for there to be a danger due to the state of the premises, there must be something defective or something in the nature of a latent defect. The vital point in that case is that Mr Taylor could not tell that there was a problem which he was about to encounter because he could not see it and there were not sufficient signs. It is another latent or hidden problem case.

H *Horne* replied.

The court took time for consideration.

17 January 2022. The following judgments were handed down.

A

DINGEMANS LJ

Introduction

1 This appeal raises issues about whether claims: (1) under the Occupiers' Liability Act 1984 ("the 1984 Act") against occupiers of land adjoining a highway; and (2) against the relevant highway authority; arising from a tragic road traffic accident which occurred on 16 May 2017, were reasonable causes of action or had a real prospect of success.

B

2 On 16 May 2017 Mrs Hazel Brown, then aged 29 years, was driving her Ford Fiesta motor car on the C164 highway near Redruth, Cornwall. The highway is subject to the national speed limit of 60 mph. The highway borders the Stithians Reservoir. Mrs Brown's car left her lane, crossed the other oncoming lane and a grass verge, went through a wire fence on the verge, and then went down a stone faced bank into the reservoir where the car was submerged. Mrs Brown was drowned.

C

3 A claim was brought by Mr Benjamin Brown, Mrs Brown's husband, and their children David Brown and John Brown, then aged four years and one year. The claim was for damages pursuant to the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934.

D

4 The claim was brought against South West Lakes Trust ("South West Lakes"); South West Water Ltd ("South West Water"); and Cornwall Council ("the council"). It is common ground that South West Lakes has a licence to use the reservoir. South West Lakes is a charity formed in 2000 to look after 40 inland waters in Cornwall, Devon, Somerset and Dorset. The licence to use the reservoir was from South West Water, the owner of the reservoir. The council is the highway authority for the C164.

E

5 This is the hearing of an appeal against the order of Judge Gore QC, sitting as a judge of the High Court ("the judge"), dated 17 February 2021 striking out and granting reverse summary judgment in respect of the claims made by Mr Brown and his children against each of the defendants.

F

The statements of case

6 As this is an appeal against the striking out of a claim it is necessary to examine the particulars of claim. The particulars of claim were dated 23 June 2020. The location of the accident was pleaded in paras 7 and 8 of the particulars of claim. So far as South West Lakes and South West Water were concerned it was pleaded in para 9 that "on the offside of the deceased's direction of travel and immediately adjacent to the wire link fencing was the main body of the reservoir and its sloping stone-faced banks". It was also pleaded that "there was no safety barrier to protect against the risk of drivers losing control on the bend of the carriageway which crossed the reservoir and crashing into the reservoir".

G

7 The location of the accident was pleaded to be "on a section of the highway where there was a sweeping left-hand bend which ran across the southern end" of the reservoir. This part of the highway was pleaded to be "a causeway road which crosses the southern end of the reservoir . . . albeit in recent years the area of land south of the highway at the accident locus has been marshland". It was pleaded in the particulars of claim that there was

H

A “a history of drivers losing control of their vehicles at or around the accident locus”.

8 In para 18 of the particulars of claim it was pleaded that “the defendants (or each of them) were aware or ought to have been aware of the risk of vehicles leaving the carriageway at the accident locus at all material times; there had been accidents on the bend on inter alia 28 October and 21 November 2014”. These other accidents were said to have been referred to at the inquest into Mrs Brown’s death.

9 In the defence on behalf of South West Lakes it was pleaded “the deceased did not crash through the fence on the sweeping left-hand bend but beyond it”. The incidents in 2014 were said to have been incidents in which drivers had only damaged the fence. It was stated in the defence on behalf of South West Water that “there had never before been an accident where a vehicle entered the water of the reservoir”.

10 There was reference to “lease and/or licence agreements” between South West Water and South West Lakes. It was pleaded that South West Lakes and South West Water were responsible for the construction and maintenance of the wire fencing enclosing the reservoir.

11 So far as the highway authority is concerned it was pleaded in the particulars of claim that the council “was responsible for the construction and/or design of the physical road and its surrounds which forms the material section of the highway”. It was also pleaded that it was the council who had installed the vehicle restraint barrier erected after the accident.

