Hilary Term
[2018] UKSC 7
On appeal from: [2016] CSIH 29

JUDGMENT

HM Inspector of Health and Safety (Appellant) *v* Chevron North Sea Limited (Respondent) (Scotland)

before

Lord Mance, Deputy President
Lord Sumption
Lord Reed
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

8 February 2018

Heard on 14 December 2017

Appellant
Andrew R W Young QC
Ian Wright
(Instructed by Anderson Strathern LLP)

Respondent
Peter Gray QC
Barry Smith
(Instructed by Clyde & Co)

LADY BLACK: (with whom Lord Mance, Lord Sumption, Lord Reed and Lord Hodge agree)

1. Chevron North Sea Ltd operates an offshore installation in the North Sea ("the installation"). In April 2013, the installation was inspected by Mr Conner in his capacity as one of Her Majesty's Inspectors of Health and Safety. Mr Conner was accompanied by three colleagues with specialist expertise of particular relevance to the inspection. A vital part of the installation is the helideck, the principal means of reaching the installation being by helicopter. The inspectors examined the condition of the stairways and stagings providing access to the helideck and formed the view that corrosion had rendered them unsafe so that there was a risk of serious personal injury from falling through them. Mr Conner therefore served a prohibition notice on Chevron under section 22 of the Health and Safety at Work etc Act 1974 ("the 1974 Act"). Chevron appealed against the prohibition notice to an employment tribunal under section 24 of the 1974 Act. The question for us to determine is what approach a tribunal hearing such an appeal should take. In particular, in reaching its decision whether to affirm, modify or cancel the notice, is the tribunal confined, as the appellant contends, to the material which was, or could reasonably have been, known to the inspector at the time the notice was served, or can it, as the respondent contends and the First Division of the Inner House of the Court of Session held, take into account additional evidence which has since become available?

The relevant provisions of the 1974 Act

2. Section 22 of the 1974 Act provides:

> "**22. Prohibition notices**
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> (1) This section applies to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.
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> (2) If as regards any activities to which this section applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of

serious personal injury, the inspector may serve on that person a notice (in this Part referred to as 'a prohibition notice').

(3) A prohibition notice shall -

(a) state that the inspector is of the said opinion;

(b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;

(c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and

(d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied.

(4) A direction contained in a prohibition notice in pursuance of subsection (3)(d) above shall take effect -

(a) at the end of the period specified in the notice; or

(b) if the notice so declares, immediately."

3. Section 24 provides:

"**24. Appeal against improvement or prohibition notice**

(1) In this section 'a notice' means an improvement notice or a prohibition notice.

(2) A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an employment tribunal; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.

(3) Where an appeal under this section is brought against a notice within the period allowed under the preceding subsection, then -

(a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;

(b) in the case of a prohibition notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction).

(4) One or more assessors may be appointed for the purposes of any proceedings brought before an employment tribunal under this section."

4. Also material to a consideration of the question at issue in this appeal is section 33 which provides:

"**33. Offences**

(1) It is an offence for a person -

…

> (g) to contravene any requirement or prohibition imposed by an improvement notice or a prohibition notice (including any such notice as modified on appeal) ...”

The central facts

5. The prohibition notice served on Chevron stated that the inspector was of the opinion that there was a risk of serious personal injury because:

> “The steel grating of the stagings and the stairway treads are in a weakened condition because of corrosion which compromises safe evacuation.”

6. Having launched an appeal in May 2013, Chevron arranged in July 2013 for the metalwork which had been of concern to the inspector to be removed from the installation and tested. The results of the testing were set out in an expert report dated March 2014. In short, with the exception of a panel which had been damaged during the inspection by an inspector striking it with a fire fighting axe in order to test the extent to which it was corroded, all the metalwork passed the British Standard strength test, and there was no risk of personnel being injured by falling through it. Without the damage, the damaged panel may well also have passed the test, but the damage made it impossible to determine its safety.

7. Chevron sought to rely upon the expert report as part of their appeal to the tribunal. The inspector opposed that on the basis that the tribunal must focus on the information that was available, or ought reasonably to have been available, to an inspector at the time of the service of the notice. The results of the expert testing could not have been available to the inspector when he decided to serve the notice and so, in his submission, no regard could be had to them by the tribunal.

8. The tribunal prudently approached the matter in two alternative ways. First, it looked at the position on the basis of the information that was or ought to have been available to the inspector, without having regard to the subsequent testing and analysis. On that basis, it would have affirmed the prohibition notice, albeit in a modified form. It then looked at the matter again, taking into account the expert evidence that came into existence later. Approaching things in that way, it concluded that at the time of the service of the notice, there was not, in fact, a risk of serious personal injury. As it decided that it was entitled to look at the later material, it cancelled the notice.

