Claim No. G90MA044
[2021] EWHC 1800 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

Before Mr. David Allan QC, sitting as a Deputy High Court Judge

B E T W E E N :

MR. RUBEN MOREIRA
(A Protected Party by Ms. Susete Araujo,
his Wife and Litigation Friend)

Claimant

- and –

(1) MR. ASHLEY MORAN
T/A ACH Joinery and Building Contractors
and
(2) MR. CHRISTOPHER DUNNE
T/A CD Landscaping and Construction
and
(3) PROLAKEBALLS LIMITED

Defendants

Mr Darryl Allen QC (instructed by Potter Rees Dolan) for the Claimant
The First Defendant appeared in person
The Second Defendant appeared in person
Mr James Rowley QC (instructed by DWF LLP) for the Third Defendant

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J U D G M E N T

INTRODUCTION

1. This claim arises out of an accident which occurred on the 3rd April 2018 at factory premises, rented and occupied by the Third Defendant in Southport. On that date Mr.

Ruben Moreira, who is now 40 years old, was working at the premises with the First and Second Defendants on the construction of an office, when he fell from a mezzanine onto the concrete floor below. He suffered a number of injuries but in particular to his head, sustaining fractures of the skull and injury to the brain. As a result of the effects of that injury he brings this claim by his wife and litigation friend, Susete Araujo.

2. The Third Defendant is a company carrying on the business of reclaiming golf balls from water hazards on golf courses. At their Southport premises the balls are washed, graded and packaged for resale. The Third Defendant entered into an agreement with the First Defendant to build a wooden office on a mezzanine at their premises. The First Defendant is a self-employed joiner and builder. In the months before the accident he sometimes carried out jobs with the Second Defendant who is also a self-employed builder. The Second Defendant agreed to assist the First Defendant on this project. The Claimant was working with them as a labourer.

3. The accident was investigated by the Health and Safety Executive (HSE). As a result of that investigation the First Defendant pleaded guilty to an offence contrary to Section 3(2) of the Health and Safety at Work Act 1974. The Second Defendant was also prosecuted and he pleaded guilty to a breach of Regulation 6(3) of the Work at Height Regulations 2005. As against the First and Second Defendants the Claimant alleges that the accident was caused by their negligence. The First Defendant had a relevant policy of insurance with a maximum cover of £1million. That sum has been paid by his insurers to the Claimant without any admission of liability. The claim

against the Third Defendant alleges a breach of the common duty of care under the Occupiers Liability Act 1957 and negligence.

4. The hearing before me took place as a remote hearing on MS Teams. The Claimant was represented by Mr. Darryl Allen QC, and the Third Defendant by Mr. James Rowley QC. The First and Second Defendants represented themselves. At the beginning of the trial I gave permission for the First and Second Defendants to be assisted in the presentation of their cases by a McKenzie Friend; in the First Defendant's case he was assisted by his father-in-law, and in the Second Defendant's case he was assisted by his father.

THE EVIDENCE

5. A witness statement by the Claimant was served but he did not give oral evidence. A hearsay notice was served stating that the Claimant intended to rely on his witness evidence, but would not give oral evidence due to his cognitive difficulties and current level of symptoms of anxiety. The Claimant was born and brought up in Portugal. His witness statement describes him taking a degree in tourism and then working in travel agencies for about two years. He then started working as a security guard. He married and had two children. In 2015 he and his family came to England. His wife arrived first and rented a room in a house owned by the Second Defendant who offered to give work to the Claimant when the Claimant came to the UK. Soon after the Claimant's arrival he began working for the Second Defendant. These details were all confirmed in evidence from the Claimant's wife, Susete Araujo. From early 2016 the Claimant frequently worked for the Second Defendant save for a period of about one month when he worked in a restaurant at the John Lennon Airport.

6. The Claimant was initially paid in cash by the Second Defendant, but after the Claimant opened a bank account the Second Defendant paid monies due to the Claimant directly into the account. There is no dispute that the Claimant was responsible for any tax or national insurance payments that were due. There is also no dispute that any tools required for jobs were provided for the Claimant by the Second Defendant. The Claimant describes jobs which required working at height and with scaffolding. He describes a job at a school where he was provided with a hard hat and a high visibility jacket. Ms. Araujo states that the Second Defendant provided her husband with work-clothes, namely a coat, boots, gloves and trousers.

