Neutral Citation Number: [2017] EWHC 2302 (QB)

Case No: HQ14X04604

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2017

Before :

AMANDA YIP QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

Darrell BAKER **(a protected party by his Litigation Friend Kerry BAKER)**	**Claimant**
- and -	
BRITISH GAS SERVICES (COMMERCIAL) LIMITED (1)	**Defendants**
- and -	
J & L ELECTRICS (LYE) LIMITED (2)	

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Robert Weir QC (instructed by **Davies and Partners Solicitors**) for the **Claimant**
Colm Nugent (instructed by **Bond Dickinson LLP**) for the **First Defendant**
Shaun Ferris (instructed by **Kennedys Law LLP**) for the **Second Defendant**

Hearing dates: 17 to 21 July 2017

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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.

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AMANDA YIP QC

Amanda Yip QC :

Introduction

1. The Claimant seeks damages for personal injury arising out of an accident which he sustained in the course of his employment as an electrician on 25 July 2012. Liability falls to be determined as a preliminary issue.

2. The Claimant was employed by the First Defendant in its "Reactive Maintenance Business". His team provided electrical repairs and maintenance for retail and commercial clients. On the day in question, the Claimant had been sent to the Coventry Building Society branch in Arena Park, Coventry. He was to carry out some works including the replacement of a number of lamps.

3. While working at height with one of the lights, he was electrocuted, causing him to suffer a cardiac arrest and to be thrown to the floor below. He struck his head sustaining a severe brain injury. It would appear that he has been left with significant deficits and his cognitive impairment is such that he lacks capacity to litigate. He proceeds through his wife as his litigation friend. He has no recollection of the accident or the events leading up to it.

4. It is not in dispute that the Claimant sustained a massive electric shock via the casing of the light because the junction box to which it was connected had been mis-wired. The Second Defendant was the electrical contractor responsible for originally fitting the lights in 2004. It is the Claimant's primary case that the mis-wiring had been present from then.

5. Before October 2010, the Claimant was employed by Connaught Compliance Electrical Services Ltd ("CCES"). Pursuant to an asset purchase of CCES, the employment of the Claimant and other electricians was transferred to the First Defendant under the Transfer of Undertakings (Protection of Employment) Regulations 2006. On the Claimant's primary case that the mis-wring dates from 2004, he contends that his employer, the First Defendant, is also liable to him. In that regard, he relies particularly on the failure to identify the fault during periodic inspections in 2009 and 2010.

6. It is the Claimant's secondary case that, if the mis-wiring does not date from 2004, it is likely to have arisen in the course of maintenance works performed by employees for whom the First Defendant is liable.

7. The parties are not agreed as to the legal position surrounding the First Defendant's liability in light of the transfer of the undertaking and I shall return to this once I have dealt with my findings of fact.

The Evidence

8. The trial took place over five days. The first witness to be called was the Claimant's wife. Despite her visible distress, she gave her evidence in a perfectly sensible and straightforward way. However, the reality was that she had no direct knowledge of what had happened. The Claimant then called two of his former colleagues, Malcolm Allison and Mike Lynch. Mr Lynch was an engineer and was the first person to

investigate the scene after the accident, having been asked by the First Defendant to attend on the day it happened. I found him to be a particularly impressive witness.

9. The First Defendant called four witnesses. I was told, and I accept having seen them give evidence, that the First Defendant's witnesses were generally sympathetic to the Claimant. Chris Portt, a field services manager, dealt with the training the Claimant had. Paul Buck was also a field services manager and had been the Claimant's line manager for a time although not at the time of the accident. Christopher Huddart was Head of Health, Safety and Environment for the British Gas group of companies at the time of the accident, although he had little direct knowledge of relevant matters. Paul Gibson was an Electrical Standards Manager and had been tasked with carrying out an internal investigation into the circumstances of the accident. He gave his evidence in a careful and considered way and I found his evidence to be helpful.

10. I then heard from four witnesses called by the Second Defendant, namely John Ray (managing director of J & L); Lee Dudley (the project manager for the relevant electrical works); Steven Moule (electrician) and John Foxall (testing electrician).

11. I also heard evidence from three electrical engineering experts, each of whom had produced a report and contributed to a joint statement. They were David Anthony Sykes, for the Claimant; Stephen Braund, for the First Defendant and Michael Jones, for the Second Defendant.

The Facts

The happening of the accident

12. The circumstances surrounding the accident emerge from CCTV footage from security cameras and from a statement dated 26 July 2012 from Aisha Kemp, an employee of the Building Society. That statement was taken as part of an investigation into the accident by Coventry City Council in conjunction with the Health and Safety Executive. Ms Kemp was not called to give evidence. I had the opportunity to view the CCTV footage. It shows the lead up to the accident and the Claimant's fall from the ladder. Unsurprisingly, no camera was trained on the ceiling and so it does not show exactly what the Claimant was doing when he was electrocuted.

13. Having arrived at the premises, the Claimant carried out some other jobs before turning to the ceiling light in question. It is not in dispute that he changed the lamp (bulb) but that this did not solve the problem. Having come down from the ladder, he appears to have briefly turned the lights at the front of the store off before turning them back on. He is then seen to pick something up, probably a lever or a screwdriver, before going back up the ladder. His legs and feet can be seen in the CCTV. Ms Kemp said in her statement:

> *"The next thing I noticed was a noise, a moaning, groaning animal sound. It was a strange noise that I had not heard before. This made me look up and I remember thinking why was there a machine hanging down. I thought he may have been using a testing machine, but I now know that this was the light fitting hanging down. His body looked stiff and stuck in*

> *place. I think his right arm and face were in the ceiling hole. The cable from the light fitting was just hanging down. He did not move and the sound just went on. It seemed to go on for a really long time. I thought he was then starting to come down the ladder, but his body fell straight to the floor …"*

14. It is now known that, as a result of the wiring error, the case of the light fitting was permanently live (whether the light switch was on or off). It is apparent that the Claimant had removed the light fitting from the ceiling (while it remained connected by its flex). Electrocution occurs when there is a pathway through the body from a live source of electricity to earth. The Claimant was standing on an insulating ladder. Therefore, the pathway to earth was not completed when he first touched the fitting. However, there was earthed metalwork in the ceiling. Touching that while still in contact with the light fitting would complete the circuit and cause electrocution.

15. Within the accident investigations and the expert evidence, some differing views were expressed as to the entry and exit points for the electric shock. However, in their joint statement (at paragraph 2.2.2), the experts agreed:

> *"It is quite likely that the live casing of the incident light fitting made contact with Mr Baker's chest (through his shirt) while one of his hands or arms was touching the suspended ceiling support structure."*

16. This fits with all the evidence and I find as a fact that it is what occurred. It is clear that Ms Kemp looked up and saw the Claimant while the shock was still being applied. He looked stiff and "stuck in place". He was moaning and groaning. At that point, the light fitting was hanging down from the ceiling rather than being in the Claimant's hand. The medical evidence served with the Particulars of Claim confirms that the Claimant had bruising and blistering over the front of his chest and an electrocution injury to his right hand. Ms Kemp noted that it was a hot day and that the Claimant was sweating. Mr Jones explains in his report how this could allow the electricity to be conducted through the Claimant's shirt. Ms Kemp thought that the Claimant's right arm and face were "inside the ceiling hole". In fact, it is agreed that his face and arm could not have fitted within a hole that was only 200mm in dimension. However, it would seem that his right arm and face were up by the ceiling out of her sight. This coupled with the evidence of injury to the right hand suggests that the Claimant touched the metalwork inside the ceiling with his right hand while his chest was in contact with the live light fitting.

17. The metalwork in question is illustrated in photographs, in particular those at pages C/198 and C/200 of the trial bundle. The proximity of the metalwork to the opening in the ceiling can be clearly seen. It is not the case as Mr Sykes initially suggested in his report that the entry point for the electricity was one of the Claimant's hands as he reached into the ceiling void. Nor is it right to say as Mr Nugent does in his closing note that the Claimant placed his arm into the void and "in doing so came into contact with live metalwork". The metalwork was not live. It was properly earthed. In itself, it presented no danger at all. However, it provided the pathway to earth which allowed the electricity to run from the live light fitting (which by then was outside the ceiling) through the Claimant's body. This caused him to be electrocuted and to fall from the ladder which led to further serious injury.

The faulty wiring

18. The cable to the light fitting was connected into the lighting circuit via a junction box in the ceiling void. When the junction box was opened and inspected after the accident it was immediately apparent that there was an error in the wiring. An incoming permanently live feed had been connected to the earth wire. This caused the case of the light fitting to be permanently live. In their joint statement, the experts agreed that: "*Whoever introduced the wiring error at the junction box made a serious error*". There is no dispute that whoever was responsible for this wiring had committed breaches of the Electricity at Work Regulations 1989 and was negligent. What is in issue is when and by whom the error was introduced.

19. That is an issue of fact for me to decide. Although the expert evidence may throw some light on matters, the conclusions of the experts are of limited assistance in determining this factual issue. That applies to those carrying out investigations after the accident as much as to the experts in the case.

20. It is known that the premises were fitted out in 2004 and that the Second Defendant was responsible for the installation of the electrical circuits and lighting. It is also known that electricians had attended the premises on numerous occasions since 2004 and that a number of lamps and fittings had been repaired or replaced.

21. When lights were not working, the Building Society would call an electrician. The Claimant and the other electricians who usually carried out repairs and maintenance at the premises were initially employed by Pat Connelly Lighting Ltd. Their employment was transferred to CCES in 2007 and to British Gas in 2010. On three occasions, electricians from another company, Triplelec, were engaged in "re-lamping work" at the premises. It is common ground that an electrician attending to a light that was not working would first change the lamp. If that did not solve the problem, the next step likely to be taken (as confirmed by Mr Sykes and Mr Gibson) would be to change the ballast in the fitting. A ballast is an electrical component required to start the lamp and regulate the current flow when it is cold. Outwardly, it has the appearance of a plastic box. If a ballast was to be changed, the light fitting would be disconnected and brought down to be worked on.

22. It is not uncommon to find lights of this sort connected to the circuit by means of plugs and sockets. That allows the light fitting to be easily disconnected. In fact, the original design for these premises had provided for such fittings but Mr Ray told me that this was changed at the client's request to save costs. Instead, the light was wired into the circuit via the junction box. That was a perfectly acceptable method of installation but it meant that if the light needed to be disconnected to be worked on it would have to be unwired from the junction box and wired back in when it was replaced.

23. Other potential reasons for disconnecting the light from the junction box were suggested by Mr Ferris for the Second Defendant. While the lay and expert witnesses who were asked about this accepted that changing the flex, bulb holder or the junction box itself would theoretically require disconnection from the junction box, it was clear that they all thought that these components were very unlikely to be changed in practice. Unlike the ballasts, these are not components that are expected to wear out. Mr Ferris also suggested that there might have been a need to repair damage done by

"other services", highlighting that the roller shutters were located nearby. There is no evidence at all of any accidental damage to the light fitting and I reject that as being nothing more than speculation. It was also suggested that a decorator may have disconnected the lights in the course of painting the ceiling. That suggestion came from Mr Jones who referred to photographs which he said demonstrated that a circumferential dust mark around the hole for the light had been partially obscured by paint suggesting the ceiling had been repainted since the lights were installed. Even accepting that the ceiling had been repainted, I do not accept that the photographs provide evidence that the light in question had been disconnected by the decorator. It seems to me that it is somewhat unlikely that a decorator would disconnect the lights from their junction boxes. Indeed, if the paint marks can be interpreted at all, the fact that the dust mark had not been wholly painted over might suggest that the light fitting had been loosened off but not fully removed.