9. The inspector appealed unsuccessfully to the First Division of the Inner House against both of the alternative conclusions of the tribunal. I can confine my attention to the second of the two alternatives, in relation to which the Inner House held that the tribunal had been correct to have regard to the subsequent testing and analysis, and entitled to accept that evidence. In the light of the fact that the Court of Appeal in England and Wales had taken a different view on the proper approach to an appeal under section 24 of the 1974 Act, in the case of *Hague (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Ltd* [2015] EWCA Civ 696, the Inner House gave the inspector leave to appeal to this court on the point.

The framework of the relevant provisions of the 1974 Act

10. A prohibition notice directs that the activities to which it relates shall not be carried on unless the matters that, in the opinion of the inspector, gave rise to the risk of serious personal injury have been remedied (section 22(3)(d)). The notice can be drawn up to take effect immediately or at the end of a specified period (section 22(4)). Where the notice is not one with immediate effect, section 23(5) enables an inspector to withdraw it at any time before the date on which it is to take effect. There is no provision for an immediate notice to be withdrawn; it appears that the only way, under the statutory scheme, in which such a notice can be dislodged is by an appeal. A prohibition notice is not automatically suspended by an appeal. However, the appellant may apply to the tribunal for a direction suspending it from the date of the direction until the appeal is finally disposed of or withdrawn (section 24(3)). A public database of notices is kept by the Health and Safety Executive. Notices are entered on the database by virtue of statutory requirements in some cases, and otherwise as a matter of policy. However, registration is deferred to allow for the appeal process and, in the event of a successful appeal, does not take place.

11. It is an offence to contravene a prohibition imposed by a prohibition notice (section 33 of the 1974 Act). This applies in full force to activity during the appeal period except in relation to a period during which the tribunal has directed that the notice is suspended.

The practical effect of a prohibition notice

12. Understandably, the appellant is at pains to emphasise, as an important part of his argument in support of his appeal to this court, that it is vital for inspectors to be able to take prompt and effective action to ensure compliance with the provisions of the 1974 Act. A prohibition notice is a powerful tool in the inspector's hands. It not only enables him to step in when he is of the opinion that a particular activity will involve a risk of serious personal injury, it also improves public safety by encouraging employers to have good systems in place so that they can demonstrate

to the inspector that there is no material risk and thereby avoid the disruption of a prohibition notice.

13. The service of a prohibition notice on a business has the potential to do considerable harm to it. Having to cease the activity in question will inevitably result in disruption and is likely also to have a financial cost, but there may be other serious consequences as well, including significant damage to the business's reputation and its ability to tender for contracts. This is reflected in the fact that, according to the appellant, a very common motivation for an appeal against a notice is to avoid registration of the notice on the Health and Safety Executive's public database.

The issue

14. It is common ground between the parties that a section 24 appeal is not limited to a review of the genuineness and/or reasonableness of the inspector's opinion, but requires the tribunal to form its own view of the facts, paying due regard to the inspector's expertise. It is also common ground that the tribunal should be focussing on the risk existing at the time when the notice was served. These agreed propositions still leave room, however, for the debate about what material the tribunal is entitled to take into account when forming its view of the facts as they were at the material time.

15. The appellant invites us to adopt the reasoning of the Court of Appeal in the *Rotary Yorkshire* case (supra). Rotary Yorkshire were arguing for the broad interpretation of section 24 supported by Chevron in the present case and the inspector for the more limited interpretation for which the appellant contends. Laws LJ (with whom the other members of the court agreed) said:

> "31. … the question for the inspector is whether there is a *risk* of serious personal injury. In reason such a question must surely be determined by an appraisal of the facts which were known or ought to have been known to the inspector at the time of the decision. He or she is concerned with the prevention of injury at that time, that is the focus of the provision, which, it should be remembered, contemplates action in a possible emergency. The employment tribunal on appeal are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector's action.
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> …

> 34. To accede to [Rotary Yorkshire's] argument would, I think, risk distorting the section 22 function. The primary question for the employment tribunal is whether the issue of the notice was justified when it was done. An inspector may rightly apprehend a risk and be justified in acting on his or her apprehension even though later necessarily unknown events may demonstrate that, in fact, there was no danger. Section 24 is not, in my judgment, to be construed so that it may appear to call in question the propriety of a notice which it may well have been the inspector's duty to issue at the time."

16. This reasoning did not commend itself to the Inner House in the present case. Lord Carloway said, with the agreement of the other two members of the court who also added helpful reasoning of their own:

> "28. The fundamental problem with the approach of Laws LJ is that it prohibits an appeal on the facts in a situation where it can be demonstrated that the facts or information upon which the inspector proceeded were wrong. That is the essence or purpose of many appeals on the facts. In short, there is no sound basis for restricting appeals under section 24 to what would in essence be a form of judicial review of the inspector's opinion. An appeal on the facts is a much wider concept and … it enables an appellant to prove, using whatever competent information is available at the time of the tribunal's hearing on the appeal, that the factual content of the notice was wrong and that, accordingly, however reasonable the inspector's opinion was at the time, had the true facts been known, he would not have reached it."