7. Mr. Dunne, in his evidence, stated that the Claimant worked for him as a general labourer. He said he charged the Claimant out at £100 a day plus VAT and paid the Claimant £80 a day. He provided the Claimant with any tools the Claimant required. On these building jobs Mr. Dunne controlled what the Claimant did or did not do. He did not send the Claimant on any training courses. He said that he gave the Claimant on-the-job training.

8. In the eight months or so before the accident, the First and Second Defendants worked together on a number of projects. The contract would be obtained by one of them and then the other would work as a sub-contractor. Mr. Moran stated that when he worked with the Claimant, then the Claimant was only ever referred to as a labourer. He says the Claimant was not good at painting, but was better suited to labouring jobs such as moving materials, unloading tools and brushing up. He says that the Claimant had a very basic knowledge of construction.

9. The First Defendant was born in 1981. He states that he studied carpentry and joinery at the Hugh Baird College in Bootle. He worked in the construction industry until about 2016 when he decided on a career change. He undertook a course to become a personal trainer, but having completed the course and started this work he gave it up. In 2017 he set up a small business as ACH Joinery and Building Contractors, undertaking joinery work.

10. The Second Defendant, Mr. Dunne, had worked for many years in the construction industry. He said in evidence that he had undertaken a course in 2007 and had obtained certificates covering first aid, risk assessment, and manual handling.

11. Prior to the work of constructing an office on the mezzanine, the First Defendant had carried out a job for the Third Defendant, which consisted of replacing a fire door. The evidence indicates that, albeit a small job, the First Defendant completed this work satisfactorily. As a result he was invited by the Third Defendant's director, Alec McKernan, to provide an estimate for further work. There were two estimates provided, both dated 2nd March 2018. The first was in the sum of £4,550. The work consisted of constructing an office above the existing office area using carcassing timber for the structure, glass fibre wool for insulation and MDF board for the cladding. In addition the contract provided for the construction of a barrier above the existing toilet and kitchen area consisting of rails clad with MDF board. This was to create an extra storage area. The estimate indicated that the work would take 5 to 7 days and involve two joiners and one labourer. The second estimate was the same as the first except for an additional item of work consisting of adding timbers and

flooring boards above the wash bay. The price was increased to £4,800, but the evidence indicates that it was agreed not to proceed with this extra item of work.

12. Within the trial bundle are a number of photographs, some taken before and some after the Claimant's accident. A flight of steps led up from the ground floor of the premises to the mezzanine. That part of the mezzanine on which the office was to be constructed was used as a storage area. It already had a rail in position at the edge of the mezzanine. At a right angle to this area of mezzanine was a further area of mezzanine. This was the area for which a rail and boarding was to be constructed as part of the contract. There was no protection at the edge of this area of mezzanine. The HSE investigation indicates that at the widest point this mezzanine had a width of 1.95 metres, and at the narrowest point it had a width of 1.35 metres. Prior to the work commencing there was a rail at the top of the flight of stairs which was designed to prevent access to that section of mezzanine without a rail at its edge. Underneath this section of mezzanine were toilets and a kitchen. The access to these facilities was immediately below the unguarded edge of the mezzanine.

13. Mr. Moran began work on the project on the 29th March 2018. This was the Thursday before the Easter holiday. He was joined later on that day by Mr. Dunne. Mr. Moran took with him the timber which was required to build the wooden framework of the office. He stacked the timber on the area of mezzanine which had no guardrail. A photograph shows the stacked timber with an electric cable across this section of mezzanine. The cable went through the rail that prevented access to this section of mezzanine and then continued across the top of the steps.

14. The Claimant was not present on the job on the 29th March 2018. He was on holiday. Mr. Dunne assisted Mr. Moran on the Thursday for about 3 hours. On that day the timber framework was constructed and there is a photograph of the framework before any insulation or cladding had been applied.

15. No work was undertaken on the project over the Easter holiday. On the morning of the 3rd April 2018 Mr. Moran collected windows that were to be installed in the office, and a number of MDF boards for the cladding. He arrived at the Third Defendant's premises at about 10am. Mr. Dunne and the Claimant were already there, having arrived at about 9am. That morning Mr. Dunne had arranged to pick up the Claimant at 8.45am.