24. In the end, Mr Ferris accepted that the suggested reasons for disconnecting the light, other than the failure of the ballast, were individually unlikely. However, he contended that I should look at the cumulative effect of there being a number of possible reasons for the wiring in the junction box to have been interfered with after the initial installation.

25. The Second Defendant relied on evidence from two electricians who had been involved with the original installation in 2004. Mr Moule had been a qualified electrician since 1986 or 1987. His regular partner was John Byran. Together, they installed the electrics at the Coventry Building Society. In accordance with their usual practice, they worked together on the "first fix" when high level cabling was installed and then at the "second fix" Mr Moule did the light fittings while Mr Bryan did the ground level fittings such as installing sockets. Mr Moule's evidence was that he did not mis-wire the junction box. Apart from the obvious error, which he says he would not have made, he maintains that the wiring shown in the photographs is not in his "style".

26. Mr Foxall had started his electrical apprenticeship in 1965. He is now retired. In 2004, he was working for J & L. His role on this project was inspection and testing of the installation. He had been qualified for that role since 1992. It was his responsibility to test the installation and to issue an electrical installation certificate. His evidence was that he carefully tested the installation, carrying out earth loop impedance testing at each light fitting and that no fault was found. He also confirmed that Mr Moule was a careful electrician who would not have made an error of this nature. The inference, if I accept his evidence, is that the fault could not have been present at the time he tested and approved the installation.

27. Mr Ferris invites me to accept the evidence of Mr Moule and Mr Foxall. It is right that if I do so, the Second Defendant cannot be liable. However, I cannot look at this evidence in isolation. Rather, I must weigh all the available evidence to decide whether it is more likely that the wiring error was introduced at the time of the original installation by J & L or at a later date.

28. On paper, the evidence of Mr Moule and Mr Foxall looked strong. Having had the opportunity to assess them in the witness box, I was less impressed. Of course, I allowed for the fact that they were giving evidence about work they undertook over twelve years ago.

29. In his statement, Mr Moule said that he could not remember the specifics of the job. That would be unsurprising. Mr Moule said:

> *"If there had been anything specifically difficult or unusual during the job, I would most likely have remembered. This was not the case and the installation was completely standard."*

By contrast, in the witness box, he said that he could remember the job because it was a particularly easy one. That is inconsistent with his statement. He was asked about timings. I note the following relevant evidence in his witness statement:

> *"The first test is undertaken before the installing electricians start the third fix stage. …. When John Foxall had completed the initial dead testing, I would proceed with the third fix. … Following the connection of the lights and on completion of all remaining third fix items, John Foxall would have proceeded to carry out the live tests."*

In his oral evidence, Mr Moule said that he did not have to wait until the testing was completed before starting work on the final fix. Rather, he would start work on one circuit while Mr Foxall was testing another. In my judgment, that is very different from what he describes in his statement. His explanation of the process which he called "conveyor belting" came about in my view when it became apparent that the time Mr Foxall had been on site would not have allowed sufficient time for the processes described in Mr Moule's statement. It is another significant inconsistency between his statement and his oral evidence.

30. Mr Moule told me that he could fit 15 to 20 light fittings per hour. He would have been working on a ladder or platform and would need to move from one location to the next, taking each fitting to its location. On his evidence, he would have only three to four minutes per fitting with no pauses in between. Even allowing for him being an experienced electrician well practised at installing fittings of this sort, that seems a remarkably short time. Mr Moule's evidence as to timings also appeared to be contradicted by Mr Ray. He agreed in cross-examination that the final fix could only start after dead testing was completed and thought that the fitting of the lights was likely to take "all day". Even allowing for Mr Ray not being as quick as those who regularly carried out the work in practice, his evidence suggested things would take longer than Mr Moule claimed.

31. Mr Moule was insistent that the faulty junction box was not wired in his "style". It was suggested by him and indeed by Mr Jones that experienced electricians will have a signature style so that they can identify work they have done and distinguish it from wiring done by others. When this was explored, it did not seem to me that it was a particularly strong point. In addition to the relevant junction box, the wiring in two other junction boxes was photographed. One in the rear office showed neat and tidy wiring which Mr Moule identified as being in his style. The other, which was on the same circuit as the relevant one, was not as tidy and the wires had not been looped inside as good practice dictates they should be. However, there was no dangerous defect such as existed in the relevant junction box. Mr Moule said this was not his. However, there was no independent verification of that. I accept that the evidence suggested that the one in the rear room probably dated from the time of the original

installation but the evidence about the other junction box was less clear. I note that when Mr Dudley was asked about the photograph showing the junction box from the same circuit, he was very uncertain as to whether or not that had been wired by J & L. Having been taken to the photograph and asked whether it appeared to have been wired by J & L, he said after a lengthy pause: "*It is hard to say*". He then said it was not necessarily as tidy as he would expect but conceded it might have been done by J & L before settling on saying he did not believe it looked like J & L's work. His evidence cast considerable doubt on the notion of a readily apparent signature style. Further, Mr Jones told me that the photograph of the rear office junction box showed what would be expected of a good electrician exercising best practice. The wiring was as an apprentice would be taught in the course of their training. He described it as showing a "particular degree of meticulousness" whereas the other junction boxes photographed were "shoddy". He conceded that it could be implied that a bit of time had been taken over the neatly wired box whereas the other ones may have been done quicker. He said that it does take a while to make the wiring look "just right". It was also apparent that there was limited scope for variations in style if best practice is followed. Mr Jones explained that some electricians might twist the wires whereas others would loop them in a different way.

