Neutral Citation Number: [2018] EWHC 1290 (QB)

Case No: B11YX892
Appeal Ref: M17Q066

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
ON APPEAL FROM MANCHESTER COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2018

Before :

MR JUSTICE MORRIS

- -

Between :

ANDREW STUART BOND	**Claimant**
- and -	
TOM CROFT (BOLTON) LIMITED	**Defendant**

- -
- -

Marc Willems QC (instructed by **Slater Gordon**) for the **Claimant**
Matthew Snarr (instructed by **BLM**) for the **Defendant**

Hearing dates: 1 & 3 November 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Morris:

(A) Introduction

1. This is an appeal against the order of His Honour Judge Main QC sitting at Manchester County Court dated 21 March 2017 ("the Order"). By the Order, the learned judge dismissed the claim of Andrew Stewart Bond ("the Claimant") against Tom Croft (Bolton) Limited ("the Defendant") for damages for breach of statutory duty and/or negligence for personal injury arising out of an accident when the Claimant fell off a ladder whilst at work. After a two day trial of a preliminary issue on liability and causation in September 2016, the learned judge handed down judgment on 21 March 2017. The Claimant now appeals with permission granted by Mr Justice King dated 28 June 2017.

The background facts

2. The Claimant was a self-employed electrician working on a sub-contract basis for the Defendant, a local building contractor, within "Limbert House", a part of North Manchester General Hospital. The Defendant was undertaking general electrical work of fitting conduits for electrical wiring. On 16 July 2012 at about 11am, in the course of his self-employed duties, to the Defendant's instruction, the Claimant was working from an aluminium "A" frame ladder supplied by the Defendant, when he fell, as the rear left support leg ("stile") failed. In doing, so he suffered accidental injury loss and damage. The Claimant was taken to the Accident Unit in the hospital. The medical history described falling from the ladder and hitting his head on the solid floor. A CT brain scan showed some sign of a small contra-coup extradural haematoma over the left frontal area. He was admitted and kept in under observation for 4 days. Subsequently at the end of July he began to experience intense headaches together with the onset of cognitive deficits. In August 2012 evacuation and drainage of the subdural haematoma was undertaken. The Claimant has made a fairly good, but incomplete, recovery. He remains at risk of developing recurrent epilepsy. This was a serious head injury and, as the judge realised, raised questions as to his ongoing cognitive functioning for the purposes of assessing the reliability of his evidence at trial. I refer to this further below.

3. The Claimant claimed damages potentially in excess of £300,000. His case was that the Defendant was responsible for the accident, alleging that whilst working normally off the ladder, it had collapsed without warning. He maintained that he should have been provided with a proper working platform. He relied on breaches of a variety of regulations, including the Workplace (Health, Safety and Welfare) Regulations 1992, the Work at Height Regulations 2005 and, in particular, Regulation 5 of the Provision and Use of Work Equipment Regulations 1998 ("the 1998 Regulations"), in failing to ensure that the ladder was maintained in an efficient state, in efficient working order and in good repair. He alleged, in the alternative, negligence on the part of the Defendant.

4. The Defendant put the Claimant to proof as to the fact and manner of the happening of the accident. It contended that the ladder was not anything other than well-maintained and in proper efficient working order. In so far as the left rear support leg

failed, that was not due to any patent or latent defect or disrepair in the ladder. It was much more likely to have been due to the way in which the Claimant had used the ladder, either by overreaching beyond the stability of the ladder or by trying to shuffle the ladder along. The Claimant was entirely the author of his own misfortune.

5. The judge, in dismissing the claim, found essentially that the rear left stile of the ladder's failure was caused by the Claimant himself overreaching outside the balance of the ladder so as to cause an additional sideways loading and, not as a result of any pre-existing defect in the stile (either from manufacture or from pre-existing earlier use). In so concluding, he preferred the evidence of the Defendant's expert engineer over that of the Claimant's expert engineer.

(B) The case before the Judge

6. The judge heard evidence from the Claimant himself, from Mr Andrew Weaver, an ex-director of the Defendant who had completed the incident investigation report two days after the accident, from Mr Bartley, a director of the Defendant, who had found the ladder in a cupboard and from two expert engineers, Mr McFeeley and Mr Botham called, respectively, by the Claimant and the Defendant.

The Expert evidence

7. In the light of the nature of this appeal, I refer in some detail to the expert evidence that was before the judge. Mr McFeeley and Mr Botham each provided an expert report, dated, respectively, 12 April 2016 and 29 April 2016. The two experts then provided a Joint Statement dated 14 June 2016, in which they agreed that "failure of a single leg of a step ladder is usually indicative of overloading, at the time of use, or else a pre-existing weakness at the point of failure". Each expert then gave oral evidence.

Mr McFeeley's evidence

Report dated 12 April 2016

8. In his summary of conclusions, Mr McFeeley stated that he had "*no reason to believe that the Claimant's accident resulted from a manufacturing or materials defect*" and that "*on the balance of probability,… the ladder had been used inappropriately and/or overloaded at some time prior to the Claimant's accident, causing weakness in the left-side support frame stile*" (paras 3.3 and 3.4). His conclusions were stated more fully in section 7. At paragraph 7.4 he stated that on the balance of probability, the stile "*failed because it had been overloaded at some point in the course of use.*" Then at paragraph 7.5 he stated: "[*the Claimant's] description of his accident indicates… that the left side support stile of the… ladder had been weakened at some time prior to him using it*". This conclusion of pre-existing weakness was itself predicated on the account of the accident given to him by the Claimant. At paragraph 7.9 he stated that a bent front edge of the platform "*probably indicates that the platform had been subjected to overloading at some time prior to the Claimant's accident.*"

Joint statement

9. In the areas of disagreement in the Joint Statement, at paragraph 4.1, Mr McFeeley noted, (but did not directly contradict) Mr Botham's opinion that the stile had failed as a result of overreaching or shuffling whilst the Claimant had been standing on it. Rather he went on to state his opinion that the Claimant should not have been required to work from the top platform when unable to maintain a secure handhold. Mr McFeeley however in the Joint Statement did not expressly maintain his view that the failure arose as a result of pre-existing damage.

Oral evidence

10. In cross-examination Mr McFeeley said there was no physical evidence, that he saw, of any pre-existing weakness in the ladder. He had no reason to doubt that the ladder complied with EN 131 (transcript, page 45 ("T45")). The damage to the left leg was consistent with overloading and not with a fatigue crack. The failure of the left leg was caused by overloading at some point in the course of use. But he did not know when that occurred. Then, asked about paragraph 7.5 of his report, he accepted that he did not know absolutely that the left side had been weakened at some time prior to it being used. However he believed that probably the leg was weaker at the time of the accident than it was at the time of manufacture. He accepted that there was no evidence of any defect, namely that the leg was damaged, before the accident (T53).

11. When it was suggested to him that his statement that it had been weakened prior to use was just conjecture, his response was that that was the conclusion he had drawn from Mr Bond's description of the accident. He accepted that it was his own supposition. However he did not accept that the absence of evidence of a defect or of fatigue on the leg pointed to there being a single incident of overloading (T54). As regards his suggestion of multiple incidents of overloading, he accepted that he didn't have any evidence of that (T55). He accepted that he did not know whether it was a result of overloading in the index accident or pre-existing damage, adding "*my opinion is based on the information provided and therefore is based on the claimant's evidence*" (T56).

12. Mr McFeeley further accepted that ultimately it depended on what the judge found as to whether it was overloaded at the time of use or not. He could not rule out overloading at the time of the accident, but the evidence he had seen would indicate that was not the case, but that ultimately that was a question for the judge. He accepted that overloading at the time of the accident was "*a possibility certainly*". He reiterated that "*based on the claimant's evidence*" he could not envisage the circumstances in which the leg would have been overloaded on the day of the accident (T57).

13. Later in cross-examination he reiterated that he believed there was pre-existing damage and that the Claimant working on the top platform placed maximum loading on the rear legs. He accepted that Mr Botham's conclusion - that there was no evidence of manufacturing faults, no evidence of pre-existing damage on the failed leg and the only conclusion was that overloading on the day in question caused the incident - was logical. But he did not agree that it was irresistible. He added that the pre-existing damage had been caused by overloading at some point which had caused

slight but not necessarily visible damage. He accepted that that such damage would have been visible on microscopic examination (T63).

14. In re-examination, Mr McFeeley said that he could not "*conceive of a manner in which the claimant carrying out his tasks could have imposed a force of 900 N sideways on the foot … of the failed foot*" (T72).

Mr Botham's evidence

Report dated 19 April 2016

15. In his report, Mr Botham's conclusions were that he had found no evidence to suggest that the ladder was defective prior to the accident. The ladder showed evidence that its leg failed as a result of an overload where that overload was "very likely*"* to have arisen as a result of improper use. The improper use had caused a lateral loading of the leg that caused it to fracture. In his opinion, the type of failure seen was "most likely" caused by the user leaning/reaching excessively to the side of the stepladder, or by the stepladder being shuffled whilst the user was standing on it.

Joint statement

16. In the areas of disagreement, and by contrast with paragraph 4.1, paragraph 4.2 recorded Mr Botham's view that he had seen no evidence of pre-existing damage. The failed leg only showed evidence of having failed by overloading under the action of a sideways load. "*Mr Botham considers the failure most probably arose as a result of the Claimant reaching excessively to one side or shuffling the stepladder whilst on it.*"

Mr Botham's oral evidence

17. In examination in chief, Mr Botham confirmed the contents of his report were true to the best of his knowledge and belief.

18. In cross-examination (T90-93) he accepted that a man of 100 kg, would put 25 kg of downward force on each of the four legs. In relation to how 92 kg came to be put through the left stile and to the suggestion that may have occurred by "pulling" the cables, he accepted that it would appear to be an extremely difficult, if not a rather odd thing to do (T93).

19. When asked about "shuffling", he explained (T93-94) that not only did that give rise to an increased vertical load, but also a lateral load which "*because of the increased friction and momentum in one particular direction could result in a colossal bending moment which occurs at the weakest cross-section which was where that cross-bearer intersects with the stile and that's where it failed*". It was put to him that that would still require more force through the leg then the weight of the man involved. He replied:

> *"A: "Yes but that's quite possible during a dynamic situation because … it's not a static load any more. This is about the amount of energy and the moment that a person has, so their greater mass actually leads to a greater momentum for a given speed and when that gets arrested by the legs coming into*

> *contact with the floor again, that energy has to be dissipated in some way and it goes through the leg.*
>
> *Q: I am trying to conjure a mental image of what you're talking about. It sounds almost pogoing on one corner of the ladder?*
>
> *A: Pogoing to the side even, yes.*
>
> *Q: Right"*

20. He expressly disagreed that it was not conceivable that the stile could have bent unless the stile was already defective. Rather it could have arisen by pulling or shuffling and, when pressed, he said that he thought it was "*more probably the shuffling would have the greater effect than the pulling*" (T94).

21. When questioned by the judge as to what activity could have given rise to a lateral force of more than 900 Newtons, Mr Botham agreed that, if the force was static that might be difficult to understand, but that dynamic forces can be quite substantial and arise in a different manner. There is a sideways load as well as vertical load and in that situation there is complex loading going on. A lateral load as a result of shuffling or jerking can create a spike which creates instability. He pointed to a big distinction between a lateral load in such a situation and slow static loading (T105).

22. In the course of re-examination, the judge suggested that it was the side forces on top of the weight that gave rise to the bending moment. Mr Botham said "Exactly yes" (T107). The judge indicated that he was trying to encourage Mr Botham to give some examples. The judge then sought further answers, if he were to conclude that shuffling was not the probable explanation. Mr Snarr then put to Mr Botham the example of someone overreaching outside the frame of the ladder (T108). The transcript continues (T108-109):

> *"A. It can be a complicated way in which that instability arises. If somebody over-reaches during a pull and feels the ladder begin to become unstable in a particular direction, we can sometimes react very quickly and change our mass. The ladder goes back the other way. The instability comes in the opposite direction and the forces generated become totally different. I'm offering possibilities here not…*
>
> …
>
> *JUDGE MAIN: Forgive me, the question is this: is somebody over-reaching and in so doing tipping the ladder causing a lateral force as described as a function of that lateral force together with the 95 kilograms of weight, is that the sort of activity which you can anticipate can give rise to the sort of traumatic failings that we see in relation to this ladder or not?*
>
> *A: I can only say it's a possibility.*

> *JUDGE MAIN: A possibility, okay. All right. That gives me an example as to a potential, okay."*

The Claimant submits that, in relation to overreaching, Mr Botham's evidence was at best that it was "possible" that such overreaching could give rise to forces which could give rise to the traumatic failure.

23. Finally at the end of this passage of evidence, Mr Botham's opinion contained in paragraph 4.2 of the Joint Statement (paragraph 16 above) was put to Mr Botham. He confirmed that the statements there remained his opinion.

(C) The Judgment below

24. The judge found in favour of the Defendant. He found that the failure of the ladder stile was caused as a consequence of the Claimant himself either attempting to shuffle the ladder sideways or unnecessarily overreaching outside the balance of the ladder so as to cause additional sideways loading on the left rear stile. The failure of the stile was not brought about by a traumatic failure arising from a pre-existing defect. Further the lack of formal risk assessment and preparation of a method statement, whilst negligent and amounting to a breach of statutory duty, was not causatively significant.

25. At paragraph 11 of the judgment, the judge recognised that inconsistency in the claimant's recollection could only speak to the likelihood that he continued to labour under a real cognitive difficulty which went to undermine the reliability and cogency of his evidence.

26. At paragraphs 12 to 36, the judge recorded the varying accounts from the Claimant and from Mr Weaver and elsewhere concerning the primary facts. At paragraphs 12 to 19, he recorded the Claimant's account of what had happened, noting in particular that the Claimant's evidence was that he was working on the top plate of the ladder and that the work did not involve him needing to work "outside" the ladder by way of leaning to his side or stretching. The conclusion reached by the Claimant was that the ladder collapse was due to a traumatic failure of the lower left support stile in the course of quite ordinary use (paragraph 19).

27. At paragraphs 20 to 31, he set out the evidence of Mr Weaver and pointed to inconsistencies in the Claimant's account, in particular in relation to whether the Claimant was fitting conduits or pulling cable through at the time of the accident. At paragraphs 27 to 31, he referred to the conflict in evidence in relation to whether or not at the time of the accident, his involvement was during the "first fix" stage or rather, at the "second fix" stage. Mr Weaver was clear that the Claimant had been pulling data cables through at the time of the accident, a second fix activity. At paragraph 34, the judge recorded that the Claimant has stated that he had not inspected the ladder himself and "*he agreed the ladder looked in good condition before he used it. There was no evident sign of any damage*.".

28. At paragraphs 35 and 36 the judge referred to the evidence relating to the ladder itself. The experts agreed that in the absence of any defect in the ladder then given the weight of the Claimant, the ladder should have remained stable if used in accordance with the manufacturer's instructions. At paragraph 36 he referred to the Defendant's

"Ladder Record". The ladder in question had gone missing previously and had been relocated in a cupboard at the hospital a few weeks before the accident. On being relocated, Mr Bartley had inspected it visually and all appeared to be in order: it appeared in good condition with no signs of wear and tear.

The expert evidence

29. At paragraphs 37 to 47 the judge addressed the expert evidence. He accepted that both experts had a real wealth of practical experience in materials science. He referred to the Joint Statement: there were few areas of disagreement. They agreed that so long as the Claimant's tasks did not involve him having to overreach outside the balance of the ladder so as to impose sideways loading, the ladder would have been a safe "place of work". At paragraph 39 he summarised Mr Botham's evidence as follows:

> *"Mr Botham having examined the ladder and the location of the failure of the left stile, reached the clear conclusion that there was no evident sign of a manufacturing fault or defect - i.e. a pre-existing fault affecting the ladder stile at the time of the Claimant's use. In evidence, in summary, he stood by this conclusion and stated that to suggest otherwise was pure supposition not supported by the hard evidence. Accordingly he came to the clear conclusion that on any balance of probability, this stile failure came about due to sideways loading, as the Claimant's combined 100 kgs vertical weight was being applied to the ladder. Such a sideways loading, sufficient to exceed the tolerance of the left stile, could have come [about] either by the Claimant reaching outside the balance of the ladder or if the Claimant sought to "shuffle" the ladder to the right (as he moved along Wall "A") without getting off. The Claimant will have known full well, either action would have been entirely contrary to the manufacturer's instruction as to the proper use of the ladder and contrary to this own trained use of the ladder (as he acknowledged)."* (*original emphasis*)

30. He then addressed Mr McFeely's evidence. At paragraph 40, the judge said:

> *"Mr McFeely in the joint statement appeared to speak in generalities (para 4.1) - i.e:*
>
> > *"The geometry of the support frame would result in the leg folding outwards if subjected to a vertical load of sufficient magnitude… the Claimant should not have been required to work from the top platform… when he was unable to maintain a secure handhold, and when the loads applied to the rear support legs were at their maximum…"*
>
> *Mr McFeely does not identify the source or extent of any "vertical force of sufficient magnitude". The statement is of*

> *itself unexceptional but it takes the Claimant's case no further. The implication in his statement was that if the Claimant was standing on the top plate, precariously balanced and actively engaged - then lost that balance in the course of his activity (whatever that activity was), in such an event, the forces thereby created might have been sufficient to cause a traumatic failure of the left stile. So the provision of a working platform would have removed such a risk and therefore was required. He does not disagree specifically with the proposition that the construction and strength of the stile was to the required and claim tolerance."*

However, in footnote 15 at the end of that paragraph, the judge referred to the evidence in Mr McFeely's original report at paragraph 7.5, stating "although following the Claimant's description of events, Mr McFeely had originally stated "*... His description of his accident indicates… the left-sided support stile… had been weakened at some point prior to him using it…"*

31. At paragraph 42 the judge referred to concerns expressed by Mr McFeely in his report (although not mentioned in the subsequent Joint Statement) as to the state of repair of the ladder at the time of use, pointing to particular aspects of disrepair. He continued:

> *"This was designed to raise a concern as to what use ladder 20 had been put, while out of the Defendant's cognisance, until it was rediscovered in a locked cupboard…. However, in the course of giving evidence, Mr McFeely was clear - there was no sign of any pre-existing defect in the construction of the ladder - he had no reason to doubt, it will have conformed to BS EN 131 with no pre-existing weaknesses." (emphasis added)*

32. In the course of recording Mr Botham's evidence that a greater force could only have been generated by means of a side-load being imparted to the ladder affecting its stability, at footnote 17 (to paragraph 46) the judge recorded the agreed evidence that "*testing of the ladder had shown that a force of 900 newtons (about 92 kg) was required to bend the right stile. An even load on the ladder (100 kilograms) would have passed 25 kg down the left rear stile. The activity on the ladder would need to have exacted a force through this stile, in excess of 92 kg.*"

33. At paragraphs 47 to 50, the judge turned to issues relating to method statements and risk assessment. At paragraph 47 the judge referred to the relevant regulations and directed himself as follows:

> *"As this equipment failed in the course of its use, in the absence of any other more obvious explanation (such as the Claimant in some way abusing his use of the ladder) the Claimant stands in a strong position by reason of his Statutory rights. So too, if a defect in the equipment is established, the Employers' Liability (Defective Equipment) 1969 engages."*

He then went on to identify the issues in the case relating to the Defendant's own assessment of the risks in using the ladder, particularly in relation to method statements, and risk assessment, pointing out that the Defendant's case appeared to rest on an informal assessment of Mr Weaver. Nevertheless (at paragraph 50), even if in that regard there was a breach of the relevant statutory duty, the case would still have to turn on the issue of causation. If a risk assessment would have persuaded a reasonable employer to opt for a movable working platform then the Claimant would succeed on liability. However "*if on the other hand such an assessment would have concluded that such access did not require a movable platform, then the Claimant fails here, unless there is some strict liability for the condition of the ladder*".

34. Having run through the evidence, the judge then assessed the witnesses. At paragraph 52, he commented that he was impressed by the Claimant's candour and that so far as his recollection permitted he was entirely straight and that was very much to his credit. However his evidence had become inconsistent and in the light of the injury he had sustained that was to be expected. At paragraph 53 he was equally impressed by Mr Weaver. He concluded that where there was any real conflict between the two witnesses of fact, he preferred Mr Weaver. The Claimant had obviously become either confused or simply could no longer recall clearly events.

Findings

35. At paragraph 54 the judge drew all the strands in his analysis together to reach his conclusions. He set out his findings as follows:

> *"a. The ladder complied with BS EN 131 and **was without any significant defect at the time** and subject to its stated tolerances and responsible use, was entirely safe for use by the Claimant;*
>
> *b. In so far as Mr McFeeley identified features of disrepair in relation to the ladder, they are irrelevant to the cause of the failing of the rear left stile of the ladder.* [The judge's footnote reference to paragraph 40 of the judgment was in fact a reference to paragraph 42]
>
> *c. The Claimant had engaged on the ladder after his return… in the task of "pulling through data cables", as part of the "second fix" of the work and as he was so engaged he was standing on the first rung of the ladder (not on the top plate), working in front of himself at about eye level.…*
>
> *d. The use of the ladder as in (c) was in accordance with the HSE Guidance INDG 402 on the footing: the individual actions with the ladder in such a position will have been short-lived, could be categorised as "light work", where a 3 point of contact was available, albeit without a hand hold, where the claimant and others had expressly become satisfied it*

could be done safely within the confines of the ladder and subject to manoeuvring the ladder, well within the foreseeable competence of a trained and experienced operative, if the task in hand generated any significant sideways force;

e. *The task being undertaken by the Claimant did not dictate the provision of a mobile platform or scaffold;*

f. ***The failure of the ladder stile was caused as a consequence of****:*

i. ***either an aberrant movement of the ladder to the right, as the Claimant remained with his weight on the ladder, as he attempted to shuffle the ladder sideways, so as to re-position the same in the course of pulling through the cable; or***

ii. ***the Claimant unnecessarily, overreaching outside the balance of the ladder so as to cause additional sideways loading on the left rear stile, as he pulled through the data cables (or if tying the cables) stretched outside the ladder the [sic] tie them;***

