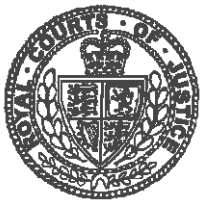

Neutral Citation Number: [2016] EWHC 868 (Admin)

Case No: CO/0089/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ON APPEAL FROM THE CARDIFF EMPLOYMENT TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 April 2016

Before :

MS GERALDINE CLARK
(Sitting as a Deputy High Court Judge)

Between :

CHRISTOPHER WILCOX
(One of Her Majesty's Inspectors of Health & Safety)

Appellant

- and -

SURVEY ROOFING GROUP LIMITED

Respondent

Mr Cyril Adjei instructed by the Health and Safety Executive for the **Appellant**
Mr Gerard Heap instructed by Lupton Fawcett Denison Till for the **Respondent**

Hearing date: 17 March 2016

Approved Judgment

Geraldine Clark
19.4.16

Ms Geraldine Clark :

Introduction

1. This is an appeal by Christopher Wilcox, one of Her Majesty's Health and Safety Inspectors ("the Inspector"), under section 11 of the Tribunals and Inquiries Act 1992, against the decision of an employment tribunal dated 17 December 2015, on an appeal brought by Survey Roofing Group Limited ("Survey Roofing") under section 24 of the Health and Safety at Work Act 1974 ("HSWA").

2. The Tribunal decided to cancel a prohibition notice issued by the Inspector under section 22 of HSWA on 3 March 2015 which had prohibited Survey Roofing from carrying out further roofing works at the premises of a client until it had remedied the matters set out in the notice.

The Facts

3. Survey Roofing had contracted with Screwfix Ltd to carry out maintenance works to the roof at the Screwfix store at Berse Road, Wrexham which included numerous fragile roof lights. Survey Roofing engaged self-employed contractors Mr James Phillips and Mr Keith Tyrer to carry out the work. Work began on 26 February 2015 there was then a break of a few days until work was due to recommence on 3 March 2015.

4. That day the Inspector made an unannounced visit to the premises. When he arrived at about 9:15 am the contractors had just arrived and had not yet started work on the roof. The Inspector climbed a scaffold tower in order to view the roof and he was given some information about the method of work by Mr Phillips. This method involved covering the rooflights near when the contractors were working with plywood boards and moving the boards across the roof as work progressed by "leapfrogging" them so that the rooflights nearest the area being worked on were always covered by the boards. The Inspector requested and was given a copy of the written method of work contained in Survey Roofing's Risk Assessment and Method Statement ("RAMS"). The purpose of the RAMS was to explain to the contractors how the work should safely be carried out. The relevant part of the RAMS provided:

> "Before any further roofing works are allowed to be carried out on a roof where fragile roof lights are present (e.g. Georgian wired glass, PVC, thin fibreglass) the existing roof lights are to be covered with 18mm plywood secured to their frames.
>
> Operators carrying out these tasks will have cut the plywood to size first then approach the roof light with the board held between themselves and the roof light thereby negating any chance of them falling through.
>
> If operatives must work within areas closely surrounded by hazardous roof lights whilst carrying out these works, then full harness and lanyards must be used as fall protection measures. Also refer to "the safety harness use" risk assessment below."

5. The Inspector also received a telephone call from Mr Julian Byrd, a Director of In-Line Safety Ltd, Survey Roofing's Health and Safety consultants, which had compiled the RAMS.

6. The Inspector was not satisfied with the safety arrangements for the work and at 10:24 am on 3 March 2015 he issued a prohibition notice ("the Notice") under section 22 of HSWA. The material part of section 22 provides:

> "(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."

7. The Notice stated that Inspector was of the opinion that the roof works involved a risk of serious personal injury because persons were liable to fall a distance likely to cause

injury through the rooflights and that this involved contraventions of Section 2(1) and 3(1) of HSWA and Regulations 6(3) and 9(2) of the Work at Height Regulations 2005 ("the 2005 Regulations"):

> "because suitable and sufficient measures had not been taken, so far as is reasonably practicable, to prevent persons falling through the fragile roof lights during work on the roof adjacent to roof lights and/or the passage of persons across the roof."

The Regulatory Regime

8. It is convenient here to set out the applicable regulatory provisions which lay behind the Inspector's power to issue the Notice.

9. Section 1 of the Health and Safety at Work Act 1974 ("HSWA") sets out the objects of that act and the secondary legislation made under it:

> "**1.** Preliminary
>
> (1) The provisions of this Part shall have effect with a view to—
>
> (a) securing the health, safety and welfare of persons at work;
>
> (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;"

10. By section 2(1) HSWA, Parliament placed a duty on employers to ensure, so far as reasonably practicable the health, safety and welfare of all of its employees:

> "**2.** General duties of employers to their employees
>
> (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
>
> (2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—
>
> (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
>
> (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work."

