EMPLOYMENT TRIBUNALS

Appellant: Holker Estates Company Limited

Respondent: South Lakeland District Council

HELD AT: Manchester **ON:** 19, 20, 21 and 22 March 2018

BEFORE: Employment Judge Horne

Members: Mr G Skilling
Mr T A Henry

REPRESENTATION:

Appellant: Mr D Kay, Queen's Counsel

Respondent: Mr N Johnson, Queen's Counsel

Judgment having been sent to the parties on 9 April 2018 and the appellant having requested written reasons at the hearing, the following reasons are provided:

REASONS

Issues for determination

1. This is an appeal against two prohibition notices. Each notice was served on 12 May 2017 by Mr John Blythe of the respondent. The notices related to two swimming pools, both operated by the appellant. One was at the appellant's caravan site in Old Park Wood, Cark-in-Cartmel and the other was at Longlands Caravan Park, Kirkby-in-Furness.
2. Determination of the appeal on its merits involves asking ourselves:
   2.1. Whether, at the time of service of the notice, the operation of the swimming pools involved a risk of serious personal injury;
   2.2. If so, whether we would have issued prohibition notices; and
   2.3. If so, in what terms.

3. Our scrutiny is more intrusive than simply asking whether the inspector acted reasonably; if we disagree with the inspector's decision we can and should substitute our view. In answering that question, we must take account of all the available evidence relevant to the state of affairs at the time of service of the notice. We are not confined to considering the material available to the inspector at the time the notice was served. We are also entitled to take account of evidence that has since come to light.

4. During the course of the hearing, the employment judge raised the question of whether the appeal had been presented within the statutory time limit. By the time the hearing reached closing submissions, it had become common ground that the appeal had been presented 8 hours after the time limit had expired. The respondent did not seek to argue that it was unreasonable to extend the time limit if the tribunal had power to do so: an extension of 8 hours would plainly have been reasonable. But the question remained, was it within the tribunal's power to grant an extension of time? That question depended entirely on whether the appellant could prove that it was not reasonably practicable to present the claim within the time limit.

Relevant law

Prohibition notices and appeals

5. The Health and Safety at Work etc Act 1974 (HSWA) relevantly provides, with our emphasis:

> **22. Prohibition notices**
>
> (1) This section applies to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.
>
> (2) If as regards any activities to which this section applies an inspector is of the opinion that, as carried on … by or under the control of the person in question, the activities **involve … a risk of serious personal injury**, the inspector may serve on that person a notice (in this Part referred to as 'a prohibition notice').
>
> …
>
> **24. Appeal against improvement or prohibition notice**
>
> (1) In this section 'a notice' means … a prohibition notice.
> (2) A person on whom a notice is served may **within such period from the date of its service as may be prescribed** appeal to an employment tribunal; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.
>
> …

6. It is common ground that relevant statutory provisions apply and that one of them is section 3 of HSWA, which reads:

> 3. It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons

not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

7. Section 3 is supplemented by regulations 3 and 5 of the Management of Health and Safety at Work Regulations 1999. Regulation 3(1)(b) requires every employer to carry out a suitable and sufficient risk assessment. By regulation 5(1), arrangements must be put in place for the effective control, monitoring and review of the preventative measures identified in the risk assessment.

8. In *HM Inspector of Health and Safety v. Chevron North Sea Ltd* [2018] UKSC 7 at paragraph 24, Lady Black stated:

> "In my view, on an appeal under section 24, the tribunal is not limited to considering the matter on the basis of the material which was or should have been available to the inspector. It is entitled to take into account all the available evidence relevant to the state of affairs at the time of the service of the prohibition notice, including information coming to light after it was served."

Presentation of appeals and time limits

9. The highlighted phrase from section 24 HSWA makes clear that the time limit for presenting an appeal is such time limit as shall be prescribed.

10. The time limit is prescribed by Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, to which we will refer as "the 2013 Rules". Rule 105(1) of the 2013 Rules provides, with our emphasis:

> **Application of this Schedule to appeals against improvement and prohibition notices**
>
> **105.**—(1) A person ("the appellant") may appeal an improvement notice or a prohibition notice by presenting a claim to a tribunal office—
>
> (a) before the end of the period of **21 days beginning with the date of the service on the appellant of the notice** which is the subject of the appeal; or
>
> (b) within such further period as the Tribunal considers reasonable **where it is satisfied that it was not reasonably practicable for an appeal to be presented within that time**.

11. By rule 8 of the 2013 Rules, a claim is started by presenting a completed claim form, using a prescribed form, in accordance with any practice direction made under regulation 11 of the accompanying Regulations. "Present", according to rule 1(1), means "deliver (by any means permitted under rule 85) to a tribunal office". And under rule 85(2), a claim form may only be delivered in accordance with the practice direction.

12. The *Presidential Practice Direction – Presentation of Claims* (2016) lists three methods of presenting a completed claim form to the tribunal:

    12.1. Online (with details of the website address);

    12.2. By post to the Central Processing Facility (with the address stated in bold); and

12.3. In person to an Employment Tribunal Office listed in the schedule to the Practice Direction.

13. Amongst the offices listed in the Schedule is the North West Regional Office, along with its full address.

14. "Not reasonably practicable", in rule 105, does not mean physically impossible. Nor is the test satisfied merely by the appellant acting reasonably in not presenting the claim within the time limit. The correct position between these two extremes has been described as a test of "reasonable feasibility": *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372.

15. If the claimant was represented by skilled advisors, such as solicitors, the claimant cannot rely on ignorance of the time limit unless the advisors could not have been reasonably expected to know of the time limit. If a claimant has been negligently advised, or his solicitors have negligently failed to present the claim on time, the claim fails and the claimant's remedy is against the advisors: *Dedman v. British Building and Engineering Appliances Ltd* [1974] 1 All ER 520.

Expert evidence

16. Courts and tribunals are not bound to accept the opinion of an expert, even if he or she is the only expert in the case. In *Coopers Payen Ltd v. Southampton Container Terminal Ltd* [2003] EWCA Civ 1223, Clarke LJ observed:

> **[42]** All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate

17. In *Armstrong v. First York Ltd* [2005] EWCA Civ 277, Arden LJ added at paragraph 33:

> …there is no rule that a judge has to explain why he cannot accept expert evidence at a technical level and on that evidence's own merits. On the other hand, if there are grounds on which he can reject that evidence on a technical level he should certainly explain why he has not accepted that evidence.