It is more probable that the cause was (ii);

g. *The failure of the stile was <u>not</u> brought about by a traumatic failure of the left rear stile, due to <u>just</u> the gravitational force of Claimant's own weight (and that of his tools) as he was engaged in normal working in front of himself standing on the first rung. Such a finding is supported by:*

i. ***The fact that he had used the same ladder without incident earlier in the day and on previous days, without incident, doing just the same or similar tasks;***

ii. *The force necessary, **absent some significant sideways loading**, allowing for the fact that the rear stile would take just 25% (or thereabouts) of the load of 100 kgs, when it individually will have had a pay-load tolerance of at least 92 kgs, strongly suggests an intervening event subjecting the stile to a sudden additional force;*

iii. *The ordinary task of working (undertaken even the pulling through of data cables) with his weight within the confines of the ladder, could*

not explain such an increase of forces beyond the left rear stile's likely tolerance;

iv. ***The evidence of Mr Botham, which I accept as best explaining the likely sequence of events;***

h. *Insofar as the cause of the sideways loading was in the event due to the Claimant "overreaching", outside the confines of the ladder, this was not a requirement or necessary for the task being undertaken nor was it foreseeable by the Defendants, the Claimant would act in such way given:*

i. *The Claimant will have known it was an action that could potentially destabilise the ladder contrary to his training and experience on ladders;*

ii. *The Claimant said expressly he would never do such a thing;*

iii. *The need to obtain greater width of action outside the ladder, could easily been safely obtained by dismounting and repositioning the ladder, to avoid sideways forces - the Claimant accepting he was constantly off and on the ladder;*

i. *The lack of formal risk assessment and preparation of method statement, whilst negligent in amounting to a breach of Statutory duty, was not causatively significant. A reasonable employer, fully aware of the relevant risks, would still have permitted the use by a skilled and trained operative of a ladder to undertake such work. It had significant and obvious advantages to a mobile scaffold or working platform, as the Claimant readily acknowledged;…"* (***emphasis*** *added*)

36. At subparagraph j, the judge went on to hold that, if it had been relevant, he would have found the Claimant to have been 33% contributory negligent based on his positive finding that the Claimant had overreached the ladder and 60% contributory negligent *if* he had found that he specifically sought to "shuffle" the ladder sideways. In this way the judge confirmed (as he concluded in subparagraph f.) that his finding was that the cause of the failure was the Claimant overreaching outside the ladder, rather than shuffling the ladder sideways.

(D) The Parties' cases on appeal

The grounds of appeal

37. The Claimant contends that, in circumstances where there was no direct evidence of the Claimant misusing the stepladders and no indirect evidence such as scratch marks, the learned judge was wrong to find that the Claimant had misused the step ladders. He misdirected himself as to the likelihood or possibility of a sufficient force being imposed upon the left rear stile by the Claimant overreaching or shuffling, when no satisfactory engineering explanation had been given. That finding of fact was not supported by any direct evidence and was illogical.

38. There was an "appropriate assumption" that the Claimant's accident was in fact caused by a defect, albeit hidden, in the left rear stile. Had the judge directed himself appropriately that 92 kg of lateral force was required to cause the stile to bend, he would have concluded that the exertion of such a force was not possible and that in the circumstances the Defendant had not satisfied the evidential burden upon him to dislodge that appropriate assumption.

The Claimant's arguments

39. In his skeleton argument, the Claimant submitted, first, the judge misdirected himself as to what was the central issue in the case namely a defect covered by strict liability under Regulation 5. The judge wrongly considered (at paragraph 43), that the central issue related to failure to carry out appropriate risk assessments.

40. Secondly, under Regulation 5, the failure of equipment is evidence that the absolute and constant duty to maintain equipment was breached, even if the cause of the failure remains a mystery. The only circumstance in which the strict liability imposed by Regulation 5 would not bite is if the malfunction occurred when the equipment was being misused.

41. In this case the Claimant need only establish that the accident occurred as a result of his use of the equipment for the burden of proof to be passed to the Defendant to show that the accident was due to unforeseeable circumstances beyond their control or to exceptional events, the consequence of which could not be avoided in spite of the exercise of due care on his part: see *Hide v The Steeplechase Company Limited* [2013] EWCA Civ 545; *Stark v Post Office* [2000] ICR 1013 and *Galashiels Gas Company Limited v Millar* [1949] AC 275. The burden was upon the Defendant to establish, on the balance of probabilities, that its theory or allegation that the Claimant had abused the ladder was the actual cause of the ladder failing, as opposed to a hidden defect.

42. Thirdly, applying this approach to the facts, and set in the context of the absence of scratch marks found on the floor and the fact that the Claimant had no propensity or history of misusing ladders, the judge's reliance upon Mr Botham's evidence was a misdirection in the fact-finding process. The evidence provided by Mr Botham did not establish that the Claimant probably overreached, since his evidence only went so far as to say that it was "possible". The judge's finding of fact of overreaching was not open as a finding on the balance of probabilities. Further, Mr Botham's evidence did not establish any engineering or mathematical or even sensible basis for the finding that the Claimant had shuffled onto one of the four legs. His evidence did not

sufficiently establish how it would be physically possible for the Claimant to have caused more than 900 N force on one stile. Mr McFeeley's evidence was that he could not conceive of a manner in which the Claimant could have imposed such a force sideways on the foot of the left stile. Accordingly the judge was not entitled to rely upon the evidence of Mr Botham. Absent that evidence, the only inference available to the court was one of hidden defect. The alternative conclusion based on "shuffling" was adversely affected by the judge's own personal experience of his own DIY at home and shuffling a ladder across a floor. What is more, Mr Botham accepted that for "shuffling" to have happened the Claimant would have had to have been "pogoing on one corner".

43. The Claimant invited this Court to replace the judge's finding of fact with a finding that the cause of the Claimant's fall was as a result of a defective piece of equipment.

44. Then, in oral argument, Mr Willems QC drew together the Claimant's case as follows:

(1) The judge misdirected himself on the burden of proof and the effect of res ipsa loquitur. The fracture in the stile was the cause of his fall and the Claimant does not have to show that that failure in the leg was caused by a defect. The contest here is between, on the one hand, an assumption that there was a hidden defect in the ladder and, on the other hand, the Defendant's ability to prove that it was not due to a defect.

(2) The judge misdirected himself as to the strength of Mr Botham's evidence in relation to overreaching as the cause. His evidence was that overreaching was only a "possibility". In any event there is a contradiction between Mr Botham's preference, in his evidence, for shuffling, rather than overreaching, and the judge's finding preferring overreaching, rather than shuffling.