16. Mr. Moran had collected approximately 30 MDF boards, each measuring about 8 feet by 4 feet. Mr. Moran had intended to use boards of 9mm thickness, but the supplier had an insufficient number of these boards. Mr. Moran therefore obtained thicker boards, some were 12mm in thickness and others 12.5mm.

17. Following Mr. Moran's arrival at the Third Defendant's premises, it was decided that the MDF boards would be unloaded and stacked on the unguarded section of mezzanine. Mr. Moran lifted each board out of the van and passed it to Mr. Moreira. He lifted each board up to Mr. Dunne, who was standing on the unguarded mezzanine, and Mr. Dunne stacked each board against the back wall. The unloading took about 30 minutes and after it was completed Mr. Dunne set about removing the guardrail which obstructed access to the unguarded section of mezzanine. Mr. Dunne says that Mr. Moreira completed the work of removing the guardrail. Mr. Moran

states that he asked Mr. Dunne to move all the MDF boards from the unguarded section of mezzanine onto the area of mezzanine where the office was to be constructed. He says that Mr. Dunne refused to do so. At this stage Mr. Dunne began moving boards from the stack to the other area of mezzanine to attach them to the timber structure. In the meantime the Claimant had begun to apply insulation to the wooden structure.

18. After Mr. Dunne had moved two or three MDF boards from the stack he noticed that the boards were not all the same thickness. In November 2018 Mr. Dunne was interviewed by HSE inspectors. In the course of that interview he describes his realisation that the MDF boards were different thicknesses. He says that he brought this to the attention of Mr. Moran. He says that together they began going through the boards measuring them. Mr. Moran said that they should choose the boards most similar in thickness. Mr. Dunne stated that he and Mr. Moran began carrying out this exercise when Mr. Moreira offered to help and he took over from Mr. Moran. Mr. Dunne says that he would select a board, remove it and Mr. Moreira, who had been supporting the boards, would lean them back against the wall. Mr. Dunne described how initially they would both be supporting the weight of the boards, but in order to pull out an individual board he required two hands and at this point the Claimant would take the full weight of all those boards which were to the outerside of the selected board. It was as Mr. Moreira was taking the weight of the boards that he was unable to cope with the weight and was pushed off the edge of the mezzanine.

19. In the HSE investigation a statement was taken from a Mr. Jamie Booth dated 27th April 2018. He worked for the Third Defendant cleaning and grading golf balls. In

that statement he says that the first floor, by which he meant the mezzanine, was used for storage and he very rarely went up there. He describes seeing boards being lifted up to the narrower section of mezzanine. At about 11am he saw two men working on the narrower section of mezzanine. One looked as though he was trying to slide a board out. Then Mr. Booth saw the stack topple towards the other man who then staggered back and fell off the mezzanine onto the concrete floor below.

20. Mr. Alec McKernan is one of the two directors of Prolakeballs Ltd. He is 36 years old. He completed an NVQ course in leisure and tourism. He worked in retail hospitality and then as a support worker in the NHS. At 25 he trained as a diver and was soon involved in the commercial retrieval of golf balls. In 2012 he went into partnership with Mark Collinson, and in 2015 they moved into their present premises and formed the company Prolakeballs Ltd. At the time of the accident Mr. McKernan and Mr. Collinson were the only full-time employees of the company. They employed some part-time staff and seasonal workers. Mr. McKernan has never worked in the construction industry.

21. Mr. McKernan states that Mr. Moran had done a good job installing a new fire door. When they wanted a new office built on the mezzanine he invited Mr. Moran to provide an estimate. The work was to include a barrier along the edge of the section of mezzanine which was unguarded. This was to provide additional storage space. In his witness statement he says that he did not realise until after the accident that the guardrail preventing access to the unguarded mezzanine had been taken down.