12 In the particulars of claim it was stated that in 2018 a vehicle restraint barrier on both sides of the highway was installed where the accident occurred. In the council’s defence it was pleaded that a vehicle restraint barrier was installed in about May 2019, but that installation did not mean that there was a legal duty to install it.

13 The particulars of negligence and breach of statutory duty pleaded against the council included: “(a) caused and/or permitted the highway and/or reservoir to be designed and/or constructed and/or adopted without any sufficient assessment of the risks posed to motorists negotiating the left hand bend of the highway”; “(d) caused and/or permitted the highway to be designed and/or constructed with a radius on the bend which was significantly less than the absolute minimum prescribed by prevailing standards (including Memorandum No 780—Design of Roads in Rural Areas)”; and “(e) failed to heed, act upon and/or collate adequately all information and reports relating to previous accidents and incidents on the highway in the vicinity of the accident locus”.

14 The council’s defence pleaded that “no admissions are made as to the alleged or any involvement of the third defendant in the construction and/or design of the road and/or the reservoir and/or any other feature of the area in question. It is noted that no such allegations featured in the pre-action correspondence. Such matters date back to the 1960s and will require further detailed investigation if these claims proceed”.

H *The applications and evidence*

15 The applications to strike out the particulars of claim and for reverse summary judgment were supported by formal witness statements from legal representatives on behalf of each of the defendants. No witness evidence was adduced on behalf of the claimants. There were photographs of the

accident site exhibited to a skeleton argument below, which the parties agreed that this court could consider, and these photographs showed that the car had travelled round the bend and had then gone through the fence part way along the road after the bend. A

16 The formal witness statements in support of the application for reverse summary judgment did not contain any relevant evidence in the form of the police investigation report, notes from the inquest or even Memorandum No 780—Design of Roads in Rural Areas. This meant that although the application for reverse summary judgment was formally before the court below, that application did not in practice add anything to the application to strike out the particulars of claim, save where the parties had agreed certain factual matters asserted in the defences and recorded by the judge below. B

The judgment below C

17 The hearing took place before the judge on 18 January 2021 and the judge handed down a written judgment dated 17 February 2021.

18 The judge introduced the parties and set out the relevant tests for striking out a statement of case and for granting summary judgment in paras 1–5 of the judgment. These tests were common ground before the judge and before this court. The judge summarised the pleaded case in para 6 of the judgment and recorded: “for the purpose of this hearing, it was accepted by all concerned that the responsibility of the highway authority was for the carriageway and the verge up to the fence, and the [first and second] defendants were the occupiers of the reservoir and the verge between it and the fence.” D

19 The judge recorded in para 7 of the judgment that South West Lakes only came into existence in 2000, no one disputed South West Water’s admission that it constructed the wire fence, and the reservoir was constructed in or around 1967 and at the same time the highway was re-aligned. E

20 The judge stated that the claimants alleged that South West Lakes and South West Water were negligent at common law and in breach of duties under the Occupiers’ Liability Acts of 1957 and 1984. The judge also recorded that the claimants alleged that the council were negligent at common law, acted in breach of statutory duty under the Highways Acts of 1959 and 1980 and in breach of duties under the Occupiers’ Liability Acts of 1957 and 1984. F

21 The judge held that the claim against South West Lakes and South West Water could only be made under the 1984 Act as Mrs Brown was a trespasser over the bank and reservoir. There was nothing to show that the council was an occupier of the bank and reservoir. G

22 The judge distinguished cases about man-made dangers adjoining the highway, recording that duties were now governed by the 1957 and 1984 Acts. The judge also recorded that the reservoir was neither newly constructed nor invisible at night. In para 12 of the judgment the judge said that the central question as regards South West Lakes and South West Water was whether occupiers of land adjoining the highway were under a duty to prevent cars from leaving the road and coming onto their premises. The judge held that there was no such duty. H

A 23 The judge turned to consider the position of the council in para 18 of the judgment. As far as the council was concerned it was not an occupier of the highway and so the only possible claims were under the Highways Act or at common law. The judge accepted that there was no failure to maintain the fabric of the highway.