Health and Safety Executive Guidance

18. The relevant guidance is to be found in HSG 179 *Managing Health and Safety In Swimming Pools* (Third edition, published 2003):

"68. The effective management of health and safety in any swimming pool starts with careful design. All of those involved in designing new pools or upgrading existing ones will need to give the highest priority to ensuring that they provide bathers and staff with a facility that is safe. Three requirements need to be met in order to achieve this:

- the layout of the […] pool tank (including its […] profile […]), should be designed so as to make the safe use and supervision of the pool easy to achieve without complex or costly management arrangements;

…

72. Where a new pool is being discussed or major improvements/additions are being made to an existing pool, the main factors affecting which should be considered are set out in paragraphs 73-130 and Table 1.

…

Pool tank profile

73. It is recommended that all pool profiles are based on a number of important safety principles:

- abrupt changes in depth should be avoided in water less than 1.5 m in depth;
- steep gradients should be avoided – a maximum gradient of 1 in 15 is recommended for water depths of up to 1.5 m;

…

130. Pools which are being improved or refurbished may contain hazards that are impossible to eradicate and therefore measures will need to be considered to ensure that they are safe to use. Table 1 identifies some of the design problems that may be found in an existing pool, and describes some of the management action that may be taken to solve them, depending on the outcome of the risk assessment. It is not intended to be comprehensive, nor will the measures described be appropriate for every situation. It is the responsibility of the pool operator to determine whether any such management measures are a sufficient response to the hazards and risks identified.

…

Notes to Table 1

Before deciding which option(s) for control is the most appropriate, it is recommended that the accident records are evaluated as these should give an indication of the order of priority for dealing with a specific problem.

Table 1

…

6.2 **Excessive pool tank gradient, is greater than 1 in 15**

An excessive gradient may increase the likelihood of slipping and cause young children to be 'led' into deep water

Check whether the pool gradient exceeds the maximum recommended gradient of 1 in 15 and whether this occurs in water depth of less than 1.5m. It if does, consider measures listed

1. Ensure that areas of steep gradient are clearly marked using coloured pool tank floor markings
2. Provide warning signs

…

Factors to consider when deciding whether constant poolside supervision is necessary (See Figure 3)

186. Constant poolside supervision by lifeguards provides the best assurance of pool users' safety. The risk assessment may determine circumstances where the balance of cost and risk makes it possible to provide a safe swimming environment without constant poolside supervision. Before deciding this, poor operators should carefully consider relevant circumstances such as:

- the nature of the pool;
- the pool users;
- activities in the pool at any particular time.

187. A risk assessment must be undertaken to decide whether constant poolside supervision is required. If the pool meets one or more criteria from the following list, it is strongly recommended that constant poolside supervision is provided:

- […] there are abrupt changes in depth;
- it is not practicable to enforce house rules for safe behaviour;
- access is not restricted, example to hotel residents, members, hospital staff and patients

188. Whether constant poolside supervision is required also depends on how a pool is used at any given time. For example a pool which would not normally require poolside supervision may need to make arrangements for supervision may need to make arrangements for supervision on occasions when:

- the pool will be used by unaccompanied children aged under 15 years;
- crowded conditions are expected;
- food or alcohol will be available to pool users; or
- activities take place or equipment is used which can lead to additional risks through the high excitement generated. "

19. Figure 3 in HSG 179 provides a flowchart setting out the same criteria as in paragraphs 187 and 188, but in diagrammatic form.

20. On 21 February 2018, HSG 179 was revised and re-issued. Mr Ebben's report summarised the changes but we were not shown a copy of the updated guidance itself. The parties' common position was that it would be unnecessary for us to read it. A post-service change in the guidance was not, in their view, part of the "available evidence relating to the state of affairs at the time of service".

21. The parties are agreed that evaluation of the risk of serious personal injury requires a "holistic approach" taking account of the combined risks posed by all relevant factors. These include the design of the pool tank, the people likely to be using the pool, environmental factors, and the adequacy of the appellant's measures to control the risk. Compliance with particular provisions of HSG 179 does not automatically mean that the pool is safe. Nevertheless, both parties recognise that HSG 179 is authoritative guidance. Its provisions are very helpful indicators as to whether a particular operation carries with it the risk of serious injury or not.

22. The purpose of Table 1 of HSG 179 is to identify hazards in existing pools and to recommend control measures to reduce the risk posed by those hazards. Contrary to Mr Blythe's evidence, it does not assume that all pools with a Table 1 hazard require constant poolside supervision. Nor, however, does it offer any comfort that, if the control measures are implemented, a lifeguard can be dispensed with. If, having regard to all risk factors including the pool tank design, the risk is sufficiently high, it may be necessary to put a lifeguard in place.

23. The checklist in Figure 3 (based on paras 187 and 188) does not provide a definitive answer to the question of whether constant poolside supervision is needed. Constant supervision may be required even if none of the factors listed in paragraphs 187 and 188 is present. As Mr Ebben accepted in the course of his evidence, there may be circumstances where the gradient of a pool floor is sufficiently steep as to require a lifeguard even though a steep gradient is not one of the express criteria for constant supervision listed in paragraphs 187 or 188. This is common sense. We can illustrate it by way of an example. Suppose the main floor of a swimming pool had a slope of 60%. According to Mr Ebben, it would not be an "abrupt change in depth", within the letter of paragraph 187, because that phrase was intended to mean a vertical step. But in our view, the 60% slope would be no less dangerous. A child having set foot on the slope would find it almost impossible to walk back to the shallow water. Arguably a 45% slope in the mid-section of a pool would also be just as dangerous as a vertical step. Mr Ebben would not be drawn into placing a figure on the severity of gradient that would require a lifeguard, but he recognised that, beyond a certain severity of slope, a lifeguard would be needed.

24. We would add one qualification. If a steep slope begins at the poolside in an area that is clearly marked as the deep end, it is much less dangerous than a steep gradient on a main slope. This is because of the ability of a non-swimmer to cling to the edge of the pool and their natural inclination to do so if entering at the deep end. Even young children are unlikely to be fooled into thinking it is part of the shallow end or a safe place to stand.

Evidence

25. We heard oral evidence from Mr Blythe for the respondent, followed by Mr Carroll, Mr Ebben and Mr Smith for the appellant.

26. We thought that Mr Blythe was telling us the truth about what he saw, heard and did. We disagreed with some of his interpretations of HSG 179. When asked about his actions in 2010, we thought that, on occasion, Mr Blythe was reaching for explanations that were more palatable than the reality. For example, he told us that, in 2010, he thought that CCTV monitoring was the equivalent of constant poolside supervision. That was the reason he gave us for having effectively

agreed in 2010 that the pools were safe. But he cannot really have believed that the two measures afforded equivalent protection, especially not at Old Park Wood. Much more likely in our view is that in 2010 he simply underestimated the risk.

27. Mr Carroll was, we thought, giving his evidence to us honestly about the steps the appellant took to re-profile the pool after Luca Hurle's death. Indeed, at times, his evidence was quite frank. For example, he agreed that he did not think that the appellant was able to police any rule prohibiting use of the pools by non-swimmers. This was a point which, we found, worked against the appellant's interests.