22. When giving evidence Mr. McKernan stated that he had received no formal training in risk assessment, except that it was touched upon when he was at college. He was asked about a health and safety policy in respect of his company that is dated the 4th January 2018. The policy identifies the mezzanine as an area for storage. The policy identifies a risk of tripping over stored items. Mr. McKernan was asked about the risk that stored items might roll through gaps in the rails protecting the edge of the mezzanine. In reply he said he did not think there were any items that could roll, but it was not a risk that had occurred to him. He said he was not aware of items being stored on the mezzanine section without a guardrail. It was pointed out to him that in some photographs a desk top can be seen on that section of mezzanine. Mr. McKernan was not sure when the desk top was put there. He said that he had cleared a large space on the area of mezzanine where the new office was to be built sometime between the 5th March 2018 and the commencement of the work on the 29th March 2018. He agreed that when walking up the steps to the mezzanine, one could not miss the desk top. He agreed there was a flaw in the risk assessment which he had undertaken, in that no reference was made to the risk of storing items on the section of mezzanine which did not have a guardrail at its edge.

23. Mr. McKernan was asked about the risk to his employees if work was carried out on the section of mezzanine without a guardrail, particularly when using the kitchen or toilets, given that the entrances to those facilities were directly below the unguarded edge of the mezzanine. Mr. McKernan replied that his staff would have the sense to ask if it was safe to use the facilities. He was also asked about visitors who might not be aware of work being undertaken on the mezzanine and the risks of items falling on them. Mr. McKernan accepted that he had not thought about that risk.

24. Mr. McKernan was asked about the First Defendant and his competence. As far as Mr. McKernan could tell, the First Defendant appeared to be a competent joiner. He had done a good job when replacing the fire door. He came recommended by the Third Defendant's landlords. He was punctual, professional and polite. When discussing the construction of the office he appeared to know what he was talking about. Mr. McKernan said he was shown photographs of other jobs the First Defendant had completed. He accepted that the First Defendant did not provide a risk assessment or method statement. Brief details of the work were set out in the estimate. Whilst the work was to be carried out in the presence of his employees, Mr. McKernan did not believe it presented a risk of injury to his employees. He assumed the First Defendant had carried out a risk assessment for the job, but did not ask him if he had done so. He had no knowledge of the Construction (Design and Management) Regulations 2015.

25. Mr. McKernan agreed that he and his fellow director were present in the factory when the work of building the office began on the 29th March 2018. He stated in evidence that he did not see the timber, which was to be used for the frame, stored on the section of mezzanine without a guardrail at the edge. He said that during the day on the 29th March he went up the stairs to the mezzanine once or possibly twice to offer the First and Second Defendants a drink. He would not necessarily have gone to check on the work. However he agreed that prior to locking up at the end of the day he probably went up to the mezzanine to have a look. Given the position of the electric cable he agreed he probably saw it and he agreed it was an obvious tripping

hazard with a risk of someone tripping over it and falling down the stairs. However, he added that if he had seen the cable he would have moved it.

26. On the day of the accident Mr. McKernan said that the only worker on the main floor with a good view of where the First and Second Defendant and the Claimant were working was Jamie Booth. Other employees were in the retail area. Mr. McKernan said that he was moving about between the retail area and the office. When asked whether he had also been on the main floor he replied there was a 50/50 chance that he had been, possibly to see Mr. Booth. However, Mr. McKernan stated that he had not observed the unloading of the MDF boards or the work of moving the boards onto the unguarded mezzanine. At the time of the accident he thought he had been in the retail area or in the office. Mr. McKernan was taken to a statement he had given to the HSE soon after the accident. In that statement he describes being on the ground floor and hearing a loud crashing noise. His statement continues:

> "I turned to see that a number of MDF sheets had landed on the mezzanine floor and also Reuben was lying on the ground floor between the kitchen and toilet doors."

It was put to Mr. McKernan that he could not have witnessed the Claimant after the fall or the fallen MDF boards simply by turning, if he had been in the retail area or office. Mr. McKernan maintained that he had not seen what the Second Defendant and the Claimant had been doing immediately before the accident, and in particular had not seen them handling the MDF boards on the unguarded mezzanine.

27. Mr. McKernan was asked about the issue of control. He knew where they were going to build the office. He had cleared a space where the office was to be situated. He had a degree of control over where the men worked, but he did not have ultimate

control over how they did their work because he would then have been supervising how they did their work. He agreed he had the ability to stop them if their particular way of doing the work was dangerous.