11. Section 3(1) places a duty on employers regarding the health and safety of members of the public other than their employees:

"**3.** General duties of employers and self-employed persons to persons other than their employees

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, as far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety."

12. The Work at Height Regulations 2005 passed under the HSWA provide:

"**6.** Avoidance of risks from work at height

(1) In identifying the measures required by this regulation, every employer shall take account of a risk assessment under regulation 3 of the Management Regulations.

(2) Every employer shall ensure that work is not carried out at height where it is reasonably practicable to carry out the work safely otherwise than at height.

(3) Where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.

(4) The measures required by paragraph (3) shall include—

(a) ... his ensuring that the work is carried out—

(i) from an existing place of work; or

(ii) (in the case of obtaining access or egress) using an existing means,

which complies with Schedule 1, where it is reasonably practicable to carry it out safely and under appropriate ergonomic conditions; and

(b) where it is not reasonably practicable for the work to be carried out in accordance with sub-paragraph (a), his providing sufficient work equipment for preventing, so far as is reasonably practicable, a fall occurring.

(5) Where the measures taken under paragraph (4) do not eliminate the risk of a fall occurring, every employer shall—

(a) so far as is reasonably practicable, provide sufficient work equipment to minimise—

(i) the distance and consequences; or

(ii) where it is not reasonably practicable to minimise the distance, the consequences,

of a fall; and

(b) without prejudice to the generality of paragraph (3), provide such additional training and instruction or take other additional suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury."

...

9. Fragile surfaces

...

(2) Where it is not reasonably practicable to carry out work safely and under appropriate ergonomic conditions without passing across or near, or working on, from or near, a fragile surface, every employer shall—

(a) ensure, so far as is reasonably practicable, that suitable and sufficient platforms, coverings, guard rails or similar means of support or protection are provided and used so that any

> foreseeable loading is supported by such supports or borne by such protection;
>
> (b) where risk of a person falling remains despite the measures taken under the preceding provisions of this regulation, take suitable and sufficient measures to minimise the distances and consequences of a fall."

13. The HSE's publication "Health and safety in roof work" (HSG33 – Fourth edition 2012), contains guidance on how to plan and work safely on roofs. I shall refer to the parts relevant to this appeal later in this judgment.

Appeal to the Employment Tribunal

14. On 17 March 2015 Survey Roofing appealed against the Notice to the Cardiff Employment Tribunal ("the Tribunal") under section 24 of HSWA.

15. Subsection 24(2) provides:

> "(2) A person on whom a notice is served may within such period 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."

16. The nature of an appeal under section 24 was recently considered by the Court of Appeal in *Sarah Jane Hague v Rotary Yorkshire Ltd* [2015] EWCA Civ 696. Lord Justice Laws, summarised the law as follows:

> "[27] I have no doubt that section 24(2) of the HSWA confers a right of appeal on the facts and, unlike section 11 of the 1992 Act, not just the law. See the observations of Sullivan J, as he then was, in Railtrack plc v Smallwood [2001] ICR 714 at paragraphs 44 to 49. The view he there expressed was provisional but seems to me to be correct. However, this does not encompass the whole of the question. What facts are the Employment Tribunal to consider? Those which go to the propriety of the prohibition notice at the time it was issued or also later events amounting to hindsight and of which the inspector at the time may have no knowledge or means of knowledge. In Chilcott v Thermal Transfer Limited [2009] EWHC Admin 2086 Charles J adopted Sullivan J's preliminary view as to the scope of the section 24(2) appeal, that it was an appeal on the merits, and proceeded as follows:
>
> > "(10) Returning to the section, that is section 24 and the powers that it confers on the Employment Tribunal, to my mind it emphasises that the focus of attention on the appeal is the situation on the ground when the notice is actually served. I take

> from that point that it can either cancel or affirm the notice, and it is only if it decides to affirm it that it can then affirm it with modifications. That seems to me to focus the analysis to the time when the notice was actually served.
>
> (11) Turning to section 22 and the focus of the notice itself, that too, necessarily to my mind, focuses the decision-making process to the moment at which the notice was served. In broad terms, the section is concerned with the identification, prevention, and thus management of risk. The risk being a risk of serious personal injury by reference to an activity then carried on or likely to be carried on by the relevant person or under the control of that person. So, the focus is as to risk flowing from an activity then being carried on or likely to be carried on as at time X, namely the time when the notice is served."

[28] On the particular decision of the Employment Tribunal in the case before him Charles J said this at paragraph 21:

> "...it seems to me that they were not focussing, as in my judgment they should, on the point at which the notice was served and determining whether they, if they had been in the position of the Inspector, would have served the notice. Rather, they were looking at the position with the benefit of hindsight, as that expression is commonly used, namely he may well have been right, he may well have been wrong but with the benefit of hindsight we can reach a different decision. That was not the process which, in my judgment they were charged with; their task was to decide what they would have done at that point in time.