28. Mr Smith, the solicitor with conduct of the appellant's case, gave his evidence to us candidly and straightforwardly.

29. Mr Ebben is undoubtedly a leading expert in the field of swimming pool safety. He helped to draft HSG 179. He advises both pool operators and enforcement agencies. His answers to questions struck us as balanced and fair. By way of example, he volunteered his view that, when he inspected the signs around the pools, he found them to be poor. His opinions command respect. That is not, however, to say that we ultimately agreed with his opinion on the point directly in issue. We return in due course to explain why we came to that view.

30. Contrary to Mr Johnson's submission, we did not find Mr Ebben to be partisan, or in Mr Johnson's words, an advocate for his "paymaster". He did not choose to disregard evidence that was inconvenient to the appellant. Although Mr Ebben was cross-examined tenaciously on the point, we found nothing suspicious about the fact that Mr Ebben had not dealt with Luca Hurle's drowning in the first draft of his report. But in one important respect, we thought his evidence to be incomplete. The gap related to what we found to be a "near miss" incident concerning a young boy. We refer to him as "Child T". Mr Ebben's opinion appeared to us to be have been based on uncertainty as to whether this incident had happened or not. In Mr Ebben's words, the evidence relating to Child T was "hearsay". This approach did not cause us to doubt Mr Ebben's independence. It did, however, mean that we did not have the benefit of Mr Ebben's opinion based on the respondent's version of the facts, namely that the Child T incident had happened. The most we have from Mr Ebben about his opinion based on that version of the facts comes from an answer he gave in cross-examination. On the assumption that the Child T incident did happen, Mr Ebben said that "it does not help the appellant". It is unfortunate that Mr Ebben did not address this contingency in more detail in his report. Where it appears to an expert that the underlying facts are in dispute, the expert should generally express an opinion on both versions of the facts. Had we found that the Child T incident did not occur as the respondent alleged, this slip would not have mattered. But, as we later explain, we found that the incident did happen and it is relevant to assessment of the risk.

31. Mr Ebben is a wheelchair user. Because of his mobility restrictions, he could not physically enter the pools as a bather and attempt to simulate the actions of a non-swimmer. He considered whether to ask someone to undertake that exercise for him, but thought it would be of limited value, because it would be hard to evaluate their subjective experience scientifically. We thought this to be a perfectly reasonable point of view, but what it did mean was that Mr Ebben did

not have the same direct experience of Mr Blythe of what it was like trying to keep his feet on the main slope of the pool.

Facts

32. Swimming is a leisure pastime popular with adults and children of all ages. In the United Kingdom there are some 4,000 swimming pools open to the paying public and approximately a further 4,000 swimming pools, such as hotel pools, open to a restricted group of customers. An inherent risk in the operation of swimming pools is death by drowning. The risk, unless carefully managed, is more acute in non-swimmers and more pronounced still in children. Fortunately, deaths by drowning are relatively rare. Nationwide, about 6 children drown each year.

33. According to data published by the Royal College of Paediatrics and Child Health, the mid-centile height of a 5-year-old boy is 110cm. Amongst ten-year-old boys, the mid-centile height is 135cm. This means that, in 105cm of water, a typical 5-year-old boy would be out of his depth, that is to say, he would not be able to stand on the pool floor and breathe. A typical 10-year-old would be out of his depth in 130cm.

34. The appellant owns estates of land in South Cumbria, including a stately home and Old Park Wood Caravan Site, Cark-in-Cartmel, and Longlands Caravan Park, Kirkby-in-Furness. Each site is for privately-owned static caravans.

35. At each caravan site there is an indoor swimming pool. The pools are not open to the paying public. They are for the use of caravan owners and their guests. Caravan owners use the site on terms that they must not sublet to others. The rule was ineffective to prevent sub-letting occurring in practice.

36. The pools were built in the 1980s. Each is of a very similar design. Both underwent significant alteration in 2016. The Old Park Wood pool is 12.1m long and 6m wide. It has a shallow end, approximately 3.5m long, where the water depth is 0.8m. After 3.5m, the pool floor slopes downwards at a gradient of 1 in 4.8 towards the deepest point. At the deep end, the pool depth starts at 1m, but slopes steeply downwards at a gradient of 1:1.3 (45 degrees) until it reaches the pool bottom. There are slopes of similar gradient leading down from the pool sides near the deep end. This creates a “hopper” effect, with the pool floor at its deepest point being surrounded by slopes up towards the edges of the pool.

37. Prior to 2016, at the bottom of the slopes, the Old Park Wood pool was 2 metres deep. By the time the prohibition notice was served, the pool floor had been raised to 1.4m, but with the surrounding slopes remaining at their existing gradients.

38. There ingress and drainage system of each pool is such that there is no significant current of water from the shallow end to the deep end.

39. The Longlands pool is very similar in design. At its deepest point, the pool was 2m, but is now 1.35m. The other dimensions are very similar to Old Park Wood. They are not identical, but it is common ground that the difference is immaterial to the risk.

40. These two pools are similar in design to “a number” of pools across the country. We were not told what the actual number is. We accept Mr Ebben’s evidence that fatalities associated with these pools is low, although we did not understand Mr Ebben to be saying that the number of fatalities is lower than in pools of different design. We do not know whether there have been “near misses”

(children being rescued or resuscitated after getting into difficulty) at such pools or, if so, how many such incidents there have been.

41. The appellant's pools have never been supervised by a trained lifeguard, or indeed supervised at the poolside by any member of staff. Instead, at all relevant times, both swimming pools were monitored using CCTV cameras. At Old Park Wood, the CCTV monitor screens were placed in a building housing the combined site office and shop. The member of staff responsible for checking the screens would routinely be occupied with welcoming guests, checking them in, office administration and answering the telephone. The office/shop building was about 350 metres away from the pool house. If the office staff member happened to see an incident on the CCTV, it would take him or her about 5 minutes to walk to the pool house. Taking a short cut across the grass, it might take 4 minutes. At Longlands, the swimming pool and office were situated in the same building. The member of the office staff had no direct view of the pool. His or her day-to-day tasks were of a similar nature to those at Old Park Wood.

42. At both sites, whilst the pools were open, there would usually be two members of staff on duty at the sites. One of these would be staffing the office and shop. The other would usually be working on the grounds, doing work including grass-cutting with a mechanical mower. Each site had a two-way "walkie-talkie" radio system enabling the staff members to speak to each other. If the office staff member spotted an incident on CCTV, the response time of the colleague would depend on where on site they happened to be and what they were doing.

43. Both swimming pools are equipped with an audible alarm system. The alarm is activated by pressing a button near the poolside. It sounds in the office/shop.