RELATIONSHIP BETWEEN THE CLAIMANT AND THE DEFENDANTS

28. The Claimant had been undertaking work for the Second Defendant for just over two years by the time of the accident. He was paid a daily rate for that work, initially being paid in cash and later the Second Defendant paid directly into the Claimant's bank account. In his witness statement the Second Defendant suggested that for the work at Prolakeballs Ltd. the Claimant was directly engaged by the First Defendant. This is disputed by the First Defendant and there is no evidence that the First Defendant ever paid the Claimant direct. I find that the arrangement was for the First Defendant to pay the Second Defendant who in turn paid the Claimant.

29. The Claimant had no experience of working in the construction industry until he began working for the Second Defendant. The work was as a general labourer and it was of an unskilled nature. If he required any tools for this work they were provided by the Second Defendant who also provided the Claimant with some work clothes. The Claimant was working under the instruction of the Second Defendant. The First Defendant provided a description of the type of work the Claimant undertook when the First Defendant was carrying out a contract with the Second Defendant. I accept this description as being accurate, namely that the Claimant carried out basic unskilled tasks such as moving materials, unloading tools and brushing up.

30. Was the relationship between the Claimant and the Second Defendant one of employee and employer, or was the Claimant an independent contractor? The Court of Appeal in **LANE v. THE SHIRE ROOFING COMPANY (OXFORD) LTD. 1995 PIQR P417** summarised the relevant principles in determining this issue. The question of control is important, although not necessarily decisive. There is no doubt that the Second Defendant exercised complete control over the work carried out by the Claimant. Secondly, it is relevant to ask whose business was it? Again, there is no doubt that the business was that of the Second Defendant. The Claimant was not carrying on his own separate business. He was working for the Second Defendant's business. It is true that the Claimant was responsible for his own tax and national insurance, but this carries little weight when the question of whose business it was and the question of who exercised control point so clearly to Mr. Moreira being an employee. I therefore conclude that Mr. Moreira was an employee of the Second Defendant, who owed the usual duty of care for his employee's safety.

31. What is the position of the First Defendant? It was his contract which he had arranged with the Third Defendant. It was for the First Defendant to plan and organise the work so it could be carried out safely, minimising the risk of injury to those undertaking the work and to others working in the premises and to those who might visit the premises. In this role of being in overall charge of the contract and being responsible for ensuring the work was carried out in such a way as to minimise risk of injury, the First Defendant owed a duty of care to the Claimant, albeit that he was not the employer of the Claimant.

32. When considering what, if any, duty was owed by the Third Defendant, there is a dispute as to the application of the Occupiers Liability Act 1957. Mr. Allen QC submits that in respect of the circumstances of this accident the Claimant was owed the common duty of care under Section 2(2) of the 1957 Act and was in breach of that duty. Mr. Rowley QC maintains that binding authority determines that the Act has no application to the facts of this case. Further, that no duty to act arose at common law and so the Third Defendant cannot be liable to the Claimant.

33. Section 1(1) of the 1957 Act provides:

> "The rules enacted by the two following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."

Section 2 of the Act sets out the extent of the occupier's ordinary duty:

> "(1) An occupier of premises owes the same duty, the "common duty of care" to all his visitors, except insofar as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases –
>
> > (a) an occupier must be prepared for children to be less careful than adults; and
> >
> > (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
>
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) –

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

34. In **FERGUSON v. WELSH 1987 1 WLR 1553** the claimant suffered serious injury from the partial collapse of a building whilst carrying out its demolition. The building was owned and occupied by a district council. Before the House of Lords, the claimant was seeking a new trial against the council in the light of new evidence. Lord Keith, in giving a judgment to which the majority subscribed, stated at 1559H-1560A that it was more difficult to hold that Mr. Ferguson was

> "using the premises for the purpose of demolishing the building but assuming that he was, the question remains whether the absence of reasonable safety which resulted in the accident arose out of his use of the premises. The absence of safety arose directly out of the system of work adopted by the Welsh brothers, and the nature of the instructions given by them to Mr. Ferguson as to how he should go about performing his work for them. It would be going a very long way to hold that an occupier of premises is liable to the employee of an independent contractor engaged to do work on the premises in respect of dangers arising not from the physical state of the premises but from an unsafe system of work adopted by the contractor."

Lord Keith then set out Section 2(4)(b) of the Act and considered that it could apply to demolition work and the use of the pluperfect tense did not preclude the sub-section applying to ongoing work. Lord Keith stated, at 1560-G:

> "It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work.

> In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe."

Lord Keith went on to hold that the new evidence did not establish that the council knew or had reason to suspect that the person they had contracted with for the demolition work was bringing in cowboy operators.

35. Lord Goff in **FERGUSON** took a different approach to the problem. He emphasised the phrase "in using the premises" in section 2(2) of the Act and then stated at 1563F:

> "I have emphasised the words 'in using the premises' because it seems to me that the key to the problem in the present case lies in those words. I can see no basis, even on the evidence now available, for holding that Mr. Ferguson's injury arose from any breach by the council of that duty. There can, no doubt, be cases in which an independent contractor does work on premises which result in such premises becoming unsafe for a lawful visitor coming upon them .... But I ask myself, in relation to the facts of the present case, whether it can be said that Mr. Ferguson's injury arose from a failure by the council to take reasonable care to see that persons in his position would be reasonably safe in using the premises for the relevant purposes, the answer must, I think, be no. There is no question, as I see it, of Mr. Ferguson's injury arising from any such failure; for it arose not from his use of the premises but from the manner in which he carried out his work on the premises. For this simple reason, I do not consider that the Occupiers Liability Act 1957 has anything to do with the present case."

Lord Goff then stated at 1564A:

> "I wish to add that I do not, with all respect subscribe to the opinion that the mere fact that an occupier may know or have reason to suspect that the contractor carrying out work on his building may be using an unsafe system of work can of itself be enough to impose upon him a liability under the Occupiers Act 1957, or indeed in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using that unsafe system is to render the premises unsafe and thereby to cause injury to the employee. I have only to think of the ordinary householder who calls in an electrician; and the electrician sends in a man who, using an unsafe system established by his employer, creates a danger in the premises which results in his suffering injury from burns. I cannot see that, in ordinary circumstances, the householder should be held liable under the Occupiers Liability Act 1957, or even in negligence, for failing to tell the man how he should be doing his work. I recognise that there may be special circumstances which may render another person liable to the injured man together with his employer, as when

> they are, for some reason, joint tortfeasors; but such a situation appears to me to be quite different."

36. In **FAIRCHILD v. GLENHAVEN FUNERAL SERVICES LTD. 2002 1 WLR 1052** the Court of Appeal considered the liability of occupiers where men, who were employed by independent contractors, were injured by exposure to asbestos dust created by their work at the premises and/or by the work of other men working in close proximity. The Court of Appeal held that prior to the enactment of the 1957 Act the common law made a distinction between the liability for the dangerous condition of the premises and the liability of an occupier in relation to dangerous activities carried out on his premises. It was further held that this distinction was preserved by the 1957 Act. The approach of the House of Lords in **FERGUSON v. WELSH** was considered, it being stated that Lord Keith concentrated on section 2(4), whereas Lord Goff based his decision entirely on his interpretation of section 2(2). The Court of Appeal concluded that they could see nothing in the speeches of the other members of the House which cast any doubt on the correctness of Lord Goff's interpretation of section 2(2). At paragraph 131C the Court of Appeal stated:

> "The 1957 Act imposed the new statutory common duty of care on an occupier towards all his visitors to take appropriate care to see that they would be reasonably safe in using his premises, and it is not necessary in this context to go further than the provisions of the Act to see whether a duty of care exists or what is its scope. The Act does not provide an answer, however, when a question arises whether an occupier, without more, is liable to a visitor for an injury he suffers as a result of an activity conducted by a third party on his premises. For that purpose one has to go to the common law to see if a duty of care exists, and if so, what is its scope, or to some other statutory provision such as the (now repealed) section 63(1) of the Factories Act 1961."

The Court of Appeal held that in relation to the cases before them they were not concerned with the static condition of the premises. Rather the danger had arisen from the activities carried out at the premises. In these circumstances the Act had no

application. So far as the common law was concerned there was no evidence that the occupiers had actual knowledge of the dangers posed by the creation of asbestos dust. In the absence of actual knowledge, there was no basis for finding that the occupiers should not have regarded the employers as competent.

