Reserved judgment

Between

Pricewatch Limited

Appellant

and

Andrew Gausden

Respondent

Heard at London South Employment Tribunal on 4-6 May & (in chambers) 7 & 17 June & 9 August 2016

Before Employment Judge Baron

Lay Members: **Ms J Forecast & Mr E Walker**

Representation:

Claimant: ***Iaian Daniels***

Respondent: ***Richard Roberts***

JUDGMENT

It is the judgment of the Tribunal as follows:

1 That Improvement Notice number ESFRS/PET/002/I/15 is affirmed but is to be modified by the removal of 'and 3' under the heading of 'Remedy';

2 That Improvement Notice number ESFRS/PET/004/I/15 be cancelled.

REASONS

Introduction

1 I apologise for the substantial delay in issuing the judgment and reasons. This has been caused by other judicial responsibilities.

2 These cases concern appeals against enforcement notices under section 22 of the Health & Safety at Work Act etc 1974 served on the Appellant by the Respondent, Mr Gausden, in his capacity as the Lead Officer for the Petroleum Safety Department at Lewes Fire Station. He has been appointed as an inspector for the purposes of the 1974 Act by

East Sussex County Council, the relevant petroleum enforcement authority ('PEA').

3 After service of the improvement notices the appeals the subject of these proceedings were made in the name of Adam Salvidge. Following a preliminary hearing held on 21 July 2015 I ordered that clarification be provided and on 3 September 2015 I ordered that Pricewatch Limited be the Appellant. The Appellant has operated two service stations in Sussex since May 2012. The company also owns and operates an oil import terminal at Shoreham Harbour. We were told that these had previously been operated by Salvidge family companies being either or both of United Petroleum Company Limited ('UPCL') and SSL Group Limited ('SSL'), but we were not provided with details. We heard evidence from Adam Salvidge. In his witness statement he described himself as a director of the Appellant. In oral evidence in chief he said that he had only been involved in the business since 2012, and that the earlier companies had been run by other members of his family. Some questions put to him in cross-examination were specifically on the basis that he was a director of the Appellant.

4 During deliberations we wished to clarify the involvement of the father of Mr Adam Salvidge, Mr Leslie Salvidge, for two reasons. Firstly, there was correspondence in the bundle from him on the notepaper of each of UPCL SSL and the Appellant, and secondly it was clear to us that Adam Salvidge was seeking to distance himself and the Appellant from the other companies mentioned above. We therefore checked the public record at Companies House. We discovered that Adam Salvidge is not, and has not been, a director of the Appellant, and that Leslie Salvidge is shown as a director of the Appellant.

5 In the light of that information we invited comments from each of the parties. The solicitors for the Appellant provided further information about the officers of the various companies. Of more relevance is that they said that although not registered as a director, Adam Salvidge had the 'title and authority of a director of the Appellant and had first-hand knowledge of all matters contained within his witness statement.' A letter was received on behalf of Mr Gausden. The only material point made was that the credibility of Adam Salvidge must be called into question.

6 The conclusion we reach is that we are not prepared to accept any attempt by Adam Salvidge on behalf of the Appellant to seek to distance itself from any acts or omissions of its predecessors as owners of the sites.

7 We were also provided with two bundles of documents, one prepared on behalf of each of the parties, with different numbering systems. Unhelpfully one was described as 'Main Bundle' and the other as 'Proposed Core Bundle'. Most of the documents were common to the two bundles, but of course were differently numbered in each bundle. It is unfortunate that the solicitors for the parties were unable to agree upon one bundle. That failure has complicated our task.

8 At the conclusion of the oral evidence it was agreed that written submissions would be prepared by each of Mr Daniels and Mr Roberts, and that they would the provide submissions in reply. That they did, and we are grateful for the clarity of those submissions. They are, however, substantial and we have had to take sufficient time to ensure that we fully understood the points being made.

The law

9 These appeals are brought under section 24 of the Health & Safety at Work Act etc 1974 against two improvement notices served under section 21 of the Act.

> **21 Improvement notices**
> If an inspector is of the opinion that a person--
> (a) is contravening one or more of the relevant statutory provisions; or
> (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated,
> he may serve on him a notice (in this Part referred to as "an improvement notice") stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period within which an appeal against the notice can be brought under section 24) as may be specified in the notice.
>
> **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.

The word 'modifications' in section 24(2) is defined in section 82 as including 'additions, omissions and amendments'.

10 We were referred to various authorities in connection with the function of the Tribunal in hearing appeals against prohibition notices under section 22 of the 1974 Act. We consider that the position is well summarised in paragraph 22 of the judgment of Popplewell J in *MWH UK Ltd v. Wise* [2014] EHWC 427 (Admin). That case related to an improvement notice, and after a review of the authorities Popplewell J said the following:

> On an appeal from the imposition of an Improvement Notice, the Employment Tribunal reaches its own decision, paying due regard to the views and expertise of the Inspector. It decides whether it would have served the Notice at the time at which it was served on the basis of the

information which was available to the Inspector or ought reasonably to have been available following such investigation as ought reasonably to have been undertaken.

11 The statutory and regulatory circumstances of this matter are somewhat complex. The regulation of the storage of petrol was governed until 30 September 2014 by the Petroleum (Consolidation) Act 1928, as amended. The relevant provisions are as follows:

> **1**. (1) Subject to the provisions of this Act, petroleum spirit shall not be kept unless a petroleum-spirit licence is in force under this Act authorising the keeping thereof and the petroleum-spirit is kept in accordance with such conditions, if any, as may be attached to this licence:
> Provided that . . . [relates to storage for private use or small volumes]

12 Section 2(3) provides as follows:

> (3) A local authority may attach to any petroleum-spirit licence such conditions as they think expedient, as to the mode of storage, the nature and situation of the premises in which, and the nature of the goods with which, petroleum-spirit is to be stored, the facilities for the testing of petroleum spirit from time to time, and generally as to the safe keeping of petroleum spirit.

13 From 1 October 2014 those provisions were repealed and replaced by the Petroleum (Consolidation) Regulations 2014 made under the Health & Safety at Work Act etc 1974. The terminology changed from a requirement to have a petroleum-spirit licence to a requirement to have a storage certificate. The basic provision is in regulation 4. Regulations 5 then sets out the requirement for there to be a valid storage certificate, and regulation 6 sets out the requirements to be met when applying for such a certificate, and the obligation on the PEA to grant such a certificate. Regulation 7 contains provisions as to the temporal extent of the validity of a certificate.

> **4 General prohibition on the keeping of petrol**
> No person is to keep petrol except in compliance with regulation 5 or regulation 13.[1]
>
> **5 Storage under certificate**
> A person keeps petrol in compliance with this regulation if the petrol is kept on dispensing premises in respect of which there is--
> (a) a valid storage certificate; and
> (b) compliance with the notification requirements set out in regulations 9 and 10, as applicable.[2]
>
> **6 Application and grant of storage certificates**
> (1) A petroleum enforcement authority must grant a certificate in respect of dispensing premises (a "storage certificate") where--
> (a) an application has been made in accordance with this regulation; and
> (b) it is satisfied that the containment system for petrol at the dispensing premises, including storage tanks, pipework and dispensers, may reasonably be used to store petrol and would not create an unacceptable risk to the health or safety of any person.
> (2) An application under this regulation may be made by any person.
> (3) An application under this regulation must include the following information--
> (a) the name and address of the applicant;
> (b) the address of the dispensing premises;

[1] Regulation 13 relates to the storage of petrol on domestic premises and is not relevant.
[2] These regulations are not relevant to these appeals.

(c) a drawing of the layout of the dispensing premises;
(d) a drawing of the containment system for petrol at the dispensing premises, including storage tanks and pipework;
(e) a drawing of the drainage system for petrol at the dispensing premises.

(4) A storage certificate must contain the following information--
(a) the name of the petroleum enforcement authority granting the certificate;
(b) the address of the dispensing premises in respect of which the certificate is granted;
(c) a drawing of the layout of the dispensing premises;
(d) a drawing of the containment system for petrol at the dispensing premises, including storage tanks and pipe work;
(e) a drawing of the drainage system for petrol at the dispensing premises.

(5) An application for a storage certificate must be made within--
(a) a maximum of six months; and
(b) a minimum of 28 days,
before the day on which the storage of petrol is to be undertaken at the dispensing premises.

(6) A storage certificate is not personal to the person to whom it is granted and remains valid on transfer of ownership, operation or management of the dispensing premises.

7 Validity of storage certificates

A storage certificate remains valid for so long as--
(a) there is no prescribed material change (see regulation 8);[3] and
(b) the dispensing premises do not cease to be used for the keeping of petrol for a continuous period exceeding 12 months.

14 Most importantly for the purposes of these appeals there are transitional provisions in regulation 23.

23 Transitional provisions in relation to licences granted under the Petroleum (Consolidation) Act 1928

(1) This regulation applies to the keeping of petrol that immediately before the relevant date was authorised by a licence granted under section 2(2) of the Petroleum (Consolidation) Act 1928.

(2) Where the keeping of petrol to which this regulation applies--
(a) occurs on dispensing premises; and
(b) fulfils the requirements in paragraph (4),
it is deemed to be kept in compliance with a valid certificate granted under regulation 6.

(3) – (5) . . . .

(6) Except for paragraph (7), this regulation ceases to have effect at the end of the period of three years beginning with the relevant date [being 1 October 2014].

(7) A licence deemed to be tantamount to a valid storage certificate under paragraph (2), where the storage arrangements remain unaltered, is to be converted, by the petroleum enforcement authority, to a storage certificate on its expiry without having to fulfil the requirements set out in regulation 6.

15 We were also referred to a document issued by the Petroleum Enforcement Liaison Group (described as a health and safety advisory committee) entitled 'Guidance on the introduction of the new Petroleum (Consolidation) Regulations 2014' commonly referred to as PETEL. It has no statutory force. Despite extending the length of this document, we set out an edited extract from the document because it contains a useful summary of the suggested procedure, and also because our attention was drawn to it.

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[3] We are not setting out regulation 8, nor Schedule 1 to which it refers. The concept of 'material change' suffices for present purpose.

FOREWORD

. . . .

The new Petroleum (Consolidation) Regulations 2014 (PCR 2014) comes/came into force on 1st October 2014; this guidance is to inform, both PEAs and employers (site operators) of premises where petrol is dispensed, of the changes, how they will be implemented, and the action that needs to be taken.

. . . .

INTRODUCTION

1 . . . . The most significant changes relate to the administrative processes, and have been designed to reduce administration for both PEA's (*sic*) and the operators of petrol filling stations. . . . .

2. This guidance and associated template documents may be used to facilitate the transition from the existing licensing regime into the new administration, which includes:

- Granting storage certificates and notification of changes 'Petroleum Storage Certificate' (PSC).
- Notification of the 'keeper of petrol' (for a definition of who should apply for a certificate, refer to Regulation 5 and Regulation 6 of PCR 2014).
- Fee collection arrangements.

3. The new legislation allows for a site to operate within the law until either the dates at which the current Petroleum Licence expires, or prescribed material changes (as detailed in Regulation 8 of the PCR) are made to the petrol installation at the site. A PSC must be granted to come into force immediately on the expiry of the Petroleum Licence or on completion of any prescribed material changes to the petrol installation. This allows for a phased transition into the PSC regime, which could take up to three years to complete (where a three year licence has been granted from 1st September 2014).

Action 1 – by the PEA

4. Complete and send a 'transitional notification letter, form and information pack' at a date that will allow sufficient time for the operator of the dispensing premises to complete and return the 'transitional form', examples of which are included in the appendixes. Included on the form is a table which provides a record of those tanks registered to store petrol at the site. The tanks may be used to store other vehicle fuels. Tanks that meet the following criteria should be included on the table:

- Existing licensed petrol tanks
- Double skin tanks with class 1 or 2 leak detection.
- Double skin lined tanks to EN13160-7.
- A compartment of an existing single skin compartmented storage tank in which petrol is currently stored in one or more other compartment of the same tank.
- . . . .
- Single skin steel tank with auditable proof that it was installed to the petroleum standards in force at the time of installation, and that it has auditable statistical inventory reconciliation records to EN13160-6. Note: these tanks are most likely to have been installed at the same time, and in the same excavation, and surrounded with the same backfill material as a number of petrol tanks.

Action 1 – by the existing Licensee, (who may become the 'Keeper' following the granting of a PSC)

5. On receipt of the 'transitional notification letter', and 'transitional form';

- Complete the details required as indicated;
- Confirm or refute any information supplied by the PEA; and
- Return the form as soon as possible.

This will enable the PEA to issue the PSC before the date when the Petroleum Licence expires. Wherever possible, the opportunity is to be taken by both the PEA and the Keeper to communicate electronically.

6. One of the methods by which the burdens of administration are to be reduced, is the clarification of when the PEA must be notified prior to 'prescribed material changes' being carried out at the premises, that would result in the granting of a new PSC. If a tank that would be suitable for the storage of petrol, but that currently contains another product is included within the tank table on the PSC, this will remove the need for notifications of grade changes. The Keeper should therefore use this opportunity to check that all tanks that they believe are suitable for petrol have been included within the table.

The Horam site

The facts

16 A licence numbered 30003854 was issued dated 1 May 2009 to the appellant's predecessor, SSL group, for a period of one year to 30 April 2010. It appears that the licence was subsequently renewed although we cannot trace having specific evidence to that effect. The terms of the licence are important. The licence was described as being a "licence to keep petroleum spirit, petroleum mixtures and carbide of calcium". It authorised the keeping on the premises of "Twenty-six Thousand and Seven Hundred and Seventy-Two Litres in one underground tank."

17 At Horam there are three underground tanks each of which is split internally into two separate tanks, thus creating six tanks. There is an official plan attached to the licence which it is acknowledged has the wrong numbers of the tanks on it. We find it surprising that there should have been such an error, but neither party suggested that there was any question as to the validity of the licence. The table on the plan is correct if read in conjunction with the numbers on the tanks shown on the plan dated 1 November 2012 at page 385 of the Main Bundle. The details are as follows:

Tank 1 – Decommissioned
Tank 2 – Diesel – 6,800 litres
Tank 3 – Unleaded petrol – 6,800 litres
Tank 4 – Diesel – 19,200 litres
Tank 5 – Empty
Tank 6 – Gas oil – 6,800 litres

18 The licence also had conditions attached to it. In summary, the consent of the licensing authority was required the making of any material alterations, and the phrase "material alterations" has a wide definition.

19 The plan of 1 November 2012 shows different uses as follows:

Tank 1 – Not used
Tank 2 – Kerosene
Tank 3 – Diesel
Tank 4 – Unleaded petrol

Tank 5 – [No entry]
Tank 6 – Gas oil

Notes on the plan stated that Tank 2 had been changed from diesel to kerosene, Tank 4 had been changed from diesel to unleaded petrol and Tank 3 had been changed from diesel to unleaded petrol.

20 An inspection of the site was undertaken by a Jim Owen, the then Petroleum Enforcement Officer, on 26 February 2014. He completed a standard form of report. Billy Smith is shown as the competent person in charge of the site. The form is ticked to indicate that there was compliance with the licence conditions. There was a note of an informal notice of deficiencies having been served, but otherwise the report was satisfactory. What is does not disclose specifically is what fuels were being stored in which tanks.

21 There was a complaint by a customer about petrol vapour in July 2014. As a consequence a site visit was made by Mr Sherman, who reported to Mr Gausden. Mr Sherