

JERSEY / JUDGMENT

# AG -v- FDJ Construction Limited

## [2013] JRC 204 (21 October 2013)

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### JUDGMENT

THE DEPUTY BAILIFF: 1. The defendant company faced two charges brought under the Health and Safety at Work (Jersey) Law 1989 and pleaded not guilty to those charges. 2. What had happened was that on 5 th March, 2012, one of the company's employees, Mr Murray, had been told by the site foreman to take down formwork which he had erected around a swimming pool so that another contractor could access the area to install additional pipework. This was a change in the sequence of jobs needing to be done. The director of the defendant company, Mr Kelleher, was not on site and at the time that this work was being done the foreman was in another part of the site. Once dismantled the formwork components had to be cleared out of the area and they were stored on top of formwork over the garage area. The edge of that formwork had not been provided with guardrails or other edge protection as required by Article 79 of the Construction (Safety Provision)(Jersey) Regulations 1970 . Mr Murray, the employee, said he had been shown drawings for the site but had not received any other documentation. He said that the works were in Mr Kelleher's head and he was left to manage and control his own work rather than waiting for instructions from Mr Brennan or Mr Kelleher. Mr Kelleher had said that Mr Brennan was present when he gave instructions to Mr Murray to erect guardrails to the unprotected edge; Mr Brennan could not recall such instructions being given to Mr Murray and Mr Murray denied ever having been told to do so. 3. During the course of retrieving the stored components Mr Murray fell from the unprotected edge. He fell a distance of approximately 10 feet 9 inches and he landed with his legs astride a metal trestle and he suffered a serious injury. There were no witnesses to the accident in question. 4. As a result of the investigations charges were brought under the Construction Regulations for failing to have an appropriate guardrail or other edge protection, which is Count 2, and also failure to discharge the duty under Article 21(1) of the Health and Safety at Work (Jersey) Law 1989 in particular compliance sub-paragraph 2(a) of Article 3 which required the employer to ensure the safety at work of one of his employees, in this case Mr Murray. But it is conceded by the Crown that in truth the misconduct of the employer is really exemplified by the lack of guardrail or barrier protection on the unprotected edge. 5. The Court is satisfied that there was general inefficiency in managing the health and safety aspects of this particular job in a responsible way and it was that which led to the lack of protective barriers on the unprotected edge of the first floor of this particular building. Mr Kelleher, the director, was

getting round many sites at the time and he did spend some time on this site but of course he had other jobs on hand as well. As a result his employees were put at risk. Mr Murray suffered a very nasty injury. It could have been less serious; on the other hand it could have been more serious and he might indeed have died. There was a haphazard lack of focus in considering the Health and Safety at Work aspects of what was being done. 6. In AG-v-R & M and SFS trading as Hall and Kay

[2011] JRC 139 the Court said this:- "What the Court is required to do, in looking at offences of this kind, is to assess the standards which have been applied by the employers to questions of health and safety against the obligations which are set out in the legislation. It is important to emphasise that the statute places significant duties on employers to have regard to health and safety so as to ensure, as far as possible, that the employees can go about their business without having their life and health placed at risk." And the Court there endorsed the comments of the Court in the earlier case of AG-v-Hamel Brothers Limited and The Jersey Royal Company Limited

[2010] JRC 080 where the Court said this:- "We wish to reiterate that fines for serious breaches of the law where the lives of employees have been placed at risk should sting, both to punish what are grave infractions and to encourage other employers to heed their obligations." We have also had regard to the AG-v-Peter Green (Builders) Limited

[2012] JRC 225 where the Court said this:- "It is clear from what we have been told that the [defendant] in this case left [its employee] to get on with the contract and he was given insufficient support, guidance and supervision. As a result, when attending to a snagging problem, [the employee] and his colleague adopted an unsafe practice in using an unfixed ladder to gain access to a gutter, the unfortunate consequence was that he fell 11 feet and suffered a fracture to the vertebrae in his back. We accept that the company was lulled into a false sense of security because of [the employee] very considerable experience and expertise." And indeed in this particular instant case we have no doubt that Mr Murray was a man of experience and expertise and that no doubt the employer rather left him to get on with the job which he had been told to do. 7. Because we think that the misconduct really derived from the one problem of a lack of protective edge, we have looked at the matter on the basis of what, overall, would be the right fine in relation to that misconduct. We think the Crown's conclusions are too high in that respect and we think the right approach, because the lack of unprotected edge and the breach of the Regulation is perhaps more serious than the first charge, that the right fine is a fine of £15,000 on charge 1 and £20,000 on charge 2, making a total of £35,000 together with costs of £7,500 towards the prosecution and the costs of three medical reports in the sum of £1,200. In relation to the costs the fact is that the defendant company failed to admit its responsibility and we see no reason why it should not have to pay the costs of the trial and medical reports or at least a contribution towards them. 8. That was the fine which we think this particular misconduct merited and we have now had to go on to consider the question of the financial information which the defendant company has put before us, because there is no

doubt that a company should not be fined more than it can afford to pay any more than an individual should be fined more than he can afford to pay. We have been asked to consider some draft accounts which in itself is unsatisfactory. Even the accounts to the period 31 st January, 2013, are in draft and we have been told that the wage figures, which represent a substantial outgoing on the company's accounts, have not yet been reconciled by the directors. In that context the directors means Mr Kelleher because he is the sole director. 9. It seems to us that, taking the figures as they stand, there is no doubt that as at 31 st January, 2013, the company could well afford to pay. The figures at that date show that the company had made a trading profit on its preceding year of £335,000 and indeed paid a dividend of £218,500 for that year. What we have been shown is management figures for the period from 1 st February to 30 th September, 2013, which reflect a different financial story. Here it is said in these management trading figures that there has been a net loss for the period shown of £323,000 or so and no provision has been made for any dividend. 10. We have looked at the monies paid to Mr Kelleher directly for the period from 1 st February, 2012, to 30th September, 2013, which was the document the Court asked to have produced and which is, we have to note, marked as a draft document for discussion purposes only, but we have nothing else to go on. We have noted that the cash position of the company has been adversely affected by monies being withdrawn for expenses which are not due by this company, whether it is funding a mortgage for the purchase of a store by an associated company, or whether it is for investment projects of Mr Kelleher in his own name or, indeed for his family's outgoings. So the company's cash position would have been better had these monies not been withdrawn. On the other hand the Court accepts that in the current economic climate in the Island generally and in the building industry in particular, there are challenges which undoubtedly make business more difficult to conduct than hitherto. 11. We have given anxious thought to all these competing points and we think that the right way of tackling the matter is to conclude that the company does have the wherewithal and cash flow to tackle fines of the nature which we have described, but it simply needs further time than would otherwise be the case to do so. 12. Accordingly we are going to impose the fines which we think the misconduct merits, that is to say £15,000 on Count 1 and £20,000 on Count 2 and the costs of £7,500 plus the medical costs of £1,200 but we allow the company the period of 6 months within which to make these payments. Authorities Health and Safety at Work (Jersey) Law 1989. Construction (Safety Provision)(Jersey) Regulations 1970. AG-v-R & M and SFS trading as Hall and Kay

[2011] JRC 139 . AG-v-R & M Sprinkler Installations Ltd

[2011] JLR N 30. AG-v-Hamel Brothers Limited and The Jersey Royal Company Limited

[2010] JRC 080 . AG-v-Peter Green (Builders) Limited

[2012] JRC 225 . R-v-F Howe & Son (Engineers) Ltd

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