32. I am not persuaded that the variation in wiring style proves that more than one electrician had been involved in wiring the junction boxes photographed. An alternative explanation is that more time was taken over wiring the junction box in the rear office. Although Mr Dudley, the project manager, denied that there was any rush to finish this project, the evidence taken as a whole suggests that the timetable must at best have been tight. On Mr Moule's own evidence, he was allowing only three to four minutes per light fitting.

33. Contrary to Mr Ferris's suggestion that Mr Foxall had a careful approach and could be described as "pernickety", that was far from the impression he gave in the witness box. I made allowance for the considerable time that had elapsed since his involvement and for the fact that he is now retired. However, I do not think this can explain the multiple inconsistencies between his witness statement and his oral evidence. He told me initially that he could not remember the contract but later said he could remember undertaking the testing and inspection of the installation. Asked about the time taken to complete dead testing, he said that he would not have tested every junction box but would just go to the last fitting on the circuit. In his statement, he said he would test each and every junction box. In oral evidence, he said that he would start live testing while Mr Moule was still working on other circuits. That was not something that appeared in his statement. When pressed as to whether it was safe to do that, Mr Foxall said that he would lock off the other circuit breakers with padlocks to prevent any danger. Somewhat surprisingly, he suggested that would involve applying 46 padlocks. There was no mention of that in his statement. There was a discrepancy as to whether or not he would de-energise the circuit in between testing each fitting. When asked about this he said there was an error in his statement. I note that he did not seek to correct that error at the start of his evidence although he did correct another matter. He then introduced the suggestion that he had used a volt stick at each light fitting (to explain why it was not necessary to de-energise the circuit between tests). Not only did this not appear in his statement but when I asked Mr Foxall to carefully describe how he went about his testing he made no mention of the volt stick. When asked about how he would record the readings taken at each

fitting, he said he would remember them all and then write them down at the end. He gave an example of holding eleven readings in his head (although some of the circuits including the relevant one had more than eleven fittings). In re-examination, he said that it was not necessary to remember all the readings, he just had to write down the last one and check that the resistance was increasing as he moved along the circuit. However, he had been quite specific about holding all the readings in his memory until he reached the end, even making a joke about being younger at the time.

34. Mr Foxall also sought to cast doubt on his own timesheet. Mr Foxall spent two and half days at the premises. It was suggested that he had insufficient time to carry out all the tests in the way that he said he had. On the Tuesday afternoon and Wednesday, his time sheet records only that he was "*testing"*. On the final day (Thursday), it notes "*testing + wiring up ASU + fans"*. Mr Foxall suggested his time sheet was probably wrong as he could not recall wiring anything on the Thursday. It seemed surprising that he could remember the detail of what he was doing so long ago. His challenge to his own timesheet also seemed wholly inconsistent with the claim that he was a careful and pernickety employee.

35. Mr Foxall also accepted that as the inspector he should have signed the electrical installation certificate personally. He did not do so. This, he said, was a "mistake". The certificate requires the signatures of the designer, the constructor and the inspector of the installation. Mr Ray signed all three boxes. He gave his name as the designer although he accepted he had not designed the circuit. That had been done by his son and Mr Dudley. Mr Moule and Mr Foxall should have signed the certificate personally but did not, although they were named as the constructor and inspector. Mr Ray explained the need to sign the certificate and have it sent out to comply with their contractual obligations. This adds weight to the suggestion that J & L came under some time pressure at the end of the job. It is also another factor suggesting that Mr Foxall may not have been as careful and pernickety as was claimed. In short, I did not find Mr Foxall to be a reliable witness.

36. I have to bear my assessment of Mr Foxall in mind when having regard to his test results. It is common ground that a proper inspection as described by him would have detected the wiring error if it was present from the start. Mr Sykes and Mr Braund were of the view that the evidence suggested that it was unlikely that electrical tests were carried out on all the light fittings after they were connected to the junction boxes given the time available to Mr Foxall. Mr Jones strongly disagreed with this. In the joint statement, the experts agreed (at paragraph 3.4.4) that:

> *"The results of the tests carried out when the installation was commissioned appear credible, but we cannot be sure where when or how the measurements were made."*

37. Mr Jones placed reliance on Mr Foxall's description of the tests performed and his evidence that his testing was thorough and correct to conclude that the fault cannot have been present at the time of testing. In light of the findings I have made about Mr Foxall's evidence, the results of his tests have to be viewed with caution. There is, as the experts have identified, uncertainty as to how the measurements were made.

38. On the basis of Mr Foxall's evidence, I cannot be confident that he in fact live tested every light fitting as he claimed to have done. The relevant test results are to be found

in the column headed: *"Maximum measured earth loop impedance"* on page B/227. Again, that sheet has not been signed by Mr Foxall personally as it should have been. There was a suggestion in the course of the trial that some or all of the earth fault loop impedance results could have been calculated by adding the readings in the column headed "R1 + R2" to the recorded earth fault loop impedance (Zs) for the distribution board. On the relevant circuit, the measurement is exactly R1+R2+Zs as is the case for most but not all of the other circuits. Mr Foxall told me that he was aware of occasions when other electricians would complete the relevant column by adding R1+R2 and Zs although he asserted that he would never do this and did not take shortcuts.