CONCLUSIONS

37. The decision to work on the section of mezzanine with an unguarded edge created an obvious risk of a fall and serious injury. If it was necessary to utilise this section of mezzanine for the storage of materials, then a barrier should have been constructed first. This was part of the contract work which Mr. Moran had agreed with Mr. McKernan. However, the decision by Mr. Moran was to construct the office first. In fact it was probably unnecessary to utilise the unguarded section of mezzanine in the course of constructing the office. The MDF sheets could have been carried up the steps and stored on the part of the mezzanine where the office was to be built. Alternatively, a scaffold could have been utilised to transfer the MDF boards so as to avoid the risk of a fall. The First and Second Defendants sought to portray the decision to work on the unguarded mezzanine as taken jointly with the Claimant. However, the Claimant was unskilled in construction work, as described in the statement of Mr. Moran. The decision was one taken jointly by Mr. Moran and Mr. Dunne. Mr. Dunne claimed he had carried out a risk assessment when he and the Claimant had arrived at the premises on the 3rd April 2018. He agreed in evidence that this risk assessment was worthless. Neither Mr. Dunne or Mr. Moran addressed their minds to the obvious risk to the Claimant of a fall should he work on the unguarded mezzanine. Both were in breach of the duty of care they owed him, in

failing to provide a safe place of work and a safe system of work and both were guilty of negligence which caused the accident.

38. Access to the area of mezzanine from where the Claimant fell was blocked off by a guardrail. Mr. Dunne and the Claimant removed this guardrail a short time before the accident. Mr. Moran knew the guardrail was to be removed to enable the MDF boards to be transferred from the unguarded section of mezzanine to the area of mezzanine where the office was being constructed. Mr. McKernan stated, and I accept, that he did not know the guardrail blocking access to the narrow section of mezzanine had been removed until after the accident. He also did not know there was any intention to remove this guardrail. Mr. McKernan also stated that he was not aware of the transfer of the MDF boards onto the unguarded mezzanine, nor that the Claimant and Mr. Dunne were working on the unguarded mezzanine. There is no evidence from the HSE investigation that Mr. McKernan had such knowledge. His statement and Mr. Booth's statement to the HSE, do not indicate he had such knowledge. Mr. Moran and Mr. Dunne in their evidence did not describe any interaction with Mr. McKernan to suggest the latter had such knowledge. The 3rd April 2018 was the first day of work after a Bank Holiday, and it was a busy time for the staff of Prolakeballs Ltd., including Mr. McKernan. He had not noticed anything which caused him to intervene in the work which Mr. Moran had agreed to carry out.

39. What of the apparent competence of the First Defendant to undertake the work of constructing an office for the Third Defendant? He had undertaken a small job previously for the Third Defendant, the replacement of a fire door, and completed this work satisfactorily. There was a recommendation from the landlords of Prolakeballs

Ltd. as to Mr. Moran's competence. Mr. McKernan said in evidence that Mr. Moran appeared competent as a joiner. He seemed to know what he was talking about when discussing what would be required for the construction of the office. Having seen Mr. Moran give evidence and the manner in which he conducted his case, he gives the impression of being intelligent and competent. Mr. Allen QC relies on the failure to comply with the Construction (Design and Management) Regulations 2015. Neither Mr. McKernan nor Mr. Moran appeared to be aware of the requirements of these Regulations. Regulation 4 states that the client, that is Prolakeballs Ltd., must make suitable arrangements for managing a project and in particular ensure that the construction work can be carried out so far as is reasonably practicable, without risks to the health or safety of any person affected by the project. The client should ensure that a plan is drawn up before the work begins. It is accepted that breach of the 2015 Regulations does not provide a basis for civil liability. Mr. Allen QC submits it should inform what constitutes a breach of the common duty of care under the 1957 Act and the common law duty.

40. My conclusion is that to Mr. McKernan the First Defendant appeared to be a reasonably competent contractor. With the benefit of hindsight, one can see that the placing of wood on the unguarded mezzanine on the 29th March should perhaps have raised alarm bells. However, this appeared to be a straightforward job for an experienced joiner. Mr. McKernan had no role in supervising the work. Whilst he had the power to control where Mr. Moran, Mr. Dunne and the Claimant worked, he was not expecting to have to tell them where to work or how to carry out the work. He was certainly not expecting to have to intervene because the Claimant was not being provided with a safe place and safe system of work.

