

Failing to discharge its duties as an employer under Section 2(1) of the Health and Safety at Work (General) (Guernsey) Ordinance 1987, as amended, in that it failed to conduct its undertaking, namely the installation of heavy refrigeration units, in such a way as to ensure, as far as was reasonably practicable, that persons not in its employment who may be affected were not thereby exposed to risk to their health and safety.

[2023]GRC060

**ROYAL COURT
FULL COURT**

8th November 2023

**Before: Catherine Maureen Fooks, Judge of the Royal Court and Jurats:
Stephen Murray Jones OBE, David John Robilliard, Stuart Michael Crisp,
Marilyn Jasmine King, Tina Jane Le Poidevin, Heather Reed, James Robert Toynton.**

THE LAW OFFICERS OF THE CROWN

- v -

HUREL LIMITED

Crown Advocate F M Russell appeared for the Crown

The Defendant Company was absent and unrepresented

JUDGE OF THE ROYAL COURT:

Background

The Defendant Company Hurel Limited (“the Company”) is to be sentenced today in relation to one count of failing to discharge its duties as an employer under Section 2(1) of the Health and Safety at Work (General) (Guernsey) Ordinance 1987, as amended, in that it failed to conduct its undertaking, namely the installation of heavy refrigeration units, in such a way as to ensure, as far as was reasonably practicable, that persons not in its employment who may be affected, including Barry Challen, were not thereby exposed to risk to their health and safety. The maximum penalty is an unlimited fine.

The Company is not present at Court today, nor is it represented. The Company is in voluntary liquidation. The Court is satisfied that the Company is aware of the sentencing hearing today. It was given notice (via its liquidators) of the date, sent copies of the sentencing papers and was invited to make any representations for the consideration of this Court.

The Company was found guilty following a trial which ended on 29th September 2023, from which it was also absent and at which it was not represented. Again, the Company had full notice of the trial and had every opportunity to be present and/or to be represented.

Crown Advocate Russell has outlined the facts of the case in great detail in her outline and it is sufficient for the purposes of these sentencing remarks to summarise the principal facts.

On 20th May 2018, the Company was the principal contractor responsible for the management and safety of the site owned by the Channel Islands Co-operative Society Limited (“CICS”) at the Bridge, which was in the process of being fitted out as a retail unit. The CICS had arranged with its usual contractors for the supply, delivery and installation of refrigeration units. The installation task had been sub-contracted to Mr Challen’s employer. The road had been closed, barriers had been erected and the Company had opened the site but then departed. It was Mr Challen’s job, along with two other men, to move the large and heavy refrigeration units from the delivery point outside the store into position within the store. The method for moving the refrigeration units was to place them on skates and to wheel them up and over the entrance into the store and into position. The route was overlaid with wooden boards. Those in the store had been fitted by the Company over the incompletely tiled floor. The Company had indicated that the site was ready for the installation of the units. In the course of wheeling the third of the refrigeration units over the boards in the store, it became unstable and toppled and fell onto Mr Challen who tragically died a few days later from his injuries. The Court heard from experts as to the likely cause of the toppling and what steps might have been taken to prevent what happened. They agreed that the unevenness of the floor was the largest contributory factor and that this had increased the risk of the units toppling over.

The Court also heard from the Health and Safety Executive as to the lack of a specific risk assessment and method statement on the part of the Company for the movement of the heavy refrigeration units. The Company’s project statement was generic and named the wrong site. Further, there was no-one from the Company present on site during the moving of the units to co-ordinate the works and respond to any issues raised.

The Company was formerly known as RG Falla Limited. It changed its name shortly before it went into voluntary liquidation. The liquidators have been in regular contact with this Court and have indicated that the Company has no assets, the assets and all employees having been transferred into a different company prior to the voluntary liquidation.

The Company was previously convicted in 2012 by this Court for an offence under Health and Safety Legislation relating to the exposure of its employees to an asbestos risk for which it was fined. There is nothing else recorded against the Company.

This Court notes that the proceedings against the Company commenced in late 2020 but, for a number of reasons, as set out by Crown Advocate Russell, the matter did not get to trial until September 2023. At trial, the Company was acquitted of another count which was a failing to discharge its duties to its employees. Further, the person who was the direct employer of Mr Challen was also acquitted on two counts of failing to discharge his duties both to his employees and to non-employees.

After the incident, a representative of the Company was interviewed by Health and Safety Executive Inspectors and the Police. It was accepted by the representative that the Company was the principal contractor and responsible for site safety, but it was asserted that the Company had no responsibility for the installation of the refrigeration units as this was outside the scope of its contract with the CICS. It was further said that the arrangements for the installation had been made directly with the CICS’ usual contractors. It was said that the contractors were

specialist and that having the Company on site would have potentially increased risk. The Company had asked if its assistance was required with the installation, and none had been sought. It was not part of its contract but, in view of its relationship with the CICS, it would have assisted at its own expense, had it been asked to do so. A representative of the Company also said that, following the incident, the Company had reviewed its practices but would not make any changes as a result of the incident. The Company's representative expressed regret at the accident.

Sentencing Considerations

Health and Safety prosecutions are rare in Guernsey. In previous cases this Court has approached sentencing by reference to what was, at one stage, the leading English case, which is R v F Howe & Son (Engineers) Ltd [1999] 2 Cr App R 37 but also considering the broader principles contained in the English Sentencing Council Guidelines, which were based on that case. In particular, this Court finds of assistance the aggravating and mitigating factors from those guidelines. Care must always be taken in referring to the English Sentencing Guidelines as the statutory framework in England is often different and it has been long acknowledged by the Guernsey Court of Appeal that this Court is correct to sentence on Guernsey considerations. In this case, the legislative provisions and the applicable safety standards are broadly the same, so the English guidelines are of particular assistance.

It is said in Howe that sentencing of corporate entities is fact specific. It has the aim of punishing that entity but also of deterring others in the same line of work to ensure the safety of employees and others exposed to risks (in the building industry, in this case). In calculating the right level of penalty, this Court will look at the consequences of the offending and how far short of the appropriate standards the Company fell in failing to meet the reasonably practicable test. The financial penalty must have a real economic impact on the company being sentenced.

The tragic death of Mr Challen sets the actual consequences of the offending at the highest level and this Court considers that the risk of harm was at a medium level, applying the English Sentencing Guidelines.

The movement of large heavy objects carries an obvious risk. There should have been a dynamic risk assessment, including the roles and responsibilities of those involved in the moving and a full bespoke method statement setting out the process and measures to be taken to mitigate risk. The local Guernsey Guidance clearly sets out the principal contractor's duties in that role and in the role of site safety co-ordinator.

In terms of how far short of the appropriate standard the Company fell in failing to meet the reasonably practicable test, the Court accepts that there was:

- no deliberate breach and no cynical attempt to cut corners to increase profit . This was a case of the Company abdicating its responsibility to others;
- it is also relevant that the Company was found 'not guilty' of breaching its duties to its own employees as none were put at risk. The public were protected by the road closure and barriers and thus the risk was confined to those who were directly involved in the installation;
- the Company was fully aware that the refrigeration units were being delivered. Even though it held no direct responsibility for Mr Challen, the Company's duties as principal contractor and site supervisor required a formal dynamic assessment of risk and a method statement about that task which included ensuring a level surface and presence

on the site. These were not onerous measures but were reasonably practicable and had the potential to avoid loss of life or serious injury. A company of the size of the Company at that time was well equipped to have the right policies, procedures and manpower to address such issues; and

- all principal contractors must accept fully their responsibility for all works being carried out at their site. Safety cannot be compromised. Contractual arrangements are irrelevant.

In sentencing terms, the death is clearly an aggravating factor. Additionally, this is not the Company's first appearance before this Court on a health and safety matter. The first and only previous appearance was in 2012 for an incident which occurred in 2008.

Mitigation

The Company is not entitled to any credit as it entered 'Not Guilty' pleas and it had done this whilst it was still represented.

In this case, the Court does not have the benefit of any submissions or a plea in mitigation but the Court has considered what points might reasonably be made in the Company's favour, as follows:

1. It is a long-established company with just one matter recorded from 2012.
2. The Company co-operated fully with the Health and Safety Executive investigation.
3. There were contributory factors to this incident. Mr Challen's employer and the expert said that Mr Challen was experienced and that he should not have carried on with the task once he saw the issues with the flooring and that there was no principal contractor on site.

The Court has no information as to the financial state of the Company at the time of the offending or since, save that it is in voluntary liquidation and is said to have no assets. In the absence of information, the Court is entitled to draw inferences as to the value, turnover and profitability of the Company at the time of the offence and since, prior to the liquidation. Crown Advocate Russell helpfully provided caselaw on the contrasting approaches in two English cases: R v Total UK Ltd (unreported 2010) and R v Mid UK Recycling (October 2019). In one case it was said that the impact of the fine on creditors of a company which was in administration justified a reduction of that fine to a nominal sum. In the other case, although the company was also in administration, in that case with a new owner who had not purchased liabilities, it was held to be in the public interest to impose a significant fine as a matter of public policy, despite the Company's inability to pay it.

The Court does consider it relevant to sentencing that the liquidation of the Company is voluntary. Whilst there is no evidence to suggest that that process is, in any way, linked to these proceedings, it is important to state that a voluntary liquidation must not be perceived in any way as a means to avoid the consequences of breaching Health and Safety Regulations. It is appropriate that the Court should consider the impact on others of imposing a fine on the Company. A fine is not a preferred debt and the creditors will not thereby be unfairly prejudiced by the imposition of a fine in this case, nor will the employees be prejudiced as they have transferred to a new company. In this case the Court considers it a matter of public interest that the fine is set at a level which reflects the size of the Company and its likely turnover before it went into voluntary liquidation. The Court considered the appropriate fine to be £100,000 which has been reduced on account of the mitigating factors.

Sentence

The purpose of Health and Safety Regulations is to protect employees and others including the public from harm in what is a hazardous industry. It is important that those in the industry can see the consequences of breach and are not tempted to take shortcuts which might increase the risk of accidents, injury or death. Taking into account all the above, the fine will be one of £75,000. The Court extends its sympathies to the family of Mr Challen.

Catherine Maureen Fooks
Judge of the Royal Court

8th November 2023