[29] See also MWH UK Limited v Wise [2014] EWHC427 per Popplewell J at paragraph 22.

...

> [31] In my judgment, Charles J's approach in the Chilcott case was correct: 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 are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector's action."

The Tribunal's Judgment

17. The Tribunal heard evidence of fact from the Inspector and three witnesses called by Survey Roofing, expert evidence from Mr Andrew Rattray who was called by the Inspector and from Mr Ralph Bennett, who was called by Survey Roofing and

submissions from counsel over five days between 26 and 30 October 2015. The Tribunal's members also met on 4 November 2015. On 17 December 2015, by a unanimous judgment, the Tribunal cancelled the Notice.

18. As may be seen from paragraphs 2, 29 and 64 of the judgment, the Tribunal recognised that its task on the appeal was to decide whether it would have served the Notice on 3 March 2015 on the basis of the information which was available to the Inspector or ought reasonably to have been available following such investigations as ought reasonably to have been undertaken. However, it set about this task in an indirect way.

19. It began by making findings of fact, based on the common ground and the evidence at the hearing, rather than the information available to the Inspector when he issued the Notice, as to the system of work Survey Roofing had followed on 26 February 2015 and would have continued with on 3 March 2015 but for the Notice. Paragraphs 12 - 15 of the judgment provide:

> "Method of Work
>
> 12. The facts either not in dispute or which have emerged from the hearing are that the Appellant was engaged to carry out remedial roofing work of sealing the metal roof sheet laps, replacing washers and cleaning gutters at the Screwfix premises in Wrexham. Prior to the works commencing the standard procedure is for the Appellant to send an estimator to assess the work which is needed to be done and assess the most appropriate work method in order to provide a cost estimate for the client. That estimate is also used as the basis of the Risk Assessment and Method Statement (RAMS) which in this case was prepared for it by In - Line Safety Limited.
>
> 13. The method of work adopted and set out in part in the RAMS (which is subject to criticisms which are dealt with later) is as follows. A scaffolding tower was erected to create an access point onto the roof. The roof contained four pitches separated by ridgelines and gutters, the slope of each pitch being some seven degrees which (being below ten degrees) qualifies it as a flat roof. Each of the pitches contained a number of roof lights which were effectively set in pairs, one nearer the ridgeline and one lower down nearer the gutter. Prior to the issue of the Prohibition Notice, the Appellant had carried out the work on the first pitch and was on 3rd March 2015 about to start work on the second pitch. The method of work was for the Appellant's contractors, Mr J Phillips and Mr K Tyrer (who were self employed subcontractors) to cover the roof lights using 8 ft by 4 ft by 18mm thick plywood boards. The means by which they would do this was to manually carry a board along the ridgeline until the point at which they were adjacent to the nearest roof light. The

> board would then be lowered so that it was lying flat on the roofline long ways, it would then be turned so it was lying flat at ninety degrees to the ridgeline and then the workers would push or slide the board across the roof light nearest to the ridgeline. If carried out in this way, the workers pushing the board would always have the full length of the board (8 feet) between them and any exposed part of the roof light. Once put in position, the plywood board was not to be secured to the roof light, rather the process relied upon the board being sufficiently heavy not to be likely to be able to move or be moved once put in place. That process would then be repeated for the lower rooflight.
>
> 14. By using this process, a block of four roof lights would be covered which would allow the work to be carried out in the area between those four covered roof lights. If the workers remained within that area then there was no risk of them falling through the roof lights themselves. As the work went along the particular pitch, the boards would be leapfrogged so that at each point the area in which the workers were working was bounded by four covered roof lights. Access to and from the working area was from the ridgeline itself. It is accepted that the central point of the ridgeline is some 2.4 metres from the nearest edge of the nearest roof light.
>
> 15. This system inevitably requires, in particular when the working area is some distance from the access point, workers to walk back along the ridgeline to the access point and in doing so they will be walking past and between uncovered roof lights on both the pitch they are currently working on and that the other side of the ridgeline."

20. At paragraphs 52-53 of the judgment, the Tribunal accepted Survey Roofing's evidence that the contractors had undergone training that specifically covered the method of working. It held that the RAMS "despite its obvious flaws" met the standard of legal compliance when taken in conjunction with the training.

21. Having made these findings on the basis of the evidence at the hearing, at paragraph 29 of its judgment the Tribunal set out a two stage approach, whereby they would first decide whether the system of work as they had found it to be was legally compliant and then go on to consider whether, based on what was or should have been known to the Inspector on 3 March, the system was legally compliant.

22. The Tribunal then considered the first stage, legal compliance of the system as it had found it to be, over paragraphs 37-62 of the judgment and concluded at paragraph 63 that it was "reasonably safe":

> "63. Looked at overall, we have concluded that we prefer the Appellant's submissions and that this system is reasonably safe. It follows that we are not of the view that we in the light of the evidence given before us that we would have issued a Prohibition Notice on the basis that the system was itself unsafe."

23. Having made that finding, the Tribunal dealt with the second stage, i.e., whether in the light of the knowledge of the Inspector at the time and that which he could reasonably have acquired the Tribunal would have issued the Notice, in a single paragraph. At paragraph 64, which is set out at paragraph 30 of this judgment, the Tribunal found that it would not have issued the Notice. It therefore allowed Survey Roofing's appeal and cancelled the Notice.

The Appeal to the High Court

24. In January 2016, the Inspector appealed to this court under section 11 of the Tribunals and Inquiries Act 1992. Unlike the appeal to the Employment Tribunal under section 24(2) of HWSA, which is an appeal on the merits, a statutory appeal to the High Court under section 11 is only permitted on points of law.

25. The Court of Appeal considered the scope of the court's jurisdiction to hear an appeal under section 11 of the Tribunals and Inquiries Act 1992 in *Hague v Rotary Yorkshire Limited (supra)*. Laws LJ said at paragraph 21:

> "The scope of a section 11 appeal is, in my judgment, the same as that of any other statutory appeal on a point of law only. There is no particular magic in the words, "dissatisfied in point of law", the appellant must show that the Employment has perpetrated a material legal error, a misconstruction of a relevant statutory provision, a finding of fact not rationally supportable in the evidence or a procedural error leading to unfairness. All these are very familiar categories."

The Grounds of Appeal

26. There was considerable overlap between the grounds of appeal set out in the notice of appeal. For the sake of clarity, I have recast and reordered them as follows:

i) The Tribunal erred in law because, having set out the correct test, at paragraph 2 of the judgment, which was that it should base its decision on the information the Inspector knew or ought to know, it failed to apply it.

ii) The Tribunal erred in law in its construction of Regulation 6 of the Work at Height Regulations 2005 in finding that Survey Roofing's system of work was reasonably safe.

iii) The Tribunal erred in law in wrongly determining that HSG33 was best practice whereas it is a guidance document and wrongly interpreted paragraphs 185 and 187 of HSG33.

iv) The Tribunal erred in law in determining that the method of work set out in paragraphs 12 – 15 of the judgment was the industry standard method.

Ground 1: Failure to base its decision on the Inspector's knowledge

27. It was common ground before me that it would be an error of law if, having set out the test, the Tribunal failed to apply it in reaching its decision.

28. On behalf of the Inspector Mr Adjei contended that, by adopting its two stage approach, the Tribunal concentrated on the questions of what method of work Survey Roofing was in fact using at the site and whether this method met the safety test. The Tribunal ought to have concentrated on the issues that arose from the test, which were, first, what the Inspector knew or ought reasonably have known about the method of work at the time he issued the Notice and, second, whether, with that knowledge, the Tribunal would have issued the Notice. As a result, the Tribunal failed to make findings as to what information was known to the Inspector on 3 March 2005 and ought reasonably to have been known to him following a reasonable investigation. If the Tribunal had addressed those questions, it would have found that the Inspector did not know crucial facts about the system which informed the Tribunal's finding that the method of work was safe. For that reason, the appeal should be allowed and the Notice should be reinstated.

29. On behalf of Survey Roofing Mr Heap contended that the Tribunal had considered the matter carefully and issued a detailed judgment. It was common ground before the Tribunal that if leapfrogging boards was the standard industry practice the Inspector knew or should have known that. The issue was therefore: "Should the Inspector reasonably have known that leapfrogging was the method being employed?". Paragraph 64 of the judgment could have been better expressed but it contained a finding that the Inspector observed leapfrogging because it found that the Inspector observed a system of work which was standard industry practice, and the Tribunal had found that leapfrogging was standard industry practice. The Tribunal was therefore fully entitled to find that the Tribunal would also have observed standard industry practice if it had been in the Inspector's shoes. The Tribunal applied the law properly. If they did not, the case should be remitted.

30. The Tribunal addressed the test they were seeking to apply in paragraph 64:

> "64. Moving on therefrom to the final question of whether we would still have issued the Prohibition Notice in the light of the knowledge of the Inspector at the time and that which he could reasonably have acquired it appears to us that that can be dealt with relatively simply. It was conceded in submissions on behalf of the Respondent that if it is as a matter of fact correct that this is a standard industry method of working on roofs such as this, that it could reasonably be anticipated that an Inspector would [have] known of standard industry practices. In our judgment, given that we have accepted that that is right, it must follow that Inspector Wilcox and we applying that hypothetical standard would have observed a method of work which was at least viewed by those within the industry as safe and acceptable. Moreover if it is, as we accept, a standard method

> of work and being carried out on a daily basis up and down the country as was the evidence of Mr Byrd and Mr Bennett in particular it must follow that at least some Inspectors themselves regard it as safe.
>
> ...
>
> In those circumstances we take the view that we would not have issued a Prohibition Notice."