17. The answer to the issue which has divided the Court of Appeal and the Inner House does not jump out from the wording of section 24, and the matter must therefore be considered in the light of the statutory scheme as a whole. This leads me to conclude that the Inner House was correct in its interpretation of the section.

18. When the inspector serves the notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the notice comes into existence. However, as it seems to me, when it comes to an appeal, the focus shifts. The appeal is not against the inspector's opinion but against the notice itself, as the heading of section 24 indicates. Everyone agrees that it involves the tribunal looking at the facts on which the notice was based. Here, as the inspector spelled out in the notice, the risk that he perceived arose by virtue of corrosion of stairways and gratings giving

access to the helideck, and the focus was therefore on the state of that metalwork at the time when the notice was served. The tribunal had to decide whether, at that time, it was so weakened by corrosion as to give rise to a risk of serious personal injury. The inspector's opinion about the risk, and the reasons why he formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but I can see no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. It must, in my view, be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If, as in this case, the evidence shows that there was no risk at the material time, then, notwithstanding that the inspector was fully justified in serving the notice, it will be modified or cancelled as the situation requires.

19. It is important to recognise that it is no criticism of the inspector when new material leads to a different conclusion about risk from the one he reached. His decision often has to be taken as a matter of urgency and without the luxury of comprehensive information. There is no reason for him to be deterred from serving the notice by the possibility that, should more information become available at a later stage, his concerns may turn out to be groundless. Indeed, he might just as well feel *less* inhibited about serving it, confident that if it turns out that there is in fact no material risk, the position can be corrected on appeal.

20. The effectiveness of a prohibition notice is in no way reduced by an appeal process which enables the realities of the situation to be examined by a tribunal with the benefit of additional information. Once served, the notice provides immediate protection, reinforced by the existence of criminal sanctions. It is common ground between the parties that, even if ultimately cancelled by a tribunal, any contravention of the notice prior to cancellation would still be a criminal offence.

21. Furthermore, there does not seem to me to be any reason to suppose that the wider interpretation of section 24 would undermine the role that prohibition and improvement notices play in encouraging employers to have robust systems in place with a view to demonstrating easily, when an inspection takes place, that no risk exists. A prohibition notice remains in force during the appeal process, unless suspended by the tribunal, and such is the disruption and financial loss that this may cause that employers have plenty of encouragement to do what they can to avoid getting into such a situation in the first place.

22. The appellant argues that permitting the tribunal to look beyond the material available to the inspector will introduce into the appeal process undesirable delay and cost, both financial and in terms of the Health and Safety Executive's human resources, when the aim should be that any appeal is concluded speedily. This does not deflect me from my view as to the correct interpretation of section 24. The appeal

must be launched within 21 days and its progress thereafter will be under the control of the tribunal. In any event, the continuing impact of the prohibition notice may well be an incentive for the employer to marshal his case speedily so as to free himself from the notice as quickly as possible.

23. Turning to the situation of an employer in receipt of a prohibition notice, it is clear that there are potent considerations in favour of the wider interpretation of section 24. As the inspector cannot withdraw an immediate prohibition notice, even if he is completely convinced by material produced subsequently by the employer, the only means by which the notice can be cancelled under the statutory scheme is an appeal. Yet if the appellant's interpretation is right, in such a case the appeal process would not dislodge the notice, which would remain in force, with all the attendant disadvantages for the business, even though the perceived risk never in fact existed. Indeed, it is even possible that in some cases, in order to be able to restart the activity named in the notice, an employer might have to carry out works which have been demonstrated to be unnecessary. The appellant argues that, in practice, confining the tribunal's role narrowly would not cause any problems because, provided with convincing evidence that there was in fact no risk, the inspector would recognise that and not seek to enforce the notice, although the notice would still be registered on the public database because, the appellant argues, that is appropriate to reflect the fact that it was correctly served on the basis of the information then available to the inspector. This suggested solution does not, in my view, address the problem. The notice would still have the capacity to damage the reputation of the employer and his ability to do business. Furthermore, it cannot be right, in circumstances such as these, that the employer continues, after his appeal is concluded, to be exposed to the possibility of criminal proceedings, however improbable it is that proceedings would actually be taken. In addition, the appellant's proposal proceeds upon the basis that the inspector is able to accept the evidence put forward subsequently by the employer, but he may not be able to do so. In those circumstances, a forum is required in which to determine the continuing dispute between the inspector and the employer or, putting it more constructively and in the spirit of the health and safety legislation, to determine whether the circumstances that concerned the inspector did in fact give rise to a relevant risk. The appeal process provides that necessary forum.

24. I would therefore interpret section 24 of the 1974 Act as the Inner House did. In my view, on an appeal under section 24, the tribunal is not limited to considering the matter on the basis of the material which was or should have been available to the inspector. It is entitled to take into account all the available evidence relevant to the state of affairs at the time of the service of the prohibition notice, including information coming to light after it was served. I would accordingly dismiss the appeal.