41. As to the application of the Occupiers Liability Act 1957, the danger to the Claimant arose because he was working on a section of mezzanine without a guardrail. In other words, the danger arose out of his use of the premises. This appears to me to be quite different to the cases in **FAIRCHILD** where the danger arose because of the activity carried out on the premises. It was the static condition of the premises of Prolakeballs Ltd. that created the danger. I therefore conclude that the Occupiers Liability Act did apply. However, it is clearly relevant to the question of breach that no danger would have arisen but for the decision of Mr. Moran and Mr. Dunne to work on the unguarded section of mezzanine. Further, when considering whether the occupier was in breach, the occupier had placed a rail clearly designed to prevent access to that section of mezzanine. The act of removing the guardrail was carried out by Mr. Dunne and the Claimant. Mr. McKernan was unaware of the removal until after the accident. I further conclude that Mr. McKernan had not appreciated the men were working on the unguarded mezzanine and were adopting an unsafe system of work. Even if in moving between the various parts of the factory Mr. McKernan had caught sight of the workmen transferring MDF boards up to the unguarded mezzanine, or from that section of mezzanine to the area where the office was to be built, he had entrusted the work to what he understood to be experienced workmen. Section 2(3)(b) of the 1957 Act provides that an occupier may expect that a person in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to it so far as the occupier leaves him free to do so. Mr. McKernan had no knowledge of construction work nor did Mr. Booth, who did witness what the men were doing. They were entitled to take the view that these were skilled workmen who

would guard against obvious risks. In these circumstances there was no breach of the common duty of care owed by the Third Defendant to the Claimant.

42. In considering the position at common law the House of Lords in **FERGUSON** and the Court of Appeal in **FAIRCHILD** contemplated that there could be circumstances where an occupier was a joint tortfeasor. This might arise where the occupier is a substantial enterprise with a full-time safety officer who performs a role supervising work being carried out on the premises by independent contractors. In contrast, the Third Defendant was a small enterprise with two full-time employees, one of whom was Mr. McKernan, and a few part-time employees. None of the Third Defendant's workers had any expert knowledge of joinery or construction work. If one asks the question whether in these circumstances the Third Defendant owed a duty of care to Mr. Moreira to recognise that the place and system of work were unsafe, the answer must be no. The Third Defendant was not a joint tortfeasor in respect of the accident to Mr. Moreira. I therefore conclude that there is no liability on the Third Defendant for this accident.

43. Was the Claimant guilty of contributory negligence? Did he fail to act with reasonable care in respect of his own safety? He was acting under the direction of Mr. Moran and Mr. Dunne. They had decided to transfer the MDF boards onto the unguarded section of mezzanine, which inevitably involved Mr. Moreira working in an unsafe place. As to the fall itself, this resulted from an unsafe system of work decided upon by Mr. Dunne. Given the weight of the MDF boards there was a clear risk that when Mr. Dunne stopped supporting the boards so that he could extract one board from the pile, Mr. Moreira would be unable to support the entire weight of

about 14 boards. My conclusion is that Mr. Moreira was merely following the directions of Mr. Dunne and Mr. Moran and was not guilty of any contributory negligence.

44. I have previously concluded that the accident was caused by the negligence of both Mr. Moran and Mr. Dunne. How should liability for the accident be apportioned between them? Mr. Moran was in overall charge of the contract work. The onus was on him to plan the work so that it could be undertaken safely. This he failed to do. He was party to the decision to move the boards to the unsafe area of mezzanine, which led to Mr. Moreira handling the boards when he was at risk of falling. Mr. Dunne was Mr. Moreira's employer and owed him the duties of an employer. He was responsible for the work of trying to select individual boards whilst Mr. Moreira attempted to support the weight of a number of boards on his own. Given the various failings of Mr. Moran and Mr. Dunne I conclude that they are equally to blame for the accident, and liability is therefore apportioned 50/50 between them.

45. I would be grateful if the parties could agree an appropriate form of Order.