44. Mr Blythe is an Environmental Health Officer employed by the respondent. Part of his role covers health and safety in employment within the respondent's Council area. He has been interested in these swimming pools since 2008.

45. On 26 September 2008, Mr Blythe wrote to Ms Ratcliffe, the Old Park Wood Site Manager, noting that an alarm was to be installed in the pool hall. He advised that their risk assessment should focus on the danger of drowning. He recommended that the appellant buy a long rescue pole and a copy of HSG 179.

46. On 2 December 2008, Mr Blythe, responding to an earlier letter from the appellant's Chief Executive, advised that there was no absolute requirement to reduce the gradient of the pool floor. His letter did, however, list the criteria for determining whether poolside supervision was required. He advised that the appellant's risk assessment should reflect the HSG 179 guidance.

47. On 17 March 2010, Mr Blythe inspected the pool at Old Park Wood. He spoke to Ms Ratcliffe, who had prepared a written risk assessment. It appeared to him that she was "laying out a system that had been well thought through". He was persuaded that the appellant had taken measures that could comply with HSG 179. At around that time, he was expecting that HSG 179 would be revised to include reference to CCTV and how it could be used to mitigate against risk. As we have already recorded, he did not believe that CCTV offered protection equivalent to constant poolside supervision. At any rate, he could not have seriously believed that the CCTV at Old Park Wood offered that protection.

48. Following his visit, Mr Blythe wrote a letter dated 15 April 2010 to the appellant's Estates Manager, Mr Carroll. The letter stated, amongst other things:

> "The measures in place to prevent drowning are in accord with the guidance in HSG 179… The distance from the office where the CCTV screen is located presents some challenge in providing a prompt response in case of emergency. However, I noted a system in place to contact staff located closer to the pool by means of walkie-talkies. This would appear to provide a reasonably practicable safety regime, considering the other measures in place to minimise the likelihood of persons drowning."

49. At no point prior to sending the 15 April 2010 letter had Mr Blythe entered either swimming pool as a bather. He had not taken measurements and had not measured the gradient.

50. Mr Blythe inspected the Longlands pool on 8 June 2011. Following his visit, Mr Blythe wrote a letter dated 20 June 2011 to the Site Manager at Longlands. He noted the existing risk control measures including restrictive rules, CCTV, profile signage and life ring, but observed that:

> "…your pool is 6'6" deep and steeply sloping in places. The guidance would recommend that steep slopes are removed as a gradient greater than a 1 in 15 can lead non-swimmers out of their depth. I would therefore recommend that you look to reduce this gradient and the depth should it prove to be practicable, especially if you are carrying out refurbishment or significant maintenance of the pool…"

51. On 3 January 2012, Mr Blythe wrote to Ms Ratcliffe about the Old Park Wood pool. He listed the control measures that could be put in place as alternatives to the provision of a lifeguard. The letter commented on the steep gradient of the pool's mid-section, recommending that the gradient be reduced "if practicable" and, if not, to consider how the Normal Operating Procedure and Emergency Action Procedure worked in practice.

52. Mr Blythe did not at this stage consider issuing either an improvement notice or a prohibition notice. This does not mean that he was not concerned about the risks posed by the pool profile. Rather, he thought that the best way to achieve compliance was by dialogue with the appellant.

53. After January 2012, Mr Blythe did not correspond with the appellant, or visit either site, for another 4 years. This does not mean that Mr Blythe was satisfied with the level of risk. Rather, he was hampered in his ability to do anything about it. In 2012, the respondent, along with other local authorities, received instructions from the Health and Safety Executive that they should cease visiting premises unless responding to an incident or complaint. As a result, from January 2013, the respondent ceased all routine inspections.

54. The circumstances in which Mr Blythe next visited the pool are very sad indeed. On 8 August 2016, a four-year-old boy named Luca Hurle went to the Old Park Wood pool with his father. The family had sublet a caravan at the site. Whilst bathing Luca's father noticed Luca submerged under the water without any buoyancy aids. He brought Luca to the surface, by which time he was unconscious. Efforts were made by staff to revive him and he was airlifted to hospital, but he could not be saved. The subsequent inquest found that the cause of death to be a hypoxic brain injury by drowning.

55. Following Luca's death, both the respondent and the police carried out investigations. Luca's father told the police that the last time he had seen Luca before he became submerged, Luca had been wearing buoyancy aids.

56. Mr Blythe took measurements. He entered the pool as a bather and tried to mimic the actions of a non-swimmer in the shallow end. He bounced from the shallow end onto the sloping mid-section. Once his feet were on the slope, he found it difficult, even as an adult, to stop himself being drawn into deeper water. He believed that the effect on a young child would be more pronounced: they would be more buoyant in the water, would exert less force against the pool floor and would be less able to climb back up the slope by putting their feet on the floor.

57. One of Luca's rescuers was the partner of the Night Warden. We will call her "Mrs W". Whilst Mr Blythe was carrying out his investigation, Mrs W approached him and asked him if he had authority to be on site. A conversation followed in which Mrs W mentioned an incident that had happened about 5 years previously, when her own son had nearly drowned. Her son was Child T, to whom we have already referred. At the time of the incident he had been 5 years old. He and Mrs W had been in the Longlands pool when Mrs W had noticed him lifeless under the water. She had brought him to the surface and resuscitated him. Mrs W told Mr Blythe that, when she asked him how he had got into difficulty, he had replied that he had slipped down the slope. Later Mrs W made a formal witness statement confirming her account.

58. We were unable to reach any precise finding about how Luca Hurle became submerged. The investigation was inconclusive. It is possible that he slipped down the slope. It is also possible that he jumped or fell into deep water from the poolside.

59. By contrast, we find as a fact that Child T became submerged when he slipped down the slope of the Longlands pool. This finding is contentious and involves accepting evidence given by multiple removes of hearsay. We therefore explain our reasoning in more detail than we would otherwise:

    59.1. We believed Mr Blythe about what Mrs W told him. Mr Blythe could not have got away with misrepresenting her words. They were recorded in a signed written statement. Though we have not seen the statement for ourselves, we are sure that Mr Blythe would have been challenged if the statement were materially different from Mr Blythe's account of it.

    59.2. We think it highly unlikely that Mrs W would have misrepresented to Mr Blythe what Child T had told her. She was effectively blowing the whistle on her partner's employer. She must have been aware of the adverse consequences to her partner of raising an issue that could jeopardise the operation of a pool by her partner's employer.

    59.3. We also think it is likely that Child T told the truth when he told his mother that he slipped down the slope. That fact would have been vivid in his mind at the time.

60. There was no mention of the Child T incident in the appellant's accident records.

61. Part of Mr Blythe's investigation involved looking at the appellant's written procedures. He examined the respondent's risk assessment for the Old Park Wood pool. On reading it he was alarmed to discover that it had not anticipated the risk of drowning.