39. Having considered all the evidence, I am not persuaded that Mr Foxall thoroughly tested the circuit in such a way as to exclude the existence of the fault from the outset.

40. I turn then to look at other evidence as to the likelihood of the junction box having been rewired after installation.

41. In the end, the experts all agreed that the ballast in the relevant light fitting was likely to be an original one dating from the time of the installation. It was manufactured in 2004 and had the same batch number as the one found in the rear office. The suggestion that it might have been replaced soon after installation from stock does not, in my judgment, hold up. The evidence was that ballasts are high turnover items, easily obtained and there was no evidence that spares were kept on site. The ballast was stuck down with sticky pads within the light fitting and they did not appear to have been disturbed. The Second Defendant contended that the ballast could have been taken from another light fitting but that fell away in light of the evidence.

42. The Second Defendant's expert, Mr Jones, accepted that the ballast was contemporaneous to the time of J & L's fitting and that it appeared to be original to the light fitting. He said that he suspected that, if it had been changed, the whole fitting had been changed rather than the ballast being changed within the fitting. This, he suggested, might have happened to prioritise the lighting at the front of the store. If a replacement unit or replacement parts were not available, he suggested an electrician might move a light unit from a less important area to maintain the lighting at the front.

43. I discount that suggestion on the basis of the evidence I heard. Mr Allison and Mr Lynch were both clear that this was not something they had done and they were not aware of it happening. Mr Lynch told me that if one light was not working it "was not going to make a massive difference". He also said that ballasts were kept in the electrician's van and if stock ever ran out they could be readily obtained over the counter at the wholesalers. There was a record of Mr Lynch attending the premises on one day in April 2011 and replacing lamps. He then went back the next day to replace ballasts and a light pack. This fits with his evidence that parts could readily be obtained and that there would be no reason to move a light from a different area. Mr Gibson told me that it would be contrary to British Gas policy to move lights around in the way suggested. This was a theoretical suggestion put forward by Mr Jones as a possible explanation for the junction box having been rewired notwithstanding that the ballast was apparently the original. I am entirely satisfied that it was not something that occurred in practice.

44. The Second Defendant also seeks to rely upon the fact that the periodic inspections by CCES in 2009 and 2010 did not identify a fault at that time as evidence that the fault had not been present from the outset. However, this point was not pressed particularly strongly. Mr Ferris accepted that full testing had not been done in 2009 and so his focus was on the 2010 inspection. The difficulty with this is that the experts agreed that the value for earth fault loop resistance was far too low to be correct. All the experts agreed that the 2010 testing was not carried out thoroughly or diligently. Having considered the evidence as to the 2010 testing, Mr Sykes said that if 100% testing was done as requested it would have identified the fault if present. However, he did not think such testing had been done. Mr Braund said he was not at all confident that earth continuity had been tested at the relevant light fitting and concluded it was not safe to infer that the testing which was done in 2010 would have picked up the fault. Mr Jones conceded that, based on the evidence he had seen, he would not be surprised if the 2010 inspection had not identified any mis-wiring.

45. I note that the First Defendant did not call evidence in relation to the periodic inspections to describe how the testing was carried out and to explain the test results.

46. In all the circumstances, I am not satisfied that the periodic inspections demonstrate that the fault was not present before 2010.

47. In considering my findings of fact I have had regard to all the evidence I heard and all the submissions made to me. I have sought to summarise my consideration of the evidence and inevitably I will not have included detailed analysis of each and every point raised. I have though looked at all the evidence in the round and reviewed all the matters relied upon in the helpful closing notes provided by all Counsel before arriving at my conclusions.

48. In summary then, I find that:

    a) the ballast in the relevant light fitting was the original one;

    b) the light fitting itself had not been moved;

    c) there is no other likely explanation for the junction box to have been re-wired.

49. Weighing those findings alongside my assessment of Mr Moule and Mr Foxall, I am satisfied on a balance of probabilities that the fault in the wiring arose at the time of the installation in 2004.

50. I do not need to go further than that. I cannot be sure whether the wiring in this particular junction box was done by Mr Moule, by Mr Bryan or indeed by someone else. It may be surprising that any qualified electrician would make such a fundamental mistake but, as a number of witnesses said, mistakes can happen. Even on his own account, Mr Moule was working at speed and it may be that time pressure led to him taking less care than he usually would. Of course, careful testing should pick up mistakes. Mr Foxall's evidence was generally unimpressive and did not satisfy me that his testing had been as careful as it should have been.

Liability of the Second Defendant

51. Having found as a fact that the wiring error occurred at the time of the original installation, the Second Defendant was plainly responsible for it. In those circumstances, liability on the part of the Second Defendant is established.

Liability of the First Defendant

52. I must deal first with the position of CCES. I have found that the defect was present at the time of the periodic inspections in 2009 and 2010. It was not picked up during those inspections. As I have already observed, I did not hear evidence from those who conducted the inspections.

53. The experts all agreed in their joint statement that the wiring fault (if present) should have been identified by the periodic inspections. They noted that the instruction for the periodic testing was for 100% testing. Such testing would have been possible, subject to access. 100% testing done properly ought to have identified the wiring error. This was confirmed by Mr Braund and Mr Jones in their oral evidence. It appears that there may have been limitations upon the amount of testing CCES were able to carry out in 2009 but no such restrictions are contended for in 2010. None of the experts sought to resile from their agreement in the joint statement that the evidence suggests that the 2010 inspection was not carried out thoroughly or diligently.

54. Despite the fact that the First Defendant's expert Mr Braund highlighted that the purpose of the periodic inspections was to *"understand whether the installation had deteriorated and whether it was safe for those who might have to work on it or maintain it"*, Mr Nugent submits that CCES did not assume a duty to all their employees, or any third party who may visit the premises subsequently, that the electrical equipment in the premises was safe to work on.

55. I find that a surprising submission. It is a fundamental principle of common law that an employer is required to take all reasonable steps to avoid risk of injury to his employees. CCES were tasked with undertaking periodic safety inspections, an important purpose of which was to check that the installation remained safe for those who might have to work on it or maintain it. That plainly included the Claimant and his colleagues who would be required to attend and carry out maintenance works on the lighting system.

56. If an employer has the opportunity to carry out a safety inspection on an electrical installation on which it is foreseeable that his employees will carry out maintenance in the future, I fail to see how it can be contended that no duty is owed to carry out that inspection competently so as to ensure that the electrical equipment was reasonably safe. If that safety inspection misses a defect which is causing the outer casing of the light unit to be permanently and unexpectedly live and an employee is then sent to work on that light unit, there is, in my judgment, a clear breach of the duty to take reasonable care for the employee's safety.

57. I do not accept Mr Nugent's submission that the "work dead" policy could absolve the employer of any liability. An issue arises as to the point at which it can be said that it was necessary to de-energise the circuit in accordance with that policy. On any case,

it is accepted that employees would have cause to touch the light fitting before isolating it. As Mr Braund, the First Defendant's expert, said at paragraph 5.2.11 of his report:

> *"… maintenance personnel could easily have come into contact with exposed conducting parts (e.g. metal housings) when replacing lamps, ballasts and other components and so in my opinion earth continuity should have been tested during the Periodic Inspection(s)."*

58. No reasonable employer would consider that the "work dead" policy would be sufficient to discharge their duty. There is no excuse for not detecting and remedying an obvious hazard. Consideration of whether the Claimant was in breach of the "work dead" policy is relevant to the issue of contributory negligence. Having such a policy does not remove the duty to take other reasonable precautions to protect employees from a risk of injury.

59. Mr Nugent suggests that finding that CCES were under a duty to the Claimant would represent a "massive extension of tortious liability". I cannot agree with that proposition. The duty owed by CCES arose out of a perfectly straightforward application of long-established principles of employer's liability.

60. The 2009 inspection report records that there were limitations on the inspection. I heard that it would not be usual for another periodic inspection to take place the following year. Mr Braund suggested that the 2010 inspection took place because the 2009 one had effectively been abandoned. I accept this and therefore think the focus of attention as far as CCES are concerned must be on the 2010 inspection. In relation to that inspection the evidence is clear that the fault should have been picked up if the inspection had been carried out properly.

61. Had it not been for the asset transfer, CCES would have been vicariously liable for the failure of their employee, Mr Coward, to carry out his inspection with due care.

62. The inspection occurred on 21 September 2010. On that date, both the Claimant and Mr Coward were employed by CCES. One week later, on 28 September 2010, the First Defendant purchased the assets of CCES. I was told, and it was unchallenged, that payment for the inspection was received by British Gas after the date of the transfer. They therefore had the benefit of the work done by CCES before the transfer.

63. In accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), the Claimant's employment transferred from CCES to British Gas. I note from timesheets I have seen that Mr Coward's employment was also transferred.

64. The effect of that transfer was that all the rights, powers, duties and liabilities under or in connection with the Claimant's contract of employment transferred from CCES to British Gas under Regulation 4 of TUPE.

65. Mr Nugent, for British Gas, argues that at the date of transfer there was no liability to transfer under TUPE. He contends that there is no authority for imposing liability on

the transferee for "liabilities which are unknown to the employee or transferor – because they do not exist." His argument is that it is well-established that an employee can recover for personal injury sustained before a relevant transfer and caused by the transferor's breach but that liability does not arise where the breach occurs before the transfer but injury is only sustained after the relevant date.

66. With respect to Mr Nugent, I think this represents a fundamental misunderstanding of the purpose of the Regulations. The Regulations implement the European Union Acquired Rights Directive (originally Council Directive 77/187/EEC, as amended). The whole purpose of the Regulations is to provide protection to employees in the event of a change of employer and to ensure their rights are safeguarded. Mr Nugent's argument switches the focus of consideration to the protection of the transferee in that he objects to the transfer of liabilities unknown at the time of transfer. The Regulations are not designed to protect the transferee from unknown liabilities. On the contrary, the situation where a breach of the employer's duty occurs before the transfer but injury occurs after falls squarely within the Regulations. The injured employee's employment is deemed to be continuous and the duties and liabilities arising under or in connection with his contract of employment transfer with him. Regulation 4(2)(b) specifically provides that:

> *"… any act or omission before the transfer is completed, of or in relation to the transferor in respect of [the contract of employment] … shall be deemed to be an act or omission in relation to the transferee."*

67. In *Martin v Lancashire County Council* and *Bernadone v Pall Mall Services Group Limited & Others* [2001] ICR 197 (a decision under the earlier 1981 Regulations but the relevant principles of which are applicable to the 2006 Regulations), it was held that liability under or in connection with the contract of employment included liability in tort for negligence. At paragraph 36, it was said:

> *"It is to my mind significant that by common consent all contractual rights and liabilities are transferred. They are not limited to those which are still contingent. Thus fully accrued rights and liabilities are transferred. That demonstrates the far-reaching effect of the 1981 Regulations. But if such contractual rights and liabilities are transferred it is hard to understand why tortious rights and liabilities are not transferred … It would be very strange if the effect of the 1981 Regulations was that the contractual claim of the employee was transferred so that the transferee alone became liable in exoneration of the transferee employer but that the tortious claim remained enforceable against the transferor."*

68. It is quite clear from this that tortious liabilities transfer whether they are fully accrued or contingent. To hold that an employee who is injured after the transfer but as a result of a breach of duty committed before the transfer cannot recover against the transferee would frustrate the whole purpose of the Regulations and the underlying Directive.

