Neutral Citation Number: **[2023] EWHC 3334 (KB)**

Case No: QB-2021-MAN-000079

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

The Civil Justice Centre
Manchester

Date: 21st December 2023

Before :

His Honour Judge Bird sitting as a Judge of this Court

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Between :

CARL WAYNE BENNION **Claimant**

- and –

ADVENTURE PARC SNOWDONIA LIMITED **Defendant**

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- -

Marc Willems KC (instructed by **Irwin Mitchell**) for the **Claimant**
Christopher Kennedy KC and Brian McCluggage (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 9th-13th October 2023

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His Honour Judge Bird :

A. Introduction

1. On 5 August 2018, at around 9am, the Claimant ("Mr Bennion") suffered serious and life changing injuries when surfing at an artificial lagoon operated by the Defendant ("the lagoon"). By this claim, he asserts that the Defendant acted in breach of its common duty as the occupier of the lagoon and thereby caused him loss. This is the trial of liability only.

B. The lagoon

2. The lagoon opened in August 2015 and was the first of its kind. It stands on the site of former Aluminium works at Dolgarrog in North Wales, around 7 miles inland from Conwy following the Conwy river. Briefly described, it is capsule shaped, a rectangle rounded at each end with approximate semi-circles. At its longest point it measures 300m and it is 113m wide.

3. The Defendant commissioned Wavegarden S.L., a company registered in Spain, to design the lagoon. The central brief was to create waves that could be surfed with a height of up to 1.9m. The process of creating waves requires two things: a means to push water outwards from the centre line of the lagoon and an appropriate profile for the lagoon bed which would convert the movement of the water into a wave. The first requirement was met by a wavefoil that moved on a track down the centre of the bed of the lagoon, the second by the provision of deep and shallow areas of the lagoon bed.

4. The wave foil (which was manufactured by Leitner) runs on a track fixed to the centre of the bed of the lagoon. The track is around 182m long. It sits 2.3m below water level. Above the track and above the waterline is a central pier. At each end of the pier is a structure housing machinery control rooms. The pier has a flat top and sloping sides which are fenced so that surfers are protected from the wave foil. As the foil moves it generates water movement. Waves are then formed as water is pushed out from deeper water into shallower water. The lagoon gently rises on each side from the track and plateaus at a "reef" which is 0.9m below water level and 3m wide.

The reef begins at about 14m out from the centre of the lagoon. Beyond the reef there is a steeper fall leading to a flat bottom 2.8m beneath the water surface. From there the lagoon gradually rises to a shoreline at its edge. The water in the lagoon comes from a nearby hydroelectric power station. It passes through peat on its way to the lagoon and so is brown water.

5. The waves generated within the lagoon change in nature according to the bathymetry (profile) of the part of the lagoon they pass over. It was explained to me that surfers wish to surf in "green water" but begin by surfing in "white water". Between the pier and the reef the wave is "green water", at the reef the wave breaks and creates "white water". The wave then moves onwards and outwards to the shallow edges of the lagoon. In essence, a green wave, or green water is the vertical part of the wave. It is created when water moves from deep to shallow water. The green wave would run broadly along the edge of the reef.

6. The lagoon is no longer in operation. I was told that operation became uneconomical as the cost of electricity increased.

C. Surfing Levels

7. When it was operating, the lagoon catered for surfers of all abilities. Lessons were offered but it was also possible to "free surf". Each free surfer would need to select a level of expertise from 4 choices: beginner, intermediate, level 1 or 2 or advanced.

8. Intermediate 1 surfers were advised to stand on the reef, mounting their board as the wave approached. The aim was to catch the "white water" as the waves break. They would then surf to the ends of the lagoon moving away from the reef, surfing over the deep 2.8m channel into ever shallower water.

9. Intermediate 2 surfers were instructed to take off at or close to the central pier. They would then surf diagonally away from the pier, crossing over the reef, over the deep channel and into shallower water. In this way, intermediate 2 surfers had the opportunity to surf what Mr Andrew Ainscough (a director of the Defendant) described as a "softer green wave". Softer, that is, than the advanced wave.

10. Advanced surfers would take off from the central pier and surf parallel to it, in a green wave.

11. Mr Petherick (the Defendant's safety expert) has analysed free surf bookings at the lagoon and concluded that between April 2016 and September 2018 some 114,476 sessions were booked. Of those 54% (61,279) were for beginner sessions, 11% (12,711) for intermediate 1, 8% (9,662) for intermediate 2, and 27% (30,824) for advanced sessions.