62. On 2 September 2016, Mr Blythe served on the appellant an improvement notice in respect of each swimming pool. The notice stated Mr Blythe's opinion that the

respondent was in breach of the Management of Health and Safety at Work Regulations 1999, essentially because of its failure to assess the risk of persons drowning. Compliance measures were set out in the notice. In summary, those measures consisted of adequate risk assessment, information and training and routine checking of control measures to mitigate the danger of drowning. Mr Blythe did not think it necessary to serve a prohibition notice at that time. Following Luca Hurle's death, the appellant had closed the pools and had no present intention of re-opening them.

63. Following service of the improvement notices, the appellant set about making structural alterations to the Old Park Wood pool to improve its safety. Mr Carroll, the appellant's Estates' Building Surveyor, oversaw the project. He obtained quotations from specialist swimming pool contractors. One possibility that was considered was to reduce the pool gradient by excavating into the "hopper" sides of the pool. Mr Carroll's opinion was that this solution was unworkable. The steeply-sloping floors from the poolside and deep end were necessary for the pool's structural integrity. Moreover, undermining the pool structure would potentially compromise the whole pool house because of the close proximity of the pool to the foundations of the building. Another suggested solution was to lengthen the pool, thus allowing a shallower gradient whilst preserving the maximum depth at 1.4 metres. By Mr Carroll's calculation, in order to achieve a gradient of 1:15, the pool would have to be so long that it would not fit inside the pool house.

64. Eventually Mr Carroll opted to fill in part of the deep end so that the maximum depth was reduced from 2 metres to 1.4 metres. The works were carried out by Correct Flow, a specialist pool contractor. In addition to raising the floor of the deep end, the contractors fitted a strip of dark tiles in clear contrast to the light-coloured tiles of the pool floor. The dark tile strip was at the top of the main slope. Contrary to Mr Blythe's later belief, the tiles on the pool floor were of Category C non-slip design. Category C is the most slip-resistant class of tile, although degrees of slip resistance vary considerably within that category. New signs were placed around the pool hall to indicate the pool gradient. A similar modification was carried out at Longlands. The works came at a cost of £26,000.

65. The new pool profile worked to the advantage of non-swimmers who were more than about 145cm tall, that is, taller than the average 10-year-old boy. What it did not do, however, was alter the gradient of the main slope, which remained at approximately 1:4.

66. The appellant continued to correspond with Mr Blythe, who sought assurances that the pool would not be re-opened until the measures specified in the improvement notices had been put in place. On 21 November 2016, Mr Blythe e-mailed the appellant, continuing to express his concern at the retention of the steep gradient.

67. Beside raising the floor of the deep ends, the appellant took the following steps in order to comply with the improvement notices:

    67.1. They updated their Pool Safety Operating Procedures;

    67.2. They updated their risk assessments for the pools to include the risk of drowning;

    67.3. They updated their corporate Health and Safety Policy;

67.4. They placed new signs around the swimming pools, indicating the new depths;

67.5. They put in place new daily checklists; and

67.6. They made improvements to the pool emergency alarm system.

68. Both pools re-opened on 13 April 2017.

69. On 28 April 2017, Mr Blythe attended both pools once more. He took further measurements and re-calculated the gradient of the main slope. Having done so he discovered that the gradient remained as steep as it was before. He saw the new line of dark tiles at the top of the slope. This time he did not enter the pool as a bather, but instead reached in and felt the surface of the dark tiles on the pool wall. Unsurprisingly, they were slippery to his touch. Mr Blythe assumed, wrongly, that the tiles on the pool floor would be of the same specification. He did not test them for himself. Instead, he asked the appellant to provide the written specification of the dark pool tiles. The specification was not provided. This reinforced Mr Blythe's belief that the new dark tiles were slippery. In fact the appellant's reticence is more likely to have been explained by their defensive stance towards Mr Blythe's increasingly enforcement-based approach.

70. On 12 May 2017, Mr Blythe revisited both caravan sites. This time he came armed with a prohibition notice which he served on the appellant. The prohibition notice for Old Park Wood was in the following terms (with slight reformatting):

> "I … am of the opinion that the following activity, namely:- the use of the swimming pool by non-swimmers who are a height such that they would be at risk of drowning in a water depth of 1.4 metres…involves a risk of serious personal injury, and the matters which gave rise to the said risks are: a steeply sloping mid-section in this swimming pool, occurring in a depth of less than 1.5 metres, coupled with a lack of poolside lifeguard supervision because the above combination of steep gradient (from 0.8 metres depth to 1.4 metres) coupled with the lack of poolside supervision presents a serious risk of drowning to those children and adults who cannot swim and who also cannot safely stand up in the deep end (1.4 metres depth). The other protective measures in place have not been decided from a suitable risk-assessed approach, in that the particular risks at this pool and site have not been properly taken into account. The current arrangements do not ensure that persons in difficulty in this pool will be detected and rescued or resuscitated in a timely manner."

71. The notice went on to summarise HSG 179 and then alleged a breach of section 3(1) of HSWA, and breaches of regulations 3(1)(b) and 5(1) of the Management Regulations.

72. The prohibitory words were contained in the following passage:

> "And I hereby direct that the use of the swimming pool by non-swimmers who are a height such that they would be at a risk of drowning in a water depth of 1.4 metres must not be carried on by you or under your control unless the matters above have been remedied."

73. On the second page of the notice were a series of explanatory notes. One of these was headed, "Time limit for appeal". It stated:

> "A notice of appeal must be **sent** to the Employment Tribunal within 21 days **from** the date of service on the appellant of the notice, or notices, appealed against, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the notice of appeal to be presented within the period of 21 days"

74. We have highlighted the words, "sent" and "from". They misrepresented the statutory language. Rule 1(1) made clear that, order to be validly presented, the appeal had to be *delivered* within the time limit, and not merely *sent.* The word "from" might have led an inexperienced reader to think that the last day for delivery was 2 June 2017 and not 1 June 2017.

75. The Longlands prohibition notice was identical in all relevant respects.

76. By the time the notices were served, the appellant had already instructed DWF LLP solicitors. DWF is a large, multinational firm. It has offices in various UK cities including Liverpool and Manchester. At a rough estimate it has some 1,000 staff. The solicitor dealing with the appellant's file was Mr Gary Smith, the Director of Regulatory Litigation and a specialist in health and safety cases. He was based at the Liverpool office. Just prior to serving the notices, Mr Blythe e-mailed Mr Smith with a draft copy, announcing his intention to serve them. Immediately on learning about the prohibition notices, Mr Smith drafted a long e-mail setting out his advice on the next steps to be followed.

77. The appellant had the benefit of a legal expenses insurance policy with Royal Sun Alliance (RSA). Mr Smith promptly informed RSA of the appellant's wish to appeal.