69. It follows, in my judgment that the First Defendant is liable to the Claimant on the basis of the failure to detect and remedy the defect prior to the accident, in particular during the 2010 periodic inspection.

70. The Claimant does not allege further breaches of the employer's duty of care. Specifically, he does not contend that his accident resulted from failure to properly train or instruct him. It is the Claimant's case that he acted reasonably and in accordance with his instructions and training. However, the Second Defendant invites me to find further breaches on the part of the First Defendant if I conclude that the Claimant was not operating a safe system of work. This, Mr Ferris contends, would increase the First Defendant's share of responsibility when I apportion between the Defendants. This overlaps with the issue of contributory negligence, which I will therefore consider before I apportion responsibility between the two Defendants.

Contributory Negligence

71. I have found that the Claimant had replaced the bulb but that the light was still not working. He had then removed the light fitting from the ceiling while the supply to the light remained live. The casing to the light fitting, which was unexpectedly live, made contact with the Claimant's chest. He then touched the earthed metalwork in the ceiling void with his right hand, completing the circuit and causing him to be electrocuted.

72. Based on all the evidence I heard, I find that the Claimant would probably next have proceeded to change the ballast and, with that in mind, was seeking to establish whether there was a plug and socket joint allowing him to disconnect the light fitting.

73. I find that it was reasonable for the Claimant to think that there may be a plug and socket. That was a common arrangement at the time and indeed the original design for these premises had included such fittings. Even if the Claimant had worked on lights at the premises before, he would not be expected to remember the details of the connections as he would also have attended many other premises in the meantime. Further, photographic evidence suggests that other lights in these premises did have plug and socket connections.

74. The Defendants' primary contention was that the Claimant should have isolated at the distribution board as soon as he found that changing the lamp did not work and before he went any further. He is also criticised for putting his hand into the ceiling void without isolating the circuit and for failing to use a volt stick on the light fitting before taking it out of the ceiling. It is said that he was not following the British Gas "work dead" policy and was not acting in accordance with his training.

75. I was provided with copies of the materials from training presentations attended by the Claimant. As I have indicated, the Claimant does not rely upon any failure in relation to his training. It is accepted on his behalf that he was trained not to work on live equipment. However, having considered the training materials, I find there was nothing that specifically advised him that isolation at the distribution board should occur before removing a light fitting from the ceiling. I was taken to a test completed by the Claimant following an "*Electrical Safety Precautions Toolbox Talk*" in October 2011. I note that there were a number of potentially relevant questions for which the Claimant was only given half a mark. There is no evidence that his

answers were considered to demonstrate a safety risk nor is there any evidence that further training was given to follow up any identified gaps in the Claimant's understanding.

76. Some reliance was also placed on what was described as a "near miss" in July 2009 when the Claimant had left a line live when it should have been disconnected. He had failed to prove dead and a shop fitter was placed at risk. Mr Buck met with the Claimant to provide a health and safety procedures audit. He checked that the Claimant had the company risk assessments and knew how to conduct safe isolation. He confirmed he had a voltage indicator. He watched the Claimant carry out some tasks and was happy with what he saw. Mr Buck also confirmed that he was generally happy with the Claimant's work.

77. I do not consider that the incident in 2009 reflects a general lack of care on the Claimant's part. It is apparent that he cooperated fully with the investigation into the incident and was able to satisfy Mr Buck of his knowledge of safe practices.

78. The burden of proving contributory negligence rests, of course, on the Defendants. It is for them to prove that the conduct of the Claimant fell below that to be expected of a competent, qualified and experienced electrician.

79. When looking at the issue of whether the Claimant acted unreasonably in removing the light fitting from the ceiling, it seems to me that there was a large measure of consensus in the evidence.

80. Apart from Mr Portt, all the witnesses (lay and expert) suggested that it may be reasonable to remove the light fitting so as to check whether there was a plug and socket without first isolating at the distribution board. There was also a consensus that it was not sensible for an electrician to stick his hand / arm into the ceiling void beyond where he could see. This was on the basis that there could be a concealed danger such as a cable that had been damaged leaving an exposed live wire or a hazard that might cause a laceration.

81. I considered that Mr Portt's evidence was very theoretical and reflected what might be considered best practice in a training situation rather than what might be considered reasonable in practice.

82. By contrast Mr Allison, Mr Lynch, Mr Buck and Mr Gibson all seemed to take account of the reality of carrying out work during the Building Society's opening hours. Mr Allison and Mr Lynch referred to the fact that an electrician would not want to immediately isolate and potentially plunge the store into darkness. I thought Mr Lynch gave his evidence in a very straightforward and balanced way. He highlighted the need to work in a practical way and to make a judgment on site. He was ready to make appropriate concessions in cross-examination and I did not have any sense that his evidence was tailored to assist the Claimant. He clearly considered it reasonable to drop the light and look for a plug and socket before isolating at the distribution board. If there was a plug and socket that would enable the light fitting to be disconnected and so safely isolated to be worked on without the need to de-energise the supply to the other lights. Mr Buck's evidence was similar. He considered that if there was a plug and socket it was perfectly reasonable to separate there without going to the distribution board to isolate first. He would expect an

electrician to do a visual inspection by looking into the ceiling void. He added that it was not necessary to isolate before doing the inspection but that, if it was not possible to see, an electrician would be taught to isolate before entering a concealed area. Mr Gibson's evidence was also very similar. He said it was reasonable for an electrician to establish whether there was a plug and socket before conducting isolation but added that he would be reluctant to play with a cable he could not see inside a void and did not think it was reasonable for an electrician to put his hands where he could not see.

83. I note that when Mr Foxall gave evidence about how he would conduct live testing he described taking light fittings down from the ceiling while the circuit remained energised. He considered that to be perfectly reasonable although when asked about the criticism of the Claimant for taking the fitting down without isolating he then claimed he used a volt stick first.

84. Nothing within the expert evidence detracted from the view I had from the lay evidence that it would be considered reasonable to remove the light fitting from the ceiling to look for a plug and socket without first isolating at the distribution board. Mr Sykes said that if there was a plug and socket this would be the easiest way to isolate. Mr Braund said the safest option is to isolate at the distribution board but confirmed that the Claimant would have been reasonably justified in investigating whether there was a plug and socket before doing that. He sought to qualify this by suggesting a volt stick should first be used but I note that he told me that the use of a volt stick "is very much a matter of policy for the company concerned" and that in any event it cannot be relied upon. Mr Jones said that best practice was to isolate but also accepted that the particular risk the Claimant encountered was one that could not be foreseen.

85. Taking the evidence as a whole, it was clear to me that the practice of looking to see whether there was a plug and socket and, if so, disconnecting the light without first isolating at the distribution board was common and that it was a reasonable thing to do in this situation.

86. I am not able to find that the Claimant was negligent in not using a volt stick before removing the light fitting from the ceiling. The experts agree in their joint statement that the use of a volt stick was *"appropriate"* but that *"at no stage was Mr Baker required by his employer to use a volt stick"*. Mr Braund's evidence that the use of a volt stick "is very much a matter of policy for the company concerned" suggests that there is variation in practice and I simply have no evidence that the use of a volt stick before carrying out the relatively simple task of lowering the fitting from the ceiling would be considered mandatory. It seems to me that the First Defendant did provide appropriate training and were mindful of health and safety risks yet they had not insisted on the use of a volt stick prior to the accident.

87. Further, I note that Andrew Pitt, an officer of the Health and Safety Executive, said in an email to Coventry City Council dated 7th August 2012:

> *"Whilst the HSE always recommend that when it is reasonable to do so electrical equipment is made dead before any work is undertaken, it would appear in this case that the electrician was quite reasonably trying to determine if it was possible to*

> *disconnect the light fitting from the lighting circuit without having to isolate the complete circuit … I do not believe that the actions being taken by the electrician were, at the time of the incident, unreasonable, unexpected or unsafe."*

88. As to the suggestion that the accident was caused by the Claimant inserting his hand and/or arm into the ceiling void beyond the limits of his vision, I do not consider this to have been established on the evidence. This is not a case where it is known that the Claimant has come into contact with some concealed hazard in the void. The hazard (that is the live casing of the light) was outside the ceiling. The risk associated with reaching beyond his vision was that he would touch something he would have known not to touch had he seen it (such as an exposed wire or a sharp piece of metal). Here the Claimant touched earthed metalwork which ought not to have presented any danger at all. The photographs show that this metalwork was readily visible through the hole in the ceiling. There was no reason for the Claimant to think he could not touch it.

89. The evidence in the statement of Aisha Kemp does not persuade me that the Claimant was reaching beyond where he could see. Neither Defendant called Ms Kemp to give evidence so her account was not tested. She said that the Claimant's right arm and face was up in the hole yet it is agreed that this cannot be right. I cannot be confident as to what she was describing. The Claimant's position on the stepladder, the medical evidence suggesting that it was his hand that touched the metalwork and the position of that metalwork as shown in the photographs is entirely consistent with him having kept his hand within his line of sight. Given what I heard about his training and his competence as an electrician, there is no reason for me to think that the Claimant would have reached into the ceiling void past where he could see.

90. In the circumstances, I agree with Mr Pitt that the Claimant was not doing anything "unreasonable, unexpected or unsafe". It cannot be said that the accident was contributed to by any negligence on his part. I also do not consider the accident to have resulted from any want of training. The accident happened because the wiring error had caused the light fitting to be live. That was not foreseeable to the Claimant and therefore he had no reason to think that touching the earthed metalwork would have such catastrophic consequences for him.

Conclusions

91. I find that the accident occurred because the wiring error had resulted in the light fitting being live. There was contact between the light fitting and the Claimant's chest while his right hand made contact with earthed metalwork in the ceiling void, completing an electrical circuit through the Claimant's body. This caused him to be electrocuted and, in turn, to fall from the ladder.

92. The wiring error dated from the time of the original installation in 2004 and was the responsibility of J & L. It ought to have been detected and remedied by CCES during periodic inspection. The failure to detect it in 2009 may be explained by limitations on the inspection but the 2010 inspection should certainly have picked up the fault.

93. Pursuant to the TUPE Regulations, British Gas are liable for the breach of duty of CCES and for the Claimant's accident.

94. I find accordingly that each Defendant is liable to the Claimant and is required to meet his claim for damages to be assessed.

95. I do not make any finding of contributory negligence. The Claimant is accordingly entitled to recover against each Defendant on a full liability basis.

96. In apportioning liability between the two Defendants, it was common ground that if J & L were responsible for the original wiring error they must bear a greater share of responsibility than British Gas. The First Defendant's liability is on the basis of the failure to detect and remedy the defect before the accident and I have not found any further breaches such as a want of proper training. In those circumstances, it seems to me that the appropriate apportionment is to say that J & L should bear 75% of the blame and British Gas 25%.

97. I invite the parties to agree an appropriate order reflecting my findings. Further directions for the assessment of quantum will be required in due course. In the event that any matter cannot be agreed, I will deal with it by way of written submissions.