B 24 As far as common law duties were concerned the judge considered a number of authorities. These included *Stovin v Wise* [1996] AC 923 (absence of a statutory duty on the highway authority would normally exclude the existence of a common law duty of care), *Goodes v East Sussex County Council* [2000] 1 WLR 1356 (a highway authority has a duty under the Highways Act 1980 to maintain the highway, but this relates to the fabric of the road), and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, para 10 (the highway authority is not an occupier of the highway). At para 26(c) the judge held that as to any allegation that the council had created a danger “that founders because in this case neither is it alleged nor is it evidenced that what the highway authority created (the sharpness of the bend) either was dangerous in itself, or that it caused this accident”. The claim was dismissed.

D *The appeal*

25 There are nine grounds of appeal. Grounds one to six relate to the claim against South West Lakes and South West Water, as occupiers of the reservoir. Grounds seven to nine relate to the claim against the council, as highway authority. Many of the grounds of appeal overlap and I will address the respective cases below.

E 26 It was common ground that the relevant legal test to be applied by the judge below in respect of the claims against the occupiers and the claim against the highway authority was whether: the particulars of claim disclosed reasonable grounds for bringing the claims against the defendants; and the claimants had real prospects of succeeding on the claims. The test for this court is whether the judge was wrong in his findings that both the claims against the occupiers and the claim against the highway authority did not disclose reasonable grounds for bringing the claim and there was no real prospect of success in the claims.

The respective cases on appeal in relation to the claim against the occupiers of the reservoir

G 27 Mr Weir QC, on behalf of the claimants, submitted that the judge misinterpreted the provisions of the 1984 Act and the decision of the House of Lords in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46. Mr Weir drew a distinction between voluntary acts, such as diving into the water as in *Tomlinson*, and this case where Mrs Brown was an unintentional or inadvertent trespasser because she had not deliberately driven into the reservoir, submitting that this made a critical difference to the explanation of the 1984 Act in *Tomlinson v Congleton*.

H 28 Mr Weir submitted that the water, and in particular the depth of the water, in the reservoir was a danger. This danger was of drowning, and the danger was to anyone who might drive a car into the reservoir having come off the highway, and this was a danger for the purposes of section 1(1)(a) of the 1984 Act. It was submitted that the judge should have found that it was

arguable that the occupiers of the reservoir were “aware of the danger or has reasonable grounds to believe that it exists” as required under section 1(3)(a) of the 1984 Act. The judge should have found that the claimants had an arguable case on the basis that the occupiers of the reservoir knew or had reasonable grounds to believe that users of the highway were in the vicinity of the danger from the water in the reservoir, within the meaning of section 1(3)(b) of the 1984 Act. The judge should have found that it was arguable that the risk of driving into the water was one against which, in all circumstances of the case, the occupiers of the reservoir might reasonably be expected to have offered protection from as required under section 1(3)(c) of the 1984 Act. This could have been done by erecting signs warning about the reservoir or creating a stronger fence than the wire fence through which Mrs Brown’s car had travelled.

29 Mr Weir submitted that in these circumstances the judge should have found that there was an arguable case that the occupiers of the reservoir owed a duty to users of the road pursuant to section 1(4) of the 1984 Act, and should have provided a secure barrier or warning so as to prevent a driver from inadvertently driving into the reservoir. The judge should not have struck out the claim before a trial, because disclosure might have shown more evidence about previous accidents, and because expert evidence might have assisted the court in assessing the risks of driving off the road into the reservoir.

30 Mr White, on behalf of South West Lakes, and Mr Horne, on behalf of South West Water, submitted that the judge was right to strike out the claims. The danger arose because Mrs Brown failed to drive with reasonable care and skill and drove into the reservoir. The claim was answered by the judgment in the House of Lords in *Tomlinson v Congleton* which reflected the approach of the Court of Appeal in *Donoghue v Folkestone Properties Ltd* [2003] QB 1008. Mr White and Mr Horne submitted that there was no risk of anyone suffering injury in the reservoir “by reason of any danger due to the state” of the reservoir for the purposes of section 1(1)(a) of the 1984 Act. The appellants were wrong to attempt to separate the need to show that the “danger” was “due to the state of the premises”, and therefore the cases relied on by Mr Weir did not assist in answering the claim in this case.