78. The first occasion on which Mr Smith could travel to the Lake District was 18 May 2017. He met with Mr Gibb of the appellant. They agreed to instruct an expert and counsel. Accordingly, on 23 May 2017, Mr Ebben was instructed and Mr Kay QC, who now represents the appellant, was instructed the following day.

79. In order for RSA to fund the appeal it was necessary to obtain counsel's opinion. The first opportunity for Mr Kay and Mr Ebben to meet with the appellant was on 30 May 2017. That conference took place. On 31 May 2017, RSA gave approval to proceed with the appeal. Mr Kay settled the grounds of appeal and e-mailed them to Mr Smith during the afternoon of 31 May 2017.

80. Mr Smith mistakenly advised Mr Gibb that the last day for presenting the appeal would be 2 June 2017. As has now been conceded, the last day was in fact 1 June 2017.

81. At this time there was a regime of charging fees for bringing employment tribunal claims including statutory appeals. Mr Smith took the view that he would not be able to present the appeal online and would therefore have to pay the fee by cheque. He decided to post the claim form and cheque to the Central Processing Facility in Leicester. The claim form was delivered to the Central Processing Facility by post at 8.10am on 2 June 2017.

82. Since the prohibition notices were served, both pools have remained closed. The notices themselves did not require complete closure, only exclusion of non-swimmers of short stature. But the appellants did not think such an exclusion could be effectively policed.

83. The appellant made some enquiries into the possibility of employing a lifeguard. They did not recruit one. In their opinion it would have been difficult to recruit an employee with a driving licence, as their main workforce would be likely to be students on holiday. Without a driving licence they would not be able to travel between one caravan site and the other.

84. According to Mr Ebben's estimates, it would cost between £50,000 and £80,000 per year to employ one lifeguard to keep a pool supervised for 7-8 hours per day, assuming that the pool was closed on days when the lifeguard was not on duty. Mr Ebben did not state where in that range the cost of a lifeguard would be for this appellant. In our view, the cost is likely to be dependent on geographical location. Using our own general knowledge of wage costs in the North West, we would expect wages South Lakeland to be at the lower end of the range. Mr Ebben's estimated range does not distinguish between lifeguards trained to perform deep water rescue and lifeguards who only need to rescue in shallow water. It also assumes a working day of 7 to 8 hours.

Conclusions – time limit

85. We are satisfied that it was not reasonably practicable for the appellant to present the appeal until the conference with counsel and Mr Ebben on 30 May 2017. It is not suggested by the respondent that the appellant "dragged its heels" throughout the whole twenty-one day period. The appeal was funded in stages by Royal Sun Alliance. It was not reasonably practicable to proceed with the appeal until funding approval had been obtained. Approval depended on counsel's opinion given at the conference. It was not reasonably practicable to arrange the conference before 30 May 2017.

86. We do, however, consider that it was reasonably practicable for the appellant to present the appeal on 31 May or 1 June 2017. Here are our reasons:

    86.1. The appellant had retained a large multinational firm of solicitors. The fee earner with conduct of the case was a specialist in health and safety cases.

    86.2. It was reasonably practicable for the respondent, who, to know that the last day for presentation was – or at least could be – 1 June 2017. The phrase, "beginning with" is a very common formulation in statutory provisions setting time limits for employment tribunal claims. It is well established that, where a time limit is expressed to expire at the end of a period of time "beginning with" a particular event, the date of the event counts as the first day of the limitation period. Any solicitor conducting employment tribunal proceedings could reasonably be expected to know of this interpretation.

    86.3. It is unfortunate that the prohibition notice expressed the time limits in wording that was different from the actual rule 105. To the untrained eye, the notice could easily be read as meaning that the first day of the 21-day period did not count in working out the deadline. But in our view, rule 105 is clear enough to make it reasonably practicable for an experienced solicitor not to be misled by the wording of the notice.

    86.4. We imagine for a moment the possibility that we might have set the bar too high for health and safety solicitors. We have considered the possibility that the most that could be reasonably expected of them is to realise that the time limit provisions were ambiguous. In that case, they could reasonably be have expected to have considered that the last day for presentation might be

1 June 2017 and might be 2 June 2017 depending on how rule 105 fell to be interpreted. Faced with such ambiguity, and the serious consequences of presenting an appeal too late, the appellant's solicitors could reasonably have been expected to take the safer course, namely to present the appeal on the earlier of the two dates.

86.5. The fact that the appellant's solicitors were waiting for leading counsel to settle the grounds of appeal did not stop it from being reasonably practicable to present the claim. The appellant's solicitors could have had issued a protective appeal with basic grounds of appeal, followed by further and better particulars once they had been prepared by counsel.

86.6. Even if it was not reasonably practicable to present the appeal without leading counsel's draft grounds, that does not explain why the appeal could not reasonably have been presented between 3.30pm on 31 May 2017 and midnight on 1 June 2017. The claim form could have been posted to the central processing facility on the afternoon of 31 May 2017 with guaranteed next-day delivery. The appellant's solicitors could have arranged for a private courier to deliver the claim form to the central processing facility on 31 May 2017 or 1 June 2017. Or the papers could have been scanned and e-mailed to the appellant's solicitors' Manchester office for hand delivery to the tribunal's Regional Office. If need be, a junior employee or agent of the appellant's solicitors could reasonably have delivered the claim form in person to the central processing facility.

87. It having been reasonably practicable for the appellant to have presented the claim within the time limit, we have no power to extend the deadline. The tribunal therefore has no jurisdiction to consider the appeal.

Mr Ebben's evidence revisited

Mr Ebben's opinion

88. Mr Ebben's expert opinion was that the pools were safe. His starting point was that the pool operation must have been safe in 2010:

> "4.34 Given that, in the correspondence in 2010, it was explicitly stated by Mr Blythe that safety arrangements were satisfactory and, in his subsequent correspondence, that when refurbishment work was needed, the gradient could be reviewed, there was no apparent urgency or indeed requirement for Holker to make any significant changes.
>
> 4.35 Had there been any concern about bather safety, I would have expected the Council to have taken action whereas, between early 2012 and mid-2016, the Council seemingly took no apparent interest in the activities at either pool."

89. Mr Ebben went on to outline the apparent concerns at the time of the improvement notices and the steps taken to address them. He surmised, at paragraph 5.4, that, "Given the Council had previously written to Holker Estates stating, against a background of the structure of the pool having not changed, that they considered existing physical controls to be satisfactory, the focus of the Council's action must have been simply to ensure that the assessments were completed."

90. At paragraphs 5.5 to 5.8, Mr Ebben outlined the steps taken by the appellant (listed at paragraph 67 above), together with the in-filling of the deep end to reduce the maximum depth to 1.4 metres. He observed that it was not reasonably practicable to create a wholly flat-bottomed deep end and that it had been "indicated" that it was not reasonably practicable to change the gradient.