(3) The judge allowed Mr Botham to usurp the function of the judge. When Mr Botham said that misuse was the probable cause, he had no foundation for that view.

(4) The judgment contained no discussion of the difficulty that Mr Botham had in explaining how 92 kg of force could be put laterally through the rear leg of the ladder.

The Defendant's arguments

45. Mr Snarr for the Defendant submitted as follows. First, the Claimant retained the legal burden of proof to establish that the cause of the failure was a hidden defect, and retained an evidential burden to establish on the balance of probabilities that the stile of the ladder failed due to a defect or at least a pre-existing weakness, even if it was an unexplained one. Strict liability in general, and in particular under Regulation 5, does not operate automatically. It merely enables the Claimant to avoid proving negligence, but still requires proof of a material defect: see *Hall v Jakto Transport Limited* [2005] EWCA Civ 1327 at §§48 to 52. In the cases of *Stark* and *Hide* there was no criticism of the persons using the equipment nor any suggestion that the equipment was not being used for its ordinary purpose. In the present case, as in *Jakto*, there is such criticism. The Claimant has not discharged his evidential burden

to establish a defect in the ladder, nor can it be said that the mere fact it collapsed must be taken to confirm the presence of a defect.

46. Secondly, turning to the findings as to the cause of the failure of the stile, first, the absence of direct evidence as to what happened favours neither party. There was no reliable direct evidence of the use of the ladder either way, nor was there any direct evidence that the ladder had been previously overloaded. The fact that there was no evidence that the Claimant had previously abused the ladder by shuffling did not mean that on the day in question the overloading had not arisen by way of misuse by the Claimant. As regards the absence of scratch marks, there was no evidence either way as to whether anybody had looked for them, nor any evidence as to the state of the floor.

47. Thirdly, the absence of mathematical calculations did not undermine the validity of Mr Botham's expert opinion, which the judge was entitled to accept. Mr McFeeley accepted that Mr Botham's explanation was possible.

48. Finally, Mr Botham's evidence in his report, in the Joint Statement and in his evidence in chief was that the left stile failure was *probably* likely to have arisen as a result of misuse, by either overreaching or shuffling. The passage of evidence referring to "possibility" was merely a possibility as to precisely how the misuse may have occurred. In any event it was for the trial judge and not for Mr Botham to reach the final conclusion as to the cause of the failure, on the balance of probabilities.

(E) Analysis

49. The issues on this appeal are as follows:

(1) Was there a burden upon the Claimant to adduce evidence/proof that there was a pre-existing defect in the left stile or rather was the burden of proof upon the Defendant to prove that the failure of the stile was caused by the Claimant's conduct and in particular by overreaching?

(2) If there was a burden upon the Claimant to prove that there was a pre-existing defect did the Claimant discharge that duty?

(3) If the burden was upon the Defendant to prove that the failure was caused by the Claimant's conduct, was the judge right to conclude on the facts that the Claimant had caused the failure of the stile by overreaching or alternatively by shuffling? Was the judge's finding of fact to the effect that the failure of the stile was caused by overreaching or alternatively by shuffling one which he was not entitled to reach upon the evidence?

The approach on appeal

50. This appeal from a final judgment in the County Court is governed by the provisions of CPR 52.21. The question for this Court is whether the decision below was wrong. It is an appeal by way of review, and not a full hearing. Nevertheless that review encompasses review of findings of fact as well as findings of law. On such review, this court will be reluctant to interfere with findings of fact, and in particular findings of primary fact based on oral witness evidence. However the court will be prepared to

conclude that findings are wrong, particularly where based on inference or where there is an absence of evidence to support them. See in particular CPR 52.21 (1), (3) (a) and (4) and *The White Book Service 2018* vol 1 at paras, 52.21.2 and 52.21.5.

51. Where the decision of the judge is based on preferring the evidence of one expert rather than another, the appeal court similarly shows deference to the judge's determination since the judge has had the advantage of seeing and hearing the experts give evidence: *Wilsher v Essex Health Authority* [1988] AC 1074 per Lord Bridge at 1091G-H.

52. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from the direct evidence of such facts. The weight to be attached to the findings of the trial judge will depend upon the extent to which he or she has an advantage over the appellate court. The greater that advantage the more reluctant the appellate court should be to interfere. Some conclusions of fact are however not conclusions of primary fact. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and the appellate court should approach them in a similar way. That means that the appellate court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement was possible. The trial judge is entitled to "a margin of appreciation". See *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 per Clarke LJ at at §§14-17 and per Ward LJ at §§193 to 197.

The facts

53. The following facts were undisputed or found by the judge:

    (1) There was no evidence of any manufacturing or materials defect in the ladder.

    (2) Prior to use by the Claimant, both the Claimant himself and Mr Bartley considered that the ladder appeared in good condition with no signs of wear and tear.

    (3) The Claimant had used the same ladder without incident earlier that day and on previous days

    (4) The ladder complied with EN-131

    (5) Features of disrepair were not relevant to the cause of the failing of the left stile.

    (6) The ladder was designed to support a maximum load of 150kg and should have been able to withstand the weight of the Claimant.

    (7) The point of failure of the left stile corresponded to a hole through the leg where a cross bearer was located.

    (8) Failure of a single leg is usually indicative of overloading at the time of use or a pre-existing weakness at the point of failure.

(9) There were no eyewitnesses to the accident.

(10) There were no scratch marks found on the concrete floor. It was unclear whether anyone looked for such marks.

(1) Regulation 5 and the burden of proof

54. The 1998 Regulations provide, inter alia, as follows:

> ***"4 Suitability of work equipment***
>
> *(1) Every employer shall ensure that work equipment is so constructively adapted as to be suitable for the purpose for which it is used or provided.…*
>
> *…*
>
> *(4) in this regulation "suitable" –*
>
> *(a) subject to sub- paragraph (b), means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person;…"*
>
> ***5 Maintenance***
>
> *(1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.*
>
> *(2) Every employer shall ensure that where any machinery has a maintenance log, the log is kept up-to-date."*

55. I have been referred to a number of authorities relevant to the nature of the obligation arising under Regulation 5, and in particular, it is said, to the issue of the burden of proof: *Galashiels Gas Co-Limited v Millar*, supra, at 282-283 per Lord Morton of Henryton and at 287 per Lord MacDermott (a case under s.22(1) Factories Act 1937); *Stark v Post Office*, supra, (a case under the predecessor regulation to the Regulation 5); *Hall v Jakto*, supra, (a Regulation 5 case); *Ball v Street* [2005] EWCA Civ 76 (a Regulation 5 case); *Hide v The Steeplechase Company Limited*, supra, especially at §§23, 25 (a case under regulation 4 of the 1998 Regulations) . The principles to be derived from these authorities can be summarised as follows:

(1) The obligation in Regulation 5 to maintain equipment in an efficient state etc is a strict (or absolute) obligation placed upon the employer; there is no burden upon the employee to show negligence on the part of the employer: see *Stark*, citing *Galashiels*.

(2) However the mere failure of equipment does not establish a breach of that absolute obligation. The obligation does not give rise to liability, simply on the basis of "res ipsa loquitur".

(3) Where the cause of the failure lies in a choice between an existing defect in the equipment and "operator error" (i.e. misuse by the employee), there is a burden on the employee to establish, on a balance of probabilities, the existence of a defect in the equipment: see *Hall v Jakto*, per Smith LJ at§3 and per Pill LJ at§48.

(4) The conclusion in (3) above is supported by a proper analysis on a careful reading of the facts and reasoning in both *Stark* and *Galashiels*. In *Stark* the decision was based expressly on the fact that the bicycle brake had a pre-existing (albeit hidden) defect.

(5) Once that burden has been discharged then strict liability is imposed, regardless of whether or not the defect could have been discovered by the employer.

(6) The burden upon the employer (referred to in *Hide* at §25), under the different provisions of Regulation 4 (suitability of work equipment) to show that the accident was due to unforeseeable circumstances beyond his control or to exceptional events the consequences of which could not be avoided in spite of the exercise of all due care on his part does not affect the foregoing conclusions: first, because even under Regulation 4 there is a burden upon the employee to show that the equipment is or may be unsuitable and, secondly, because there is no provision in Regulation 5 equivalent to the provision relating to reasonable foreseeability contained within Regulation 4(4).

56. Accordingly, in my judgment, there was, and is, a legal and evidential burden upon the Claimant to produce evidence to show that there was a hidden defect in the left stile. This is not a case of "res ipsa loquitur" and the Claimant could not rely on an assumption that there was such a defect. Further, there is no evidence that the judge positively misdirected himself on the burden of proof or indeed that it played a part in his conclusions. If anything, at paragraph 47 (and footnote 18) of the judgment, the judge appeared to adopt an approach which favoured the Claimant, suggesting he stood "in a strong position". In any event, he certainly did not expressly require the Claimant to discharge a burden or suggest other than that it was for the Defendant to show that the ladder had been misused by the Claimant. Then if he did, in so far as this appeal is based on a misdirection as to the burden of proof, it fails.

57. Strictly, in the light of this conclusion, the next question is whether the Claimant discharged his burden of proving the pre-existing defect. The further, and third, question is whether, if I am wrong in this conclusion, the Defendant has discharged the burden upon it to show that the stile failed as a result of use by the Claimant at the time of the accident. In either event, the underlying question is whether the judge was right to conclude, on the evidence, that the stile failed as a consequence of overreaching or shuffling. I address this underlying question on the basis most favourable to the Claimant (and contrary to my above conclusion), namely that the burden of proof was upon the Defendant.

(2) The judge's findings on the cause of the accident

58. By way of preliminary, as regards the criticism of the judge for concentrating upon the suitability and risk assessment issues, there is no appeal in relation to the judge's

findings on that issue. In any event, I do not accept the Claimant's submission (paragraph 39 above). Whilst it is the case, that at paragraphs 43 and 47 of the judgment, the judge took the view that the main issue had centred upon the defendant's risk assessment and whilst he went on to consider that issue and the issue of the method statement, it is clear that his conclusion on that issue was subject to the issue of whether the ladder itself was in fact defective. This is clear both from the words of paragraph 47 itself and from the use of the word "accordingly" at the beginning of paragraph 43 and the view that he had reached at the end of paragraph 42 that there was no pre-existing weakness in the ladder.

59. Secondly, there is no appeal in respect of the judge's finding (paragraphs 11, 52 and 53) that the Claimant's own evidence was undermined by his failure to be able to recall his use of the ladder on the day in question. The judge found that the Claimant's evidence, through no fault of his own, was not reliable (and indeed expressed his admiration for the way in which the Claimant gave his evidence). This court, as did the judge, has considerable sympathy for the Claimant's position. However the fact remains that there was no direct evidence as to the use of the ladder by the Claimant and the judge was unable to accept the Claimant's account of events. This is important when it comes to considering the evidence of Mr McFeeley.

60. Thirdly, the judge made clear findings on the facts (1) that the ladder did not have a pre-existing defect (whether by way of manufacturing or by way of prior use) and (2) that the probable cause (on the balance of probabilities) was that the left stile had failed as a result of the Claimant overreaching over the side of the ladder and thereby imposing a lateral force.

61. Fourthly, in reaching those conclusions, the judge preferred the evidence of Mr Botham over that of Mr McFeeley (paragraph 54 (g)(iv)). The question is whether this Court should interfere with that conclusion, particularly in circumstances where the judge had the benefit of hearing and seeing the two experts, at some length. I consider the evidence of the two experts in turn.

62. As regards Mr McFeeley's evidence, first, paragraph 4.1 of the Joint Statement records his position in relation to areas of disagreement. By contrast with Mr Botham's consistent position recorded in paragraph 4.2, Mr McFeeley did not repeat, or expressly maintain his earlier opinion in paragraph 7.5 of his report that there was a pre-existing weakness. That he did not do so was expressly remarked upon by the judge at paragraph 40. His use of the words "Although" and "originally" in footnote 15 indicated that the judge considered this to be a change of position (see paragraph 30 above). Secondly, Mr McFeeley's opinion that the ladder had some unidentified pre-existing defect was substantially weakened in cross-examination. He accepted it was his own "supposition"; most significantly it was expressly and solely based on the Claimant's own description of the accident (as indeed was paragraph 7.5 of his report): see paragraphs 11 and 12 above. Otherwise he could not say whether it was more likely or not that the overloading happened before or at the time of the accident. However the judge rejected the Claimant's evidence of the usage of the ladder as being unreliable. Thus, the underlying basis of Mr McFeeley's opinion was fundamentally undermined. In these circumstances, in my judgment, the judge was entitled not to accept Mr McFeeley's initial evidence that there was a pre-existing defect.

63. As regards Mr Botham's evidence, from his initial report through to his oral evidence, he consistently maintained his opinion that it was probable (and not just possible) that the failure was caused by the manner in which the Claimant had used the ladder: see paragraphs 15 to 17 and 23 above. He also explained to the judge the significance of the effect of dynamic forces creating substantial loads.

64. The high-water mark of the Claimant's case on this appeal is Mr Botham's specific answer to one question that he could only say that overreaching was "a possibility" (paragraph 22 above). In my judgment, that answer does not afford any basis for allowing this appeal. First, the answer was offered to the judge in response to a specific question asking for examples. Secondly, that answer does not undermine the rest of his evidence, consistently given, and reaffirmed, that misuse by the Claimant was the "probable" cause of the ladder failing. Thirdly, considering all his evidence, the judge himself concluded that Mr Botham had stood by his initial conclusion and "came to the clear conclusion that on any balance of probability, this stile failure came about due to sideways loading…" (paragraph 39). I do not consider that the single answer referring to a "possibility" is such as to undermine the cogency of the judge's conclusion as to the overall tenor of Mr Botham's evidence. Mr Willem QC suggests that Mr Botham implicitly agreed that by adopting the word "pogoing" (see paragraph 19 above) was such as to cast ridicule on the theory of "shuffling". There is no basis for that implication or that Mr Botham was agreeing to the use of that term for any reason other than it was a convenient shorthand for what he was considering by way of "shuffling".

65. As to the absence of mathematical calculations to support Mr Botham's opinion, first neither expert was asked in evidence to comment on the relevance of such an absence, nor to provide any such calculations. Secondly, Mr McFeeley accepted that Mr Botham's explanation was, at least, a logical conclusion. Thirdly, in so far as the Claimant relies upon Mr McFeeley's response in re-examination that he could not conceive how a force of 900 Newtons could have been imposed on the failed foot, it is important to note that the question posed was predicated on the assumption that the Claimant was "carrying out his tasks": see paragraph 14 above. In so far as this is a reference to working normally on the ladder, Mr McFeeley's evidence takes the matter no further. In so far as the question was intended to extend to "abnormal" working, then Mr McFeeley's short answer contradicts his evidence throughout that failure by overreaching was possible and logical, even if he thought, based on the Claimant's account of events, that pre-existing overloading was the most likely cause. Finally, Mr Botham did address the point in his evidence (paragraphs 21 and 22 above), as did the judge at paragraph 54(g)(ii) of the judgment.

66. In these circumstances, I conclude that the judge was entitled to prefer the evidence of Mr. Botham.

67. Finally, and importantly, it is clear that the judge reached his own conclusion, and did not simply adopt the evidence and conclusions of Mr Botham. The evidence of Mr Botham is one only of four reasons given at paragraph 54 (g) for rejecting the case that the stile simply failed in the course of normal working. The first three reasons given are cogent and reasons which the judge was entitled to reach. In addition he did not accept the Claimant's account of the accident. Contrary to Mr Willem's submission, Mr Botham did not "usurp the function" of the judge. As demonstrated by the approach of the Court of Appeal in *Jakto* (§§36, 44 and 49) the function of the

judge may include preferring (on the balance of probabilities) one of "two possible explanations both of which are very unlikely". Having made findings on Mr Botham's evidence, the judge nevertheless went on to make his own decision, preferring the "overreaching" explanation to that of "shuffling" (and thereby implicitly putting "pogoing" aside).

68. As to the judge's reference to his personal experience of having once shuffled a ladder, there is no warrant for the suggestion that this affected the judge's objective analysis of the evidence. Indeed, it is clear that the judge favoured "over-reaching" as the cause in any event.

69. For these reasons, I conclude, first, that, in so far as the judge's conclusions were based on the evidence of Mr Botham in preference to the evidence of Mr McFeeley, having heard and seen the witnesses he was entitled to reach that preference, and indeed, that was a justified preference. Secondly, and in any event, the judge's findings at paragraphs 54 (f) and (g) of the judgment were matters of his own judgment, based on all the evidence, including findings of fact and inference. Far from being "outside the bounds within which reasonable disagreement was possible", those findings are logical and well reasoned.

(F) Conclusion

70. In the light of my conclusions at paragraphs 56 and 69 above, I conclude that the decision of the judge dismissing the Claimant's claim was not wrong. Accordingly, this appeal is dismissed.

71. I recognise that this conclusion will come as a disappointment to the Claimant personally and I endorse the observations of the judge as to the manner in which he has conducted his claim. As regards consequential matters, I will hear further submissions in due course.