31 Mr White and Mr Horne submitted that so far as a duty was concerned, this action had not been pleaded in public nuisance, and that it could not have been. In any event, there was no case which showed that occupiers next to a highway owed a duty to those who drove off the highway and there was no prospect of any court finding such a duty. The appeal should therefore be dismissed against the occupiers.

Relevant provisions of the 1984 Act

32 Section 1 of the 1984 Act sets out the duty of occupiers to persons “other than his visitors”. So far as is material section 1 provides:

“(1) The rules enacted by this section shall have effect, in place of the rules of the common law, to determine— (a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and (b) if so, what that duty is.”

A “(3) An occupier of premises owes a duty to another (not being his
visitor) in respect of any such risk as is referred to in subsection (1) above
if— (a) he is aware of the danger or has reasonable grounds to believe that
it exists; (b) he knows or has reasonable grounds to believe that the other
is in the vicinity of the danger concerned or that he may come into the
vicinity of the danger (in either case, whether the other has lawful
B authority for being in that vicinity or not); and (c) the risk is one against
which, in all the circumstances of the case, he may reasonably be expected
to offer the other some protection.

“(4) Where, by virtue of this section, an occupier of premises owes a
duty to another in respect of such a risk, the duty is to take such care as is
reasonable in all the circumstances of the case to see that he does not
suffer injury on the premises by reason of the danger concerned.”

C “(6) No duty is owed by virtue of this section to any person in respect
of risks willingly accepted as his by that person (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).

D “(6A) At any time when the right conferred by section 2(1) of the
Countryside and Rights of Way Act 2000 is exercisable in relation to land
which is access land for the purposes of Part I of that Act, an occupier of
the land owes (subject to subsection (6C) below) no duty by virtue of this
section to any person in respect of— (a) a risk resulting from the existence
of any natural feature of the landscape, or any river, stream, ditch or pond
whether or not a natural feature, or (b) a risk of that person suffering
injury when passing over, under or through any wall, fence or gate,
except by proper use of the gate or of a stile.”

E *No claim against the occupiers under the 1984 Act*

33 On any summary determination of a claim, either by striking it
out or by granting reverse summary judgment, a Court should always be
conscious of what might emerge in the trial process, see *HRH Emere
Godwin Bebe Okpabi v Royal Dutch Shell plc* [2021] 1 WLR 1294 at
paras 127–128. In my judgment, however, the claims against South West
Lakes and South West Trust for breach of duties owed under the 1984 Act
were bound to fail, and were rightly struck out by the judge. There was
nothing that could emerge in the trial process which might affect this
conclusion. This is because there was no sustainable basis for showing a
duty under the 1984 Act owed to Mrs Brown by the occupiers of the
reservoir for the reasons given below.

G 34 Duties on occupiers or landowners were originally restricted to a
duty not to injure trespassers deliberately. These duties expanded to include
duties owed to children who were trespassers, see generally paras 61–68 of
the judgment of Brooke LJ in *Donoghue v Folkestone Properties Ltd* [2003]
QB 1008. In *Tomlinson v Congleton* [2004] 1 AC 46 Lord Hoffmann
explained the background to the enactment of 1984 Act, which was based
H on the 1976 Law Commission report on *Liability for Damage or Injury to
Trespassers and Related Questions of Occupiers’ Liability* (Working Paper
No 52). The 1984 Act built upon the development of the common law
duties owed by occupiers of land to trespassers.

35 *Tomlinson v Congleton* concerned a case of a claimant visitor to a
park who had ignored signs not to swim in the lake, who had dived in the

lake and who had hit his head on the bottom, and who suffered catastrophic injuries. In *Tomlinson v Congleton* the claimant had been a lawful visitor to the park, but he had been warned not to dive and was therefore a trespasser when he was diving. The House of Lords held that any duties owed to the claimant were therefore under the 1984 Act.

36 In para 26 of the judgment Lord Hoffmann addressed the issue of whether there was a “danger due to the state of the premises”, within the meaning of section 1(1)(a) of the 1984 Act, and quoted with approval Lord Phillips of Worth Matravers MR’s comment in *Donoghue v Folkestone Properties* at para 53 to the effect that the injury suffered by Mr Tomlinson was because he dived into the lake “not because the premises were in a dangerous state”. Lord Hoffmann referred to both diving and then mountaineering with a person stumbling or misjudging where to put weight stating “in neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity”. The House of Lords drew a distinction for the purposes of the 1984 Act between premises which are dangerous because there is some defect in them which is not apparent to the trespasser, and the carrying out of a dangerous activity on the premises by the trespasser. It might be noted that in section 1(1)(a) of the 1984 Act there is at the end of the section express reference “to things done or omitted to be done on” the premises. This was explained to be a reference to activities carried out or licensed by the occupier which might be dangerous to trespassers, for example permitting power boating in a lake where it was known that trespassers might swim. This part of section 1(1)(a) of the 1984 Act was not relied on by any of the parties in this case.

37 I accept that the “state of the premises”, within the meaning of section 1 of the 1984 Act, might include references to natural features. This is for the reasons given by Lord Hutton in *Tomlinson v Congleton*, and because it is a conclusion which is supported by the provisions of section 1(6A) of the 1984 Act, which was inserted by amendment by the Countryside and Rights of Way Act 2000, which referred to “a risk resulting from the existence of any natural feature”. However the fact that the “state of the premises” can include natural features, does not mean that the claim in this case might succeed. This is because it is necessary to show that there was a “risk of . . . suffering injury on the premises by reason of any danger due to the state of the premises” (emphasis added). In this case the danger arose because Mrs Brown’s car came off the highway, travelled across the verge, went through the fence and down the bank, and into the reservoir. This danger was not due to the “state” of the reservoir.

38 It follows from this conclusion that I do not accept Mr Weir’s attempt to distinguish *Tomlinson v Congleton* on the basis that the claimant in that case was carrying out some voluntary activity when he dived in the lake, whereas Mrs Brown’s presence in the reservoir was inadvertent because she had not intended to drive off the road. It was accepted by South West Lakes and South West Water that Mrs Brown did not intend to drive off the road and into the reservoir, but that conclusion does not mean that the “danger was due to the state of” the reservoir rather than because of the driving. There was nothing in the “state” of the reservoir which posed a danger to Mrs Brown.

A 39 It also follows from this analysis that I do not accept Mr Weir's submission that *Keown v Coventry Healthcare NHS Trust* [2006] 1 WLR 953 was wrongly decided. In that case an 11-year-old child had climbed up the outside of a fire escape and fallen from it. The court confirmed that the risk of injury had to arise by reason of any danger due to the state of the premises, and that there was nothing dangerous about the fire escape in that case. The court in *Keown v Coventry Healthcare NHS Trust* expressly recorded that it was a question of fact and degree whether premises which were not dangerous for an adult might still be dangerous for a child.

B 40 This conclusion on section 1(1)(a) of the 1984 Act is sufficient to dispose of the appeal against South West Lakes and South West Water, and it is not necessary to consider all of the authorities which were relied on by the parties, because those authorities turned on their own particular facts. Even if, however, I had been persuaded that it was arguable that there had been a risk of suffering injury on the premises by reason of any danger due to the state of the premises, it was not, in my judgment, a risk in respect of which the occupiers might reasonably have been expected to afford the claimants some protection, under section 1(3)(c) of the 1984 Act. This is because there is nothing in the duties of those occupying properties bordering the highway which extends to preventing drivers on the highway from driving off the highway on to their land.

C 41 It is established law that owners of buildings and diseased trees adjoining highways may owe duties not to permit objects or branches to fall onto users of the highway, see generally *Clerk & Lindsell on Torts*, 23rd ed (2020), para 19-189 and *Charlesworth & Percy on Negligence*, 14th ed (2018), para 11-55, but that is very different from a duty to prevent drivers driving off the highway. It may also amount to a nuisance to users of the highway to create dangers for users of the highway, for example by excavating an unfenced pit next to the highway or using spikes on a fence adjoining the highway which might injure users of the highway. In *Barnes v Ward* (1850) 9 CB 392, 420 “a newly-made excavation adjoining an immemorial public way” into which a young mother fell and died, was held to amount to a public nuisance. This was because the danger next to the footpath “may reasonably deter prudent persons from using the way”. Therefore to amount to a public nuisance which might be actionable, the danger to users of the highway must be sufficient that it would deter prudent persons from using the highway.