91. This brought Mr Ebben to his opinion which lies at the heart of this case:

> "5.9 Against this background, I consider that a wholly reasonable approach was to ensure that the level of risk of drowning was significantly reduced and although the steeper gradient remained it was over a much reduced distance. This had the effect of reducing its impact, especially as it led to a water depth that was shallower than that required in HSG 179 for an unsupervised pool.
>
> 5.10 HSG 179 recognises that it is not always possible to change a pool profile to meet gradient criteria and taking account of this, signs alerting bathers to the gradient were also displayed at the pools by Holker. To have changed the gradient was not reasonably practicable and indeed, Mr Blythe had already recognised in his letter to Holker of 3rd January 2012, that this might not be practicable to achieve.
>
> 5.11 The measures taken as set out in 5.5 above, together with the re-profiling of both the pools and other control measures already in place including access restrictions, alarms and CCTV, mean, in my opinion, that at the time immediately prior to the service of the Prohibition Notices the pools met the requirements of HSG 179 for operation without constant supervision.
>
> …
>
> 5.21 …Alternative controls by way of signposting and warnings were put in place. Additional access controls and a requirement for non-swimmer [flotation] devices to be worn were also implemented.
>
> 5.22 I have to conclude therefore that the subsequent serving of the Prohibition Notices by the Council upon Holker was wholly inappropriate, unnecessary and unreasonable."

92. We have examined Mr Ebben's view carefully against our findings of fact and have come to the view that we cannot agree with it.

93. We remind ourselves that we do not have to follow the opinion of an expert but we have to give due regard to the expert's expertise and we have to have a carefully reasoned basis for disagreeing with it. Here is why our view ultimately parted company with that of Mr Ebben.

<u>Underestimate of the risk posed by the main slope</u>

94. Our first reason is that we think Mr Ebben underestimated the risk posed by the main slope in drawing children out of their depth. This is for a number of reasons, for which Mr Ebben himself should not be regarded as personally at fault.

    94.1. *Measurements by themselves inconclusive.* This was not a case where measurements alone would dictate whether the pool profile was safe or unsafe. Mr Ebben accepted that, if the main slope was sufficiently steep, the risk of children being drawn into deep water would be sufficient to demand constant poolside supervision. He would not be drawn on what severity of gradient, in numerical terms, would bring a pool into that category

of risk. His reticence, no doubt, was a recognition that there are many factors that determine the degree of risk that any particular pool poses. Evidence of risk must be based on the features of the particular pools in question.

94.2. *Measurements relevant to degree of scrutiny*. In the appellant's pools, the main slope is nearly 4 times as severe as that recommended by HSG 179 for a new pool. In those circumstances, there needs to be careful scrutiny of all the evidence suggestive of risk. We would expect an evidence base for any opinion that the pool is safe for unsupervised bathing.

94.3. *Observational evidence pointing towards danger*. Neither Mr Ebben nor Mr Blythe had evidence based on observation of other bathers using the appellant's pools. This is not a criticism of either professional: it would have been hard for Mr Blythe to time his visit to coincide with that of a non-swimmer and, by the time Mr Ebben first visited either pool, they had both been closed. Be that as it may, it meant that neither of them had seen for themselves whether children tended to get into difficulty or not. Neither Mr Ebben nor Mr Blythe were shown any recorded CCTV footage of children using the pool. Mr Blythe did, however, have direct experience of trying to keep his feet on the main slope. For entirely understandable reasons, Mr Ebben did not have that advantage. We agree with the respondent that, if Mr Blythe found it difficult to keep his feet, it would have been more difficult still for a child. To avoid any doubt, we did not see the need for expert evidence to prove this fact: it is a conclusion that we were able to reach using our own knowledge and common sense.

94.4. *Gaps in evidence based on experience of other pools*. Mr Ebben was able to draw on his experience of "a number" of pools of similar design. We were not able to attach much weight to conclusions based on that experience, because we were not told about any evidence of near misses, or any observation evidence, that would tend to show whether or not pools of this type presented a danger. Moreover, we did not know what control measures were in place for these pools, particularly whether or not they operated with or without poolside supervision.

94.5. *Overstating the relevance of the change in depth from 2016.* Mr Ebben believed that the change in the pool depth from 2 metres to 1.4 metres reduced the "impact" of the gradient and "significantly reduced" the risk of drowning. It is true to say that the reduced depth slightly improved the level of risk: if a child is spotted submerged in water of 1.4 metres depth, an adult rescuer can bring the child to the surface whilst standing on the pool floor. But that is only any use if the child is spotted before it is too late. The reduced depth may also help non-swimmers who are 140cm tall; they can stand on tiptoe and still breathe. But the impact on risk was relatively trivial. People over 1.4 metres tall are not typically the people at greatest risk of drowning in a swimming pool. It is the under-10-year-olds who are least likely to be non-swimmers and most in danger. For example, at a depth of 1.4 metres, Luca Hurle and Child T would still have become submerged.

94.6. *Drawing conclusions from a mistaken premise* – Mr Ebben relied on the fact that no action had been taken between 2012 and 2016 as an indicator that the respondent must not have believed that the pools were hazardous. In fact, as we have found, the lack of action was because of a

centralised change in policy and not because Mr Blythe thought the pools were safe.

94.7. *Taking an irrelevant factor into account – absence of reported incidents.* Mr Ebben drew some support from the absence of reported incidents. That in our view was an irrelevant factor because the absence of reported incidents was, in our view, no reliable indicator about whether dangerous occurrences had occurred. There was no report or record of the Child T incident, yet we found that it had happened. Even if were not for the Child T incident, we would question whether the appellant's system of recording and reporting dangerous occurrences, up to 2016 at any rate, was capable of being relied on as an indicator of risk. Here we draw an inference adverse to the appellant from its risk assessment at the time of Luca Hurle's death. It seems to us elementary that a proper risk assessment of a swimming pool would include the risk of drowning. The fact that that risk was not identified suggests to us a lack of awareness up to 2016 of the dangers of children being drawn into deep water. If the appellant had not thought about that risk, they are less likely to have noted any incidents that would be relevant to it.

94.8. *Relevant fact not taken into account*. Linked to this point is that Mr Ebben's opinion was based on a different version of the facts than the version we have found. In particular, as we have already observed, Mr Ebben did not take it to be a fact that the Child T incident had occurred. At best, he thought that it was a possibility, the evidence for which was based on hearsay. In our view the Child T incident is highly relevant. A 5-year-old child slipped down the main slope of the Longlands pool and was drawn into deep water where he became submerged and would have died had he not been rescued and resuscitated by his mother. To our minds, this near-miss says more about the risks posed by the slope of the appellant's pools than general experience of other pools of similar design.