31. The reasoning in paragraph 64 appears confused. The Tribunal reasons that, because (a) it was conceded on behalf of the Inspector that, if the method of work employed was a standard industry method of working, it could reasonably be anticipated that an Inspector would have known that it was a standard industry method, and (b) the Tribunal found that the method of work employed by Survey Roofing was a standard industry method, it automatically follows that (c) the Inspector (and the Tribunal) would have observed a method of work which was viewed within the industry as safe and acceptable before he issued the Notice.

32. This reasoning involves an assumption that the Inspector knew or ought to have known from his observation of the work that Survey Roofing was using the system of working set out in paragraphs 12 to 14 of the judgment.

33. This assumption was not justified. The Inspector did not observe Survey Roofing's method of work. As the Tribunal found at paragraphs 7 and 13 of the judgment, when the Inspector visited the site and issued the Notice, the contractors were not working but preparing to commence work.

34. The Inspector was therefore dependent on his inspection of the roof, the RAMS and the information he was given about the method of work by the contactors and Mr Byrd in forming his opinion that there was a risk of serious personal injury from the activities likely to take place. The Tribunal should have made findings of fact about the information that the Inspector had or ought to have had about the method of work and the contractors' training at the time he issued the notice and gone on to find whether, on the basis of that information, it would have issued the prohibition notice.

35. The Tribunal's decision that the Method of Work it found was employed was reasonably safe emphasised that:

i) the system of covering the four rooflights surrounding the immediate working area with boards from the ridgeline with the board vertically in front of them so that the contractors were always 8 feet distant from the rooflight they were covering and the method and sequence of "leapfrogging" the boards as they moved along the pitch;

ii) the means of accessing the work area was via the ridgeline which was 2.4 metres from the any rooflights; and

iii) the contractors had undergone specific training in the safe conduct of covering rooflights by leapfrogging boards which the Tribunal had found made good the deficiencies of the RAMS.

36. Therefore, it was necessary for the Tribunal to satisfy itself that the Inspector knew or ought to have known those facts before it could reasonably have formed a view that it would not have issued the Notice in his position.

37. I accept Survey Roofing's contention that the Tribunal impliedly found at paragraph 64 of the judgment that the Inspector knew at the time he issued the Notice that Survey Roofing's contractors intended to use boards to cover the rooflights they were working near and to leapfrog the boards as they moved along the roof. This was common ground before the Tribunal and the Inspector's notes of his visit to the site on 3 March 2015 record plywood boards being used to cover the rooflights and "leapfrogging".

38. However, the Tribunal did not expressly or impliedly find that the Inspector knew the details of the method and sequence of moving the boards, the means of accessing the work area or what training the contractors had had when he issued the Notice. Moreover, it could not have made such findings on the evidence. None of this information was given in the RAMS and it was common ground before me that the precise method and sequence of moving the boards, the means of access via the ridgelines and the training the contractors had been given were first discussed at a meeting between the Inspector and Mr Byrd on 4 March 2015, the day after the Notice had been issued. Further, the Tribunal made no finding as to any reasonable investigation the Inspector ought to have undertaken but failed to undertake before issuing the Notice.

39. I therefore conclude that, despite its intention to do so, the Tribunal failed to determine whether it would have issued the Notice based on the information that the Inspector knew or ought to have known when he issued the Notice and instead determined that it would not have done so based on the facts about the system of work and training established following the hearing.

40. In the alternative to Ground 1, the Inspector also appealed on the grounds that, even if he had known (a) that Survey Roofing was using the method of work described in the judgment and (b) that the contractors had received suitable safety training as found in the judgment, the Tribunal nevertheless erred in law in three respects in cancelling the Notice.

Ground 2: Risk and the construction of Regulation 6 of the Work at Height Regulations 2005

41. Mr Adjei contended that the Tribunal misconstrued Regulation 6 of the Work at Height Regulations 2005 because it failed to recognise that training is the lowest in the hierarchy of suitable and sufficient measures to prevent, so far as reasonably practicable, any person falling a distance likely to cause personal injury. He contended that the Tribunal erred in upholding a system of work that relied on the training of contractors rather than the supply of safety equipment because such a system failed to take into account that even experienced and competent operatives sometimes fail to pay attention and act foolishly.