12. The Defendant pleads that as of 30 November 2021 there had been a total of 195,400 hours of surfing at the lagoon. That is the equivalent of 1 person surfing for 24 hours a day for a little over 22 years. In that time no other injuries comparable to those suffered by Mr Bennion were recorded.

D. Design

13. I heard evidence from Fernando Odriozola, a director of Wavegarden. It was clear from his evidence that the company has gone from strength to strength since designing the Snowdonia lagoon. There was no suggestion that the design of the lagoon, incorporating the reefs, was in any way flawed. No evidence was put forward for any alternative design, and Mr Odriozola told me that in order to make surfable waves the varying depths of the lagoon, including the 0.9 m depth of water to the reef, represented a good compromise. He told me that the profile of all lagoons created by the company (he is working on more than 60 at the moment) is broadly similar and incorporates shallow areas of around 1 m.

14. Reference was made during his cross-examination to advertising materials published by "*the Wave*" a surf lagoon designed by Wavegarden in Bristol. Under the heading "*intermediate surf session*" reference is made to a water depth "*at take-off*" of 1.5 m. It was put to the witness that this was an indication that the shallow areas of Bristol were much deeper than those at Snowdonia. Mr Odriozola told me that he did not think the document was accurate. He was quite sure that Bristol had shallows of around 1 m. I accept Mr Odriozola's evidence on this point. The advertising material is not a technical specification and is not necessarily precise. It is not entirely clear where the depth of water is measured and if, for example, it takes account of the fact that a surfer "at take-off" may be on the wave and so above normal water level.

15. Discussion between Wavegarden and the Defendant was underway by August 2013. In September 2013, the Defendant went to Spain with representatives of WCP Associates (the appointed project managers) to meet Wavegarden for a design meeting. In November 2013 there was a "*technical conference*" in Spain attended by

Wavegarden, the Defendant, WCP, the Defendant's engineering consultants (Wardell Armstrong), the Defendant's planning consultants (NJL) and A&S Inman, a company operating in the health and safety field.

E. Inmans

16. There was some disagreement at trial about the role played by Inmans. As a starting point, I accept Mr Petherick's view that Inmans are a reputable company specialising in health and safety matters.

17. Inmans attended meetings with Wavegarden and the Defendant in November 2013 (when they raised concerns about surfers getting their fingers trapped in the mesh around the central pier and about the risk of injury in the event that the wave equipment ran too quickly). Whilst Inmans were not present at the December meeting, the notes of that meeting made clear that technical design matters which might pose a risk to users (in this case "earth looping") were to be referred to Inmans. At the November meeting, Inmans confirmed that it was "*acting as an independent adviser to* [the defendant*] in order to risk assess the facility and provide documentation to confirm that all hazards have been considered from both a design and operational point of view*".

18. I also accept that it was part of Inmans role to secure a "*Declaration of Operational Compliance*" ("DOC") issued under the terms of the Amusement Device Inspection Procedures Scheme ("ADIPS"). In order to fulfil that task, Inman's would report on compliance with HSG 175 (guidance published by the Health and Safety Executive on safe practice for "fairgrounds and amusement parks").

19. Inmans' work in respect of the DOC was to be divided into three stages. The first stage was to deliver a technical due diligence report quickly (before the end of November 2013). The conclusions reached in the report would determine whether the defendant would pay a non-refundable deposit in respect of Wavegarden's services. Thereafter, Inmans were to carry out a "pre-use inspection" (or PUI) in 3 phases: an independent design review, an assessment of conformity to design and an initial test.

20. No DOC was in fact issued. I do not regard that as a central, or indeed important, aspect of the case, but the reason for the failure is unclear. There is no suggestion that the lagoon failed to meet the relevant standards.

21. In August 2015 ADIPS had expressed the view that the lagoon was outwith its remit, but by September of the same year (as appears from a letter dated 10 November 2015 written by Inmans) ADIPS had changed its mind. It would appear that the Defendant did not give Inmans access to all the data required to make a final submission. I heard no evidence from Inmans, but it is clear that there was a dispute over fees.

22. A draft of the independent design review (part of the PUI) was produced and is dated January 2016. In accordance with HSG 175 it identifies safety critical aspects ("SCAs") of the "*wave garden device*". The document identifies 35 SCAs. SCA 13 deals with injuries that might be sustained as a result of hitting the lagoon floor. The reef is identified as a particular hazard. The report contains the following:

> "*the [Defendant's] risk assessment explains that all surfers will complete the [pre-surf briefing] which explains the changes in the water depth throughout the lagoon and that the surfer must paddle on their boards to move around the lagoon (no walking or wading to cross the water) when the wave has been created the water depth will increase and any person falling into the water will always fall forward into the wave and thus be elevated above the reef feature. The lifeguards and instructors will be positioned around the lagoon and can intervene if any surfer gets into difficulty in the water*."

F. Other relevant reports

23. The Defendant's public liability insurer is Aviva. The Defendant has produced a risk survey prepared by Aviva which appears undated, but which was written after the lagoon had opened. The conclusion is that risks at the site are "acceptable" and "well managed". I note however that the report does not paint an accurate picture of the lagoon. There is no reference to the reefs and an express (but incorrect) reference to the lagoon varying in depth from 1.7m to 1.9m.

24. I have seen a report prepared by the "Adventure Activities Licensing Service" dated 21 April 2018. I accept that the report does not cover (because the relevant licence does not cover) surfing and is limited to paddleboarding. However it does make reference to surfing:

> *"prior to entering the water all surfers were required to watch a safety video in the Surf Academy which covered the key safety points and top tips providing each of the levels of wave. The inspector heard further safety instructions, session introductions and warm-ups given by instructors and lifeguards. All*

appeared to be clear and consistent. The sessions seen appeared to confirm that the risk management systems, claimed by the provider and seen in various documents, were being implemented in practice."

G. Risk assessment

25. I have seen 2 iterations of a risk assessment prepared by the Defendant. The first was created before the lagoon opened. The second was created on 11 June 2015 and was last reviewed on 2 February 2018. It is unclear who was responsible for the process of reviewing the risk assessment and keeping it up to date but the evidence I had from Joanne Dennison (which I accept) is that it was reviewed in annual meetings involving a number of staff.

26. Dealing with the risks of surfing, the assessment highlights a number of "hazard scenarios" and "possible design controls". Severity and probability scores are then allocated. The scores are then multiplied together to give an overall risk score. Mitigation is then considered, and severity and probability scores re-considered. The hope is clearly that mitigation will reduce risk. Scores are classified in a traffic light system of red, amber, green.

27. The first assessment identifies the possibility of a surfer falling and impacting on the lagoon floor resulting in injury or being "knocked unconscious.". The possible design controls include reference to an instruction to be given to surfers to "*try to fall flat (forwards or backwards) when dismounting the board*" with an instruction not to "*attempt to dive off the board*". It is noted that the possibility of an impact with the lagoon floor is "*credible*" with the result that a warning must be issued. The design controls end with the words "*the reef profile in the lagoon and any change in lagoon floor shape must be identified in contrasting colours to aid identification*." I take this last reference to be reference to how changes in the profile were to be identified to surfers in pre-surfing "*instructions or briefing*".

28. Before mitigation, the severity score is assessed at 4 (catastrophic, could result in death, permanent total disability) and the probability score is assessed at 4 (probable). The overall risk is therefore assessed at 16 placing it in the red (unacceptable) category. The risk was to be mitigated in three ways: first the pre-surf briefing ("PSB") was to include instruction on "*the correct action on wipeout*", secondly, lifeguards and instructors around the lagoon would be vigilant, and thirdly, lifeguards and instructors would intervene "*in the event of the hazard*". After such mitigation,

the severity score dropped to 3 (critical, could result in permanent partial disability, injuries or occupational illness that might result in hospitalisation). The probability score also dropped to 3 (occasional). The resultant score of 9 falls in the amber (as low as reasonably practical) classification.

29. The second risk assessment removes all reference to the identification of changes in the reef profile. The attributed scores are the same. The mitigating factors are the same but in the later assessment severity score remains at four with only probability score reducing to 3. The overall score post mitigation is therefore 12, and so remains in the red (unacceptable) category.

H. The process of booking in and preparation

30. The Claimant booked surfing sessions with the defendant online. He had booked to surf on 5 August on an intermediate 2 session. In doing so, he confirmed he already had some surfing experience and was a competent basic surfer who understood correct wipeout actions and had good consistent take-off. In other words he could competently get to his feet on the surfboard and could leave the surfboard in a safe manner.

31. After booking, he received a confirmation email, which included the following advice: to check in one hour before the booked time to allow time for the PSB, and a warning that he would not "be allowed to surf until you have watched the pre-activity video." The email also contained a link to the briefing video.

32. The PSB included a general safety brief for all surfers and bespoke sections dealing with each level of ability. The general safety advice included an instruction to "*cover your head when you wipeout to protect your head from your surfboard*". The intermediate 2 briefing included an instruction where to start and where to direct the surfboard. After the briefing, surfers were given a colour coded rash vest so that their chosen level could be easily seen.

33. The video played on a loop and was the same video linked in the confirmation email. It is 6 minutes at 24 seconds long and there is no soundtrack. After an initial call to "pay attention" the video provides an orientation of the lagoon from above, noting it lies in an east west direction. The words "*our lagoon has varying depths*" then appear. The position of the reef is highlighted. The video then moves through beginner, intermediate 1, intermediate 2 and advanced surfing levels. Intermediate 1

shows a clear cross section of the lagoon which highlights the shallow area of the reef.

34. Before surfing, the Claimant was required to sign a "statement of risk". It contained 6 numbered paragraphs with a confirmation that each had been read, understood and agree to. He agreed to a statement that surfing is a sport which is both physical and demanding and which "obviously [had] inherent hazards".

I. Mr Bennion's experience

35. I found Mr Bennion to be a very impressive witness. Having heard his evidence I formed the view that before the accident, he was a keen and interested surfer. He surfed when he could, was confident (but not overconfident) in his abilities and was keen to improve. He watched general surf videos and owned 2 surf boards. He looked at surfing websites (he referred to "magic seaweed" during his evidence) and had surfed several times at Scarborough and Cable Bay and in Ireland at Sligo and Lahinch. He had also surfed in Tenerife. He told me he could "*stand up and surf with ease*".

36. Mr Bennion first surfed at Surf Snowdonia in October 2016. He attended a course with his son in May 2017. It covered both intermediate 1 and intermediate 2 and was described as a transition course. His first intermediate 2 session took place on 6 April 2018. He surfed intermediate 2 again on 14 April 2018 but on 12 May 2018 moved down to intermediate 1. On 28 May 2018 he surfed intermediate 2 and on 9 June 2018 he surfed 2 intermediate 2 sessions. On 8 July 2018 he surfed an intermediate 1 session in the morning and an intermediate 2 session in the afternoon. On 5 August 2018 he was due to surf 2 intermediate 2 sessions.

37. From his own experience of surfing the lagoon he was aware that the reef was only around 0.9m below the water surface. As an intermediate 1 surfer he had stood on the reef waiting for the wave and recalled that the water level was just at or around his waist.

J. The injuries

38. The lagoon is covered by CCTV and the fall that lead to the injury was captured. The quality is poor. Each party had permission to rely on expert evidence from CCTV experts. I also had the benefit of agreed expert evidence from neurosurgeons who are able to assist with the mechanics of the injury.

39. The neurosurgeons (Mr Macfarlane and Mr Todd) agreed that Mr Bennion's post-accident condition should be classified as Frankel/ASIA C5 B tetraplegia. They agree that the most likely cause of the injury was that his head struck the lagoon floor when his neck was in a flexed position (with the chin tucked into the chest), this caused a C6/7 fracture/dislocation. It is agreed that such an injury does not require great force. It is caused by the continued downward trajectory of the torso whilst the head is fixed on the floor. They also agree that wearing a helmet or protecting the head with the arms would not have mitigated the injury. Because there were no material areas of dispute, I did not hear oral evidence from the medical experts.

40. The CCTV experts (Mr Hague and Mr Wooler) gave oral evidence. They agreed that the CCTV shows that Mr Bennion was on his surfboard in a crouching position immediately before he fell from the surfboard. They agree the top of his head was about 1.1m above the water surface and that his centre of mass would be between 0.8m and 0.9m above the water surface. At or close to his position they agree the wave was around 1.4m high. They agree that he fell from his board about 10m from the side of the central pier and about 12m to 13m from the centre of the pier. They also agree that Mr Bennion rotated as he fell and was approximately horizontal when he hit the water.

41. I have had the benefit of watching the relevant CCTV footage at various magnifications. I have also had the benefit of considering a large number of still shots from the footage contained in the trial bundle. The parties accept that the experts are in no better position than I am to interpret how Mr Bennion fell from the CCTV. The quality of the CCTV footage means that it is not possible to make definitive findings as to the precise mechanism of the fall. What follows are my findings drawn from the footage in the light of the evidence..

42. In my judgement a fair view of the fall can be seen in the 450% enlargement footage played at 1/16 of full speed. It shows Mr Bennion lying on his surfboard paddling to the appropriate start point for intermediate 2 at the central pier. At the starting point Mr Bennion can be seen, sitting astride his board. Initially his board appears to be facing down the central pier away from the direction of the oncoming wave. He turns the board so that is sits at an angle to the central pier. Because he is sitting on the board, the front is lifted. As the wave foil approaches him, he can be seen lying on the board. He begins to paddle. His board is then caught by the wave and rises into the vertical face of the wave. As the board is carried forward at the lower end of the wave face, Mr Bennion appears to rise form the board and begin to stand. He seems to have

both arms on the surfboard with his head in a forward position, his back is virtually straight, and his legs are bent. In effect he seems to be standing on all fours. For a short time he can be seen facing forwards on the board, so that his head, shoulders and hips are lined up over the board (this can be seen at page 1778 of the bundle timed at approximately 0.91 seconds before the fall). From there, he appears to begin to lift his body and at the same time rotate, bringing his hips forwards as his arms continue to hang down (this can be seen at page 1783 of the bundle around 0.75 seconds before the fall). Around 0.5 seconds before the fall, his arms can be seen rising (page 1788 of the bundle). At the point he is in a crouching position. Without straightening he appears then to twist to his left as the board moves forward on the wave and fall into the water. It seems to me that he is likely to have fallen onto his side.

K. Other experts

43. I heard evidence from experts in fluid mechanics. Professor Swan was instructed by the Defendant and Professor Ingram by the Claimant. In brief each addressed the dynamics of a falling surfer. Whilst the expertise of each was clear I did not find their opinions to be particularly useful in dealing with the issue of liability. Neither was able to assist with the counterfactual question of what depth of water would have meant the injury was avoided.

44. I heard evidence from safety experts, Mr Jacklin on behalf of the Claimant and Mr Petherick on behalf of the Defendant. On the first day of the trial I granted permission for 2 letters written by Mr Jacklin to be put in evidence. One is dated 8 September 2023 and the other 28 September 2023. Each was prepared as a response to correspondence written by the Claimant's instructed solicitor in circumstances that Mr Jacklin felt were covered by litigation privilege so that he understood they would not be referred to during the proceedings.

45. The safety experts were agreed that (now and at the time the lagoon opened) there is no published safety standard that is directly applicable to the operation of surf lagoons. That is perhaps not surprising.

46. Mr Jacklin's view is that guidance to be derived from safety standards applicable to comparable activities "set a clear precedent" that at least 1.5m of water must be

provided where an uncontrolled fall into water is expected. A key factor relied on by Mr Jacklin to support his view is that he "has found no design justification why 0.9 is the maximum permissible water depth over the reef". Mr Jacklin goes on to express the view that "*the concern over the lagoon [water] volume, in my view, dominated the decisions made about the water height over the reef*".

47. Mr Jacklin refers to a number of standards including the following: BS EN 15288 [4148] on swimming pools for public use, Guidance from the Institute of Sport and Recreation Management ("ISRM") on "The use of play equipment and water features in swimming: a recommended code of practice", Swim England safety guidance on "water depth and activities that can take place in different depths" [572] and BS EN 25649 (2016) dealing with "floating leisure articles". Having reviewed these and other safety standards Mr Jacklin states: "I am not aware of any industry guidance applying to recreational users which permits uncontrolled headfirst entries into water less than 1.5 m deep".

48. Mr Petherick expressed the view that none of these standards, when fairly read, can be taken to suggest that a depth of at least 1.5 m ought to have been adopted at the lagoon. He considers in turn each of the specific standards referred to by Mr Jacklin. He expresses the general view that there is a substantial difference between diving into a body of water and making "a reasonably controlled exit from a surfboard". He further notes that BS 25649 expressly excludes "surf sports-type devices (e.g. body boards, surfboards)".

49. In each material respect, I prefer the view of Mr Petherick. The only evidence I have as to potential depths is that 0.9 m was appropriate. The safety guidance quoted by Mr Jacklin caters in my judgement in the most part for a wholly different type of risk management. For example, guidance in respect of play equipment and inflatables is almost certainly directed to the management of risks faced by children, who cannot be expected to take the same degree of responsibility for their own well-being as adults. I found that Mr Jacklin adopted an over cautious approach. His evidence failed in my view to take account of the realities of surfing and was apt for an indoor swimming pool environment not an outdoor lagoon used for surfing.

50. Both Mr Jacklin and Mr Petherick accept that the time he fell, Mr Bennion must have been above what they describe as the "stationary waterline" (the water level absent a wave). I accept this conclusion. It is plain from the CCTV footage that Mr Bennion was surfing at the time he fell and that his board on the wave. It follows that Mr

Bennion must have been above the stationary waterline. Mr Jacklin puts Mr Bennion at less than 0.1 m above the stationary waterline, Mr Petherick puts him at 0.5 m above it. In my judgement, it is not possible to be precise about Mr Bennion's height at the time of the fall, but I accept that he was on the wave and therefore above the "stationery waterline".

L. Witness evidence

51. I heard evidence from Mr Andrew Ainscough of the Defendant. I accept his evidence was given truthfully. He was asked questions about the risk assessment and in particular the increase in the assessed risk of injury from a fall. He told me that the increase was an error and made clear in re-examination that there was no change of circumstance that had necessitated a re-evaluation of the risk. He accepted that the risk assessment contained mistakes, so that for example the reference to a safe fall "forwards or backwards" was an error. He told me that he regarded Inmans as having a general safety role. When it was put to him that the Defendant had failed to exercise appropriate care to make the lagoon reasonable safe, he said he thought the Defendant had done what it could.

52. The Defendant served a witness statement from Kieron Russell but did not call him. They served a statement from Rick Vlek but did not call him. Mr Vlek is a qualified surfing coach. He did not attend the trial. They also served a statement from Mr Phillip Duffy the site engineer at the time of the accident. He deals with safety inspections. Mr Duffy was not called but I understand there to be no controversy about his evidence.

53. The Defendant did call Joanne Dennison. She is an accomplished surfer and surfing coach. She is the 8 times Welsh pro surfing champion and worked at the lagoon. She was on duty on the day of the accident and played an important part (with others) in saving Mr Bennion's life. It is a tribute to Mr Bennion that he instructed leading counsel to express his thanks to Miss Dennison before cross examination. Miss Dennison is now a police officer. She was asked about the risk assessment and was clear that the increased assessment of the risk of injury from striking the lagoon floor seemed to be "quite high". I formed the view that she did not agree with the later, higher, assessment.

M. The Claim

54. Mr Bennion's case is that the Defendant failed to take such care as in all the circumstances of the case was reasonable to see that he was reasonably safe when surfing at the premises. This is the "common duty of care" set out at section 2(2) of the Occupiers Liability Act 1957.

55. The Particulars of Claim plead 20 separate particulars of breach of statutory duty or negligence (at paragraph 6(a) to (t)). In opening the case, Mr Willems KC sensibly accepted that the particulars relied on could be reduced. It seems to me that the Claimant's case on breach, as it stood after I had heard all of the evidence, may fairly be summarised as follows:

i) The Defendant's set up was such that the point at which intermediate 2 surfers were most likely to fall (the point of "take off") was the point at which the lagoon floor was at its shallowest (6(b))

ii) The Defendant failed to consider guidance which recommended a minimum depth of 1.5m where there was a risk of falling into water (6(c) in respect of IRSM guidance, 6(d) in respect of Royal Life Saving Society guidance, 6(e) in respect of Swim England guidance, 6(f) refers to ISO 25649, 6(g) in respect of general research and 6(q) generally)

iii) The Defendant failed to properly consult water safety consultants about the depth of water (6(h)) in particular after carrying out a risk assessment which identified a high risk of injury (6(p))

iv) The Defendant failed to teach or failed to require that Mr Bennion demonstrate good fall technique (6(i))

v) The Defendant failed to warn Mr Bennion of the depth of water over the reef (6(j))

vi) The Defendant failed to warn Mr Bennion that moving from intermediate 1 to intermediate 2 would expose him to the greatest risk of falling at the most dangerous point in the lagoon (6(k))

N. The Law

56. There is no dispute between the parties as to the applicable law.

57. In my judgment the principles set out by the Court of Appeal in *James v White Lion Hotel* [2021] EWCA Civ are instructive. They rely heavily on the House of Lords decision in *Tomlinson* [2003] UKHL 47.

58. The Court of Appeal made clear that the assessment of whether there is liability under the 1957 act is "*essentially a factual assessment based upon the particular circumstances of each case*". The particular circumstances of each case must include (see section 2 (3) of the 1957 Act) "*the degree of care, and of want of care, which would ordinarily be looked for in …. a visitor*".

59. The first question (derived from the speech of Lord Hoffman in *Tomlinson*) is whether the risk to Mr Bennion arose as a result of the state of the premises (the lagoon). If so, then whether or not appropriate care has been exercised (whether there has been a breach) requires an assessment of (a) the likelihood of injury (b) the seriousness of the injury (c) the social value of the activity which gives rise to the risk and (d) the cost of taking preventative measures.

O. The Arguments

60. I set out here the main arguments of the parties. In addition to oral argument I had the benefit of written opening submissions and helpful closing notes from each side. I have reconsidered the written submissions in some detail and take account of all the points there raised.

61. Mr Willems KC emphasised that the danger faced by Mr Bennion arose from the state of the premises. He submitted that the likelihood and risk of injury were well understood and documented within the risk assessment. He did not suggest that there was no social value in surfing but did suggest that it would be a simple and straightforward matter to do away with the intermediate 2 stage of surfing, thereby simply and effectively avoiding the obvious risk of falling over the reef. He relied on the assumption that overall only 8% of surfers booked in for intermediate 2 sessions. He submitted that the Defendant had created a danger and ignored it and relied heavily on the guidance which pointed to a depth of 1.5m as the minimum safe depth.

62. Mr Kennedy KC (who appeared with Mr McCluggage) submitted that when all relevant circumstances were taken into account the Defendant had discharged its duty. He invited me to take account of the fact that surfing (as a sport) was a socially

desirable activity that carried with it an inherent risk of injury. He pointed out that Mr Bennion was aware of the reef, had often stood on it and had watched the pre surf briefing several times. Mr Bennion was in any event a seasoned surfer who had confirmed when booking on for intermediate 2 sessions that he had a correct wipeout action and good consistent take-off and had taken part in a training session on the transition from intermediate 1 to intermediate 2.

63. Mr Kennedy KC pointed out that the argument that intermediate 2 surfing could have been removed as an option was a late point that was not pleaded and was not referred to in the expert reports. He suggested this was now the Claimant's main point. He submitted that intermediate level 2 was a sensible halfway house between intermediate 1 and advanced levels which allowed a surfer to surf a green wave that was materially softer than the advanced wave. It would, he submitted, be dangerous to expect surfers to move from the white water surfing of intermediate 1 to advanced.

64. He also submitted that no duty was owed because the risk arose from the activity not from the state of the premises.

P. Key findings of fact

65. I find that the reef depth of 0.9m was necessary for the creation of waves that could be surfed. There was no contrary evidence and Mr Odriozola's evidence on the point was persuasive.

66. I find that the increased risk recorded in the risk assessment of injury from collision with the lagoon floor was an error. I found Miss Dennison's evidence on this point very helpful. I formed the view she was surprised by the higher assessment. Given that there had been no change of relevant facts between the risk assessments either the first (lower) assessment or the later (higher) assessment was reached in error. If the lower, earlier, assessment had been wrong it would follow that the error had been identified and corrected. There was no suggestion that Miss Dennison or Mr Ainscough recalled any such correction. In my view, had a need for a correction been identified, one or both would have told me about it.

67. I also find that it was appropriate to have an intermediate 2 stage of surfing at the lagoon. That stage was a half-way house between the relatively straightforward intermediate 1 and advanced levels. It gave access to a "softer green wave" and ensured that surfers had an opportunity to acclimatise to a green wave before moving to the advanced class. The fact that only 8% of surfers over time took advantage of

the intermediate 2 level does not detract from that conclusion. The 8% figure would carry some weight if it was assumed that all surfers arrived at the lagoon as beginners and progressed through the stages all the way to advanced. On the basis of that assumption, it might be said that intermediate 2 was not a half way house at all. But, there is no basis for that assumption (and none was suggested). The bare data, when viewed with one eye on common sense, suggests that in fact a lot of people came to the lagoon as beginners and either remained as beginners or gave up. A few might have advanced to intermediate 1, and some to intermediate 2 and a small number all the way to advanced. It seems to me to be very likely that most of the advanced surfers (the 27%) came to the lagoon as accomplished surfers.

68. I am satisfied that Inmans were retained to advise generally on health and safety matters and not simply to achieve ADIPS approval. That finding is consistent with how Inmans understood their work and how they described their role at the meeting of 4 November 2013. Furthermore, Inmans always acted in a manner consistent with that role. Had they been instructed simply to obtain the DOC it is not clear why they went on to prepare the 2016 report.

69. It is clear from the totality of the evidence that Inmans' primary task was to report and advise on safety aspects of the design and operation of the lagoon. The ADIPS certification, whilst important, was not an end in itself. The critical aspect of Inmans' work was to show that risks in the lagoon were being reasonably managed. The DOC would be a third party verification that the work had been done and no more.

Q. Conclusions

70. I am satisfied that the Defendant owed Mr Bennion and all lawful visitors to the lagoon the common duty of care set out at section 2 of the 1957 Act. I do not accept Mr Kennedy's point that the risk of injury here was not attributable to the state of the premises but rather to Mr Bennion's surfing. Mr Bennion was at the lagoon in order to surf and paid a fee to the Defendant to use the premises for that purpose. He was injured in the course of surfing. In my judgment any distinction in these circumstances between the activity and premises is a false one. Section 2(2) of the 1957 Act makes it plain that the duty is to take appropriate steps to keep the visitor reasonably safe when using the premises "for the purposes for which he is invited or permitted by the occupier to be there". Where the injury arises from the permitted activity and the mechanics of the injury cannot be separated out from the layout of the premises it is in my judgement clear, that the duty is owed.

71. To decide if the defendant is in breach, I must conduct a balancing exercise as Lord Hoffmann points out at paragraph 34 of ***Tomlinson***. Whether or not appropriate care has been exercised (whether there has been a breach) requires an assessment of (a) the likelihood of injury (b) the seriousness of the injury (c) the social value of the activity which gives rise to the risk and (d) the cost of taking preventative measures.

72. I accept that there was a known risk of injury as a result of the layout of the lagoon. The risk assessment highlights that risk. Acting, as it must, on a worst-case scenario the risk assessment shows the Defendant was aware that serious consequences could follow if a surfer hit the lagoon floor. In my judgement there is a range of serious consequences that can flow. At one extreme is the type of injury suffered by the claimant. A low-impact injury which, as a result of neck flexion, caused immediate and irreparable damage. At the other extreme (within the range of serious consequences) is an injury which does not cause immediate and irreparable damage, but which renders the surfer unconscious. If the surfer is taken from the water quickly, then the damage (as a matter of common sense), is very unlikely to be serious. The real risk in that situation is of drowning, or brain injury as a result of oxygen starvation. In such a case, prompt action by lifeguards after the event will mitigate the risk. Instructions given to surfers to fall into the wave will also mitigate the full range of risks. Falling into the wave would increase the depth of water through which a surfer falls reduce the effect of impact.

73. I must take into account the fact that surfing is an inherently risky pastime. I accept the point that unlike skiing or mountain biking (which in other aspects of comparable activities) surfing is likely to end with a fall from the surfboard. Surfing requires a level of fitness and involves exertion. Like any sport, it has a recognised degree of social utility. I accept the evidence (which was not contradicted) that in order to create a surfable wave it was necessary to have the reef not only at the height at which it stood, but also positioned where it was. Removing the reef or increasing the height of water above it, was not a practical or workable option.

74. I now turn to deal with the pleaded breaches.

75. I accept as a fact that the Defendant's operation meant that the point at which intermediate 2 surfers were most likely to fall (the point of "take off") was the point at which the lagoon floor was at its shallowest. Mr Bennion knew where the reef was and how deep it was.

76. I accept that the Defendant failed to consider guidance which recommended a minimum depth of 1.5m where there was a risk of falling into water, but do not regard that failure as evidence that the Defendant failed to take reasonable care to keep visitors safe. The surf lagoon could not have operated with a minimum depth of 1.5m.

77. I accept that the Defendant failed to consult water safety consultants about the depth of water. In my view there was no need for them to do so . Inmans provided general safety advice which was sufficient and appropriate. There was no need to consult water safety experts.

78. I do not accept that the Defendant failed to teach or failed to require that Mr Bennion demonstrate good fall technique. Mr Bennion in effect self-certified his abilities. It would not be reasonable to expect every surfer to physically demonstrate a basic ability which they certified they had.

79. I do not accept that the Defendant failed to warn Mr Bennion of the depth of water over the reef. Depths are shown in the PSB video and in any event, Mr Bennion was well aware of where the reef was and how deep it was.

80. I accept that the Defendant failed to warn Mr Bennion that moving from intermediate 1 to intermediate 2 would expose him to the greatest risk of falling at the most dangerous point in the lagoon. Mr Bennion was aware of that fact because he knew where the reef was and how deep it was.

81. In my judgment, when the evidence is viewed in the round, the risk of injury when surfing is moderate. The risks have been considered and mitigated by ensuring (for example) that obvious risks (such as the shallowness of the reef) are drawn to the attention of surfers, by ensuring that surfer self-certify their level of ability before booking non-beginner sessions, by the provision of vigilant staff at the lagoon, by appropriate risk assessments and by consulting health and safety professionals appropriately. The likelihood of serious injury is in my judgment very low. Mr Bennion's accident was (on one view) a 1 in 20 year possibility. The social value of surfing (as a sport) is obvious. The only real steps that might have been taken to reduce the risk (or remove it) were to remove intermediate 2 as a surfing level or lower the reef. The cost of lowering the reef would be that surfing would not be possible. The entire social utility of the activity would then be lost. Equally the cost of removing intermediate 2 would be to rob those (perhaps small number of) surfers who wanted to progress to green water at the lagoon of a safe chance to do so.

82. Taking these points into account in my judgment it is clear that the Defendant discharged the duty that it owed to Mr Bennion. For that reason, the claim must be dismissed.

83. I am grateful to Leading Counsel and to Mr McCluggage for their focused and helpful submissions and for the way in which they conducted the trial.