E 42 In this case it was not pleaded that the presence of the reservoir amounted to a public nuisance, but I would not have upheld the striking out of the action on that basis alone because if there was such a common law duty on the occupier of property adjoining the highway this might be relevant to the existence of a duty pursuant to section 1(3)(c) of the 1984 Act. The important point is that there was nothing in the pleaded facts which showed that prudent persons would be deterred from using the highway because of the presence of the reservoir. Therefore it is not possible to identify any basis on which the occupiers of the reservoir might have been expected to offer protection to Mrs Brown. For all these reasons, I would dismiss the appeal against the order of the judge striking out the claims against the occupiers of the reservoir and granting the occupiers reverse summary judgment.

A reasonable cause of action against the council which should not have been summarily dismissed

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43 The issue on the appeal against the council was whether the claim against the council for the negligent design and construction of the highway, in that part of the particulars of claim set out in para 13 above, was properly struck out. The judge’s decision to strike out the claim against the council appears, from para 26(c) of his judgment, to have been on the basis that it had not been pleaded nor evidenced that the sharpness of the bend “was dangerous in itself, or that it caused this accident”.

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44 Mr Weir submitted that the judge’s conclusion on the pleading was not a fair analysis of the particulars of claim. Mr Panton accepted that causation itself had been sufficiently pleaded, but supported the judge’s conclusion that this claim against the council should be struck out. This was because there was no sufficient pleading of the detail of the claim against the council. Mr Panton pointed out that there was no identification of which part of Memorandum No 780 had been breached by the design and construction of the highway.

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45 I agree with Mr Weir and Mr Panton that causation had been sufficiently pleaded in this case. The particulars of claim pleaded that the location of the accident was on the section of the highway with the bend. The accident was pleaded to have been caused by, among other causes of action, the negligence of the council. This included the plea that the council “caused and/or permitted the highway to be designed and/or constructed with a radius on the bend which was significantly less than the absolute minimum prescribed by prevailing standards (including Memorandum No 780 . . .)”. It will be for evidence at a trial to establish whether the bend had anything to do with the way in which Mrs Brown’s car left the highway.

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46 It was accepted in the course of argument on behalf of the claimants that the particulars of claim were not as focused as they might have been and that the particulars of claim included claims against the council: as an occupier of the highway; for failing to maintain the highway; and for failing to exercise powers to erect a crash barrier; which it was common ground on appeal were bound to fail and had been rightly struck out by the judge. Quite apart from potential costs consequences, an approach to pleading where unsustainable claims are pleaded with viable claims, increases the risk that a good claim might get struck out with the bad causes of action.

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47 I also agree with Mr Panton that the pleading in this case did not contain some of the detail that might be expected in a claim for misfeasance on the part of a highway authority, for example by specifying the angle of the bend, and by specifying the angle recommended by prevailing standards. That, however, is a different thing from saying that the claim did not disclose a reasonable cause of action and that the claim did not have a real prospect of success. If the council (or its predecessor in title to whose liabilities it had succeeded) constructed a highway with a bend which was more acute than that recommended by prevailing standards for reasonable, prudent and competent builders of highways, and the acuteness of the bend was a cause of Mrs Brown’s loss of control and accident, then the claim made by Mr Brown and his children might have a real prospect of success, even if there would be an inevitable and substantial reduction for contributory negligence on the part of Mrs Brown. This is because such a claim against the council as the highway authority would be for misfeasance in negligently

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A creating a danger, rather than an impermissible claim against a highway authority for nonfeasance. In these circumstances in my judgment the judge was wrong to strike out the particulars of claim against the council and to give reverse summary judgment for the council.

Conclusion

B 48 For the detailed reasons given above I would: (1) dismiss the appeals against South West Lakes and South West Water as occupiers of the reservoir; and (2) allow the appeal against the council to the extent of permitting the claim for negligently designing and constructing the highway with too sharp a bend to progress. The claims against the council: as an occupier of the highway; for failing to maintain the highway; and for failing to exercise powers to erect a crash barrier; remain struck out and dismissed.

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WILLIAM DAVIS LJ

49 I agree.

LEWISON LJ

50 I also agree.

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*Appeal in respect of claims against first
and second defendants dismissed.
Appeal in respect of claim against
third defendant allowed in part.*

FRASER PEH, Barrister

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