42. Mr Heap responded that the Tribunal gave consideration to the Inspector's arguments based on the fact that people sometimes act stupidly but preferred Survey Roofing's submissions that its method of work supplemented by training was reasonably safe. It

was a question of fact how much stress could be placed on training, not a question of law. The Tribunal was therefore entitled to come to its conclusion that the method of work together with training was reasonably safe.

43. I disagree. The Tribunal recognised that its decision on whether it would have issued the Notice if it had been in the Inspector's position turned on whether Survey Roofing had complied with its legal obligations. In this context, I interpret the Tribunal's finding that the system of work was "reasonably safe" as shorthand for a finding that the method of work together with training complied with Survey Roofing's legal obligations. This required the Tribunal to interpret the HSWA and the Work at Height Regulations. An error in doing so is an error of law.

44. It was incumbent on the Tribunal when assessing whether it would have issued the Notice to apply the test for the issue of a prohibition notice in section 22 HSWA, namely, whether based on the knowledge the Inspector had or ought to have had at that time "the activities involve or will involve a risk of serious personal injury".

45. Survey Roofing had contended before the Tribunal that its activities on the roof did not involve a risk of serious personal injury because it employed a method of work which was "a perfectly safe system of work which corresponds with both the legal requirements and the Guidance" (paragraphs 28 of the judgment). Significantly, it did not contend that, if the Tribunal found there was such a risk, it was not reasonably practicable to provide sufficient equipment to prevent a fall or to minimise the distances and consequences of a fall. Therefore the appeal turned on the question of whether there was a risk of serious personal injury.

46. In the context of the enforcement provisions of HSWA, "a risk" means a possibility of danger, not actual danger. In R. v Board of Trustees of the Science Museum [1993] 1 WLR 1171, the Court of Appeal considered the meaning of the word "risks" in section 3(1) of HSWA. Steyn LJ, said in the judgment of the court at 1177F-G:

> "... In our judgment the interpretation of the prosecution fits in best with the language of section 3(1). In the context the word "risks" conveys the idea of a possibility of danger. Indeed, a degree of verbal manipulation is needed to introduce the idea of actual danger which the defendants put forward. The ordinary meaning of the word "risks" therefore supports the prosecution's interpretation that there is nothing in the language of section 3, or in the context of the Act, which supports a narrowing down of the ordinary meaning. On the contrary, the preventative aim of sections 3, 20, 21 and 22 reinforces the construction put forward by the prosecution and adopted by the judge. The adoption of the restrictive interpretation argued for by the defence would make enforcement of section 3(1), and to some extent also of sections 20, 21 and 22 more difficult and would, in our judgment result in a substantial emasculation of central part of the Act of 1974. The interpretation which renders those statutory provisions effective in their role of protecting public health and safety is to be preferred."

47. The issue is therefore whether Survey Roofing's activities on the roof involved a possibility of danger of serious personal injury through a contractor falling through fragile rooflights while working adjacent to rooflights and passing across the roof. If such a fall had occurred, the distance fallen would have been over 6 metres and the contractor would have fallen onto the floor or onto shop fittings and goods and would undoubtedly have sustained serious personal injury.

48. That some activities inherently present a possibility of danger and therefore risks was recognised by the Court of Appeal in the Science Museum case at page 1178 B-C where Steyn LJ said:

> "The defence also argued that if the prosecution's submission is accepted, the result may be that, subject to the defence of reasonable practicability, all cooling towers in urban areas are prima facie within the scope of the prohibition contained in section 3(1). On the evidence led in the present case that may be correct. Subject only to a defence of reasonable practicability, section 3(1) is intended to be an absolute prohibition. Bearing in mind the imperative of protecting public health and safety, so far as it is reasonably practicable to do so, the result can be faced with equanimity."

49. In my judgment there was inevitably a possibility of a contractor falling through an uncovered fragile rooflight if he was working adjacent to them or passing across a roof containing them. The Work at Height Regulations and HG33 recognise that roof work is inherently dangerous and fragile surfaces present a particular danger.

50. This raises the question of whether Survey Roofing's method of covering the rooflights and leapfrogging the boards, combined with training, eliminated that risk.

51. In my judgment, it did not do so because training cannot eliminate the possibility of a fall through an uncovered rooflight due to illness, inadvertence or stupidity on the part of the trained contractor.

52. I was shown the newspaper report of the Court of Appeal's judgment in the pre-1974 Act case Holtum v WJ Cearns 1953 Times 23 July CA which is particularly apt as it concerned a fall from a height caused by illness. In that case a healthy worker who was not subject to attacks of vertigo died when he fell from scaffolding. The Master of the Rolls is reported as saying:

> "... he was in a position of great danger and ... if the employers had taken reasonable precautions the danger might have been averted. In fact, they had not taken any precautions; and it was impossible to hold that the defendants had fulfilled their duty at common law to take reasonable care for the safety of their employees. The possibility that a workman might have a sudden attack of illness was a matter which employers must take into account. ..."