95. We should add that there is one factual dispute, relevant to Mr Ebben's oral evidence, which we resolved in favour of the appellant. As we found, the tiles at the start of the main slope were slip-resistant. In his oral evidence, Mr Ebben stated that this fact made it less likely that non-swimmers would be drawn down the slope. In our view, Mr Ebben cannot have thought of this as a particularly important factor. Had he believed that the non-slip tiles significantly lessened the danger, we would have expected him to say so in his report. If he had expressed that opinion, we would have had difficulty in accepting it. Slip-resistant tiles are not the answer to a dangerous slope. HSG 179 does not include slip-resistant tiles as one of the control measures for steep gradients (Table 1, paragraph 6.2). And, where a buoyant child is bouncing down a slope, they could easily bounce out of their depth even if their foot could grip the tiles.

96. Had Mr Ebben prepared his report based on the facts as we have found them, and not over-relied on the change in depth, we think he is likely to have believed that the severity of the main slope was something that would require very significant control measures to bring the risk of drowning to an acceptable level.

<u>Overestimate of the effectiveness of control measures</u>

97. This brings us to our second area of disagreement with Ebben. We think he overestimated the extent to which the measures at paragraph 5.5 of his report

and the requirement for flotation devices would reduce the risk to an acceptable level.

97.1. *Not taking into account difficulties in rule enforcement.* In his answers to questions, Mr Ebben quite properly acknowledged that pool rules were only effective to reduce risk if they could be effectively policed. We found that the appellant's own view was that its existing systems could not operate to ensure that a small non-swimmer would not use the pool. If they could not enforce a rule against non-swimmers, or a height restriction, it is difficult to see how they could enforce other rules designed to ensure safety. How, for example, could they ensure that children used flotation devices? Luca Hurle may well have removed his flotation aids without his father noticing. How could they ensure that the pool did not get too crowded, to make it more difficult for parents to see what their children were doing? Similar weaknesses were exposed when Mr Johnson took Mr Carroll through the list of factors at paragraphs 187 and 188 of HSG 179 (factors relevant to whether constant poolside supervision is required). It was hard to see how the appellant would be able to police restrictions designed to make unsupervised bathing safer.

97.2. *CCTV and Old Park Wood.* The second way in which the control measures were overestimated was that they failed to take into account the unusual circumstances prevailing at Old Park Wood. Most of the examples that Mr Ebben gave in the course of his evidence related to hotels where, we would imagine, the pool is close to the people who are monitoring its use. (We recognise that Mr Ebben did also give an example of a site similar to Old Park Wood where he was content that the arrangements were adequate). In Old Park Wood the pool hall was approximately a four-minute walk away from the CCTV monitoring station. The CCTV in our view was virtually useless as a means of spotting a child in difficulty. It had some value as a tool to enforce rules, but the delay in attending the pool house would mean that it would be difficult in practice; even if an infringement was spotted immediately at Old Park Wood there would then be a four-minute minimum delay until help could arrive unless by chance somebody within radio distance happened to be nearer. All that assumes that the infringement was immediately spotted and that was less likely the more other duties the monitoring staff had to do.

97.3. *Reliance on the appellant to administer the control measures.* The conclusions expressed in Mr Ebben's report appeared to assume that the appellant would give a high priority to ensuring that measures identified in the risk assessment would actually be operated in practice. That was not an assumption we were prepared to make. It appeared to us that the appellant had not demonstrated that pool safety was a high priority. Until Luca Hurle's death it had not even identified the risk of drowning.

97.4. The improvements to the alarm system, identified as a control measure, would only improve the chances of rescue once a submerged child had been spotted; they would do nothing to prevent a child becoming submerged unnoticed. The updated risk assessments for the swimming pool would not by themselves alter the risk. It was only the consequent measures taken by the appellant that would reduce the danger. Safety signs are another control measure identified by Mr Ebben as effective to reduce the

risk to an acceptable level. We agree that they would have some effect, but its utility is likely to be marginal. Children aged under 10 could not be relied on to read the profile signs at all, let alone to deduce from them that the main slope could lead them into deep water. Parents and guardians might take more notice, but, as Mr Ebben conceded, the appellant has to expect that parents will make mistakes.

Reasonable practicability

98. The third area where we disagree with Mr Ebben is in the extent to which he has considered what alternatives were reasonably practicable. He appears to have taken at face value the appellant's assertion that the gradient could not practicably be reduced to 1:15. In fact, the gradient could be reduced to 1:15 for both pools, down to an approximate depth of 1.4m, without having to lengthen the pool. What would be lost would be the flat bottom of the deep end, but we do not see why this would matter.

99. It would not be reasonably practicable to eliminate the pool's sloping "hopper" sides because of the possible effect on the pool's structural integrity. But in our view that obstacle would not stop it being reasonably practicable to alter the gradient of the main slope. It is the main slope that the respondent identified as being the principal cause of risk. Although the covering letter served with the prohibition notices did refer to the hopper sides, there is nothing in the prohibition notices themselves which identifies the hopper sides as presenting the risk of drowning. Again, we think that this accords with common sense for the reasons given at paragraph 24 above.

100. Mr Ebben did not express a definitive view on whether the provision of a life guard was reasonably practicable. He set out the cost, which is clearly a highly relevant consideration, but his estimate is based on the provision for 7 to 8 hours per day of a lifeguard who would follow a typical full-time working pattern. We think that it is unlikely that the pools would be used for all of that time. They do not need to be open to children all day. The appellant, if it wished, could have family swim sessions and adult-only swim sessions. A supervisor would only be required for the family sessions. The supervisor would not necessarily need to be a fully-trained or fully-qualified lifeguard. This is because they would not need to carry out deep water rescues. They would not need to be employed on full-time hours, because of the possibility of restricting family swimming sessions to a short period each day, or possibly no family swimming sessions during off-peak seasons. There would, of course, need to be effective measures to police adult-only swimming, but this could take the form of regular visits to the pool buildings by members of staff already on site.

Conclusions – merits of the appeal

101. For those reasons, whilst giving due regard to Mr Ebben's great expertise, we respectfully disagree with him. We think that the risks were not reduced to an acceptable level by the existing control measures at the time the prohibition notices were served. The only way of making these pools safe so as to eliminate the serious risk of personal injury is either to reprofile the pool by reducing the gradient or to have at certain times of the day a poolside supervisor who is able to keep a constant watch on the pool at times when it is used by children of a height such that they might drown in depths of 1.35 or 1.4 metres of water. In

these circumstances we would have issued the prohibition notices as currently drafted. We would therefore affirm the notices in the same terms.

102. Our main conclusion is that we have no jurisdiction to consider this appeal. In case we are wrong, we would dismiss it.

_____

Employment Judge Horne

14 May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 May 2018

FOR THE TRIBUNAL OFFICE