53. Similarly, where there is a risk if someone does something stupid and does not follow the system designed for his safety there is still a risk. In Health and Safety Executive

v Polyflor [2014] EWCA Crim 1522, [2014] ICR 1142, Foskett J giving the judgment of the court at [20] cited R v Tangerine Confectionary Ltd (2012) 176 J 349 at [42] where Hughes LJ had said:

> "... The risk of operatives, even experienced operatives, for some reason, good or bad, departing from de facto procedures in the vicinity of potentially dangerous machinery, especially in situations which are oft repeated, is a classic one. That is why an assessment for risk ought to be made."

54. Foskett J then went on to say at [30]

> "...Furthermore, as the observations of Hughes LJ quoted at para 20 above, demonstrate, the creation of a material risk by carelessness (including gross carelessness) of an employee remains a material risk for this purpose."

55. Therefore, in my judgment, the Tribunal ought to have considered whether the employer had taken all reasonable precautions to reduce the risk of falls and their distances and consequences in accordance with Regulations 6 and 9 of the Work at Height Regulations. The material parts of those regulations are set out at paragraph 12 above. Regulation 9(2) adds little if anything in this case so I shall concentrate on Regulation 6.

Construction of Regulation 6 of the Work at Height Regulations

56. I accept Mr Adjei's submission that Regulation 6 lists a hierarchy of measures that an employer is obliged to take to prevent, so far as reasonably practicable, any person falling a distance likely to cause personal injury.

57. In summary, the employer is obliged to avoid work at height where possible, to use existing places of work or existing means of access where reasonably practicable (regs. 6(3) and 6(4)(a)); where it is not reasonably practicable to use existing work places or means of access, he must provide work equipment to prevent a fall so far as is reasonably practicable (regs. 6(3) and 6(4)(b)) and, if that does not eliminate the risk, he must provide equipment to minimise the distance and/or consequences of a fall so far as is reasonably practicable and provide additional training and instruction or take other additional suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury (regs. 6(3), 6(5) (a) and 6(5) (b)).

58. It follows that, on a true construction of Regulation 6, the provision of training could only fulfil an employer's safety obligations where it was not reasonably practicable to provide work equipment to reduce the risk of a fall or to minimise the distances and consequences of a fall.

59. Training is at the bottom of the hierarchy for good reason. As the Court of Appeal held in HSE v Polyflor Ltd (above) safety must be considered in the context that even competent and experienced operatives sometimes act stupidly, fall ill or get distracted while working.

60. Applying the hierarchy to the facts of this case, it is readily apparent that work at height could not be avoided when performing maintenance on the roof of the Screwfix store (reg. 6(1)) and the work could not be carried out from an existing place of work and access gained by an existing means of access (reg. 6(3) & 4(a)).

61. Therefore, Survey Roofing's safety obligations on this job were, so far as reasonably practicable: (1) to provide sufficient work equipment for preventing a fall occurring (reg. 6(4)(b)) and (2) if that work equipment did not eliminate the risk of a fall occurring, to provide sufficient work equipment to minimise the distance and consequences of a fall (reg.6(5)(a)) *and* provide such additional training and instruction or take other additional suitable and sufficient measures to prevent any person falling a distance liable to cause personal injury (reg. 6(5)(b)).

62. The Tribunal's failure to recognise that, subject to reasonable practicality, Survey Roofing was obliged to provide sufficient work equipment to prevent a fall or minimise the distance and consequences of a fall was a material error of law. I note that although the Tribunal set out Regulation 6(3) in its judgment, it did not refer to Regulations 6(4) and 6(5) which set out the measures an employer must take, so far as is reasonably practicable, to comply with Regulation 6(3).

63. This omission may explain why its members appear to have approached their task from the position that it was open to them to find that, if the contractors were adequately trained in carrying out the method of work safely, Survey Roofing was under no obligation to supply safety equipment such as harnesses and safety nets.

64. Such equipment would obviously have minimised the distance and consequences of a fall. Therefore, in the absence of a contention by Survey Roofing that it was not reasonably practicable to provide such equipment, it is to my mind inevitable that the Tribunal would have found that Survey Roofing was in material breach of Regulations 6(3) if it had applied the law correctly.

Ground 3 – HSE Guidance

65. As I have already mentioned, the Health and Safety Executive has issued guidance in the form of its publication "Health and safety in roof work" (fourth edition, 2012). This is known as HSG33. The paragraphs relevant to this appeal are paragraphs 185 and 187.

> "185. A safe working platform on the roof and safe access to the working position must be provided when working on fragile roofs:
>
> - platforms or coverings spanning the purlins must be provided and sued to support the weight of anyone on the fragile material; and
>
> - guard rails or coverings are required to prevent someone who is passing or working near fragile roof material from falling through.
>
> ...

> 187 Boundaries can be established identifying 'safe' areas containing the workplace and routes to and from it. If these are used:
>
> - the boundary should be at least 2 m from the nearest fragile material
>
> - the boundary does not need to comply with the full edge protection standards, but there should be a continuous physical barrier (a painted line or bunting is not acceptable); and
>
> - tight discipline is essential to make sure that everyone stays within the safe area."

66. Two matters arose in relation to HSG33 on the appeal to this court. First, Mr Adjei contended that the Tribunal erred in law in finding that HSG33 represented best practice rather than guidance on what was necessary to comply with Regulation 6(3). I did not trouble Mr Heap on this submission as I do not read the judgment as endorsing Survey Roofing's submission that HSG33 represents best practice and that legal compliance with Regulation 6(3) required a lower standard (paragraph 56). In my judgment, the Tribunal's finding at paragraph 62 of the judgment: " ...in our judgment [Survey Roofing] makes an extremely good point when it asserts that its actions are not in breach of the Guidance", is simply a finding by the Tribunal that Survey Roofing's method of work complied with HSG33. Having made that finding, it was not necessary for the Tribunal to decide whether HSG33 represented a higher standard than legal compliance.

67. Second, there is the construction of HSG 33. During the hearing before me, Mr Adjei accepted that the second bullet point of paragraph 185, that was formerly relied on, did not apply due to the Tribunal's findings of fact that the contractor would access the place of work via the ridgelines of the flat roof, that working or passing "near" fragile material meant within 2 metres of it, and that all the roof lights were at least 2.4 metres away from the nearest ridgeline.

68. However, he contended that the Tribunal erred in law in finding that paragraph 187 did not require Survey Roofing to establish continuous physical barriers at least 2 m from the nearest roof lights because they failed adequately to consider the risk that, despite training, the contractors might not stay within the safe area at least 2 metres from the roof lights and might take short cuts.

69. I accept Mr Heap's contention that there was no error of law in the Tribunal's approach to paragraph 187. It was common ground before me that HSG33 provided guidance to employers in complying with their legal obligations under the Work at Height Regulations. They are not themselves legislation. Given the use of the word "may" at the start of paragraph 187, the Tribunal was entitled to find that Survey Roofing was not obliged by paragraph 187 to provide continuous physical barriers demarcating the safe areas for the contractors to walk in cases where paragraph 185 did not apply.

Ground 4: Standard Industry Method

70. The Inspector contended that the Tribunal erred in law in determining that the method of work being employed by Supply Roofing on 3 March 2015 was industry standard.

71. Mr Adjei accepted that in challenging a finding of fact he had to show that it was not rationally supportable by the evidence. He contended that, because each roof had different features affecting its safety, it was irrational for the Tribunal to find that there was an industry standard for the type of roof under discussion.

72. I disagree. While it is obviously correct that every roof is different, there may still be a standard industry practice for flat roofs containing fragile rooflights. As Mr Heap pointed out, the Tribunal based its finding on expert evidence of Mr Bennett. It was entitled to prefer Mr Bennett's evidence to that of Mr Rattray (judgment paragraph 36).

73. However, it does not follow from the fact that the system of working on a roof is standard industry practice that that method of work necessarily complies with the HSWA or Work at Height Regulations either in general, or in the case of any specific roof. That is a wholly different question.

Conclusion

74. For the reasons I have given, I find that the Tribunal failed to approach its task based upon the information that the Inspector knew or should have known when he issued the Notice. Further, even if the Inspector had been aware of the method of work and training established by the evidence at the hearing, it was not open to the Tribunal to find that it would not have issued the Notice. There remained a risk of serious personal injury if a contractor fell through a fragile roof light that Survey Roofing ought to have minimised by providing working equipment that would, so far as reasonably practicable, either eliminate a risk of falls or minimise the distance and consequences of a fall. Given that Survey Roofing did not contend that provision of such equipment was not reasonably practicable, it follows that it was in breach of ss. 2 and 3 of HSWA and Regulation 6(3) of the Work at Height Regulations.

75. I have considered whether to remit this matter to be considered by a freshly constituted tribunal but concluded that this would serve no useful purpose. It is inevitable that a rational tribunal directing itself in accordance with this judgment would have found that Survey Roofing's system, insofar as it was known to the Inspector when he issued the Notice on 3 March 2015, did not comply with its obligations. It may of course have been otherwise if Survey Roofing had contended that it was not reasonably practicable to provide further work equipment, but it did not do so.

76. It follows that the appeal is allowed. The Tribunal's decision is set aside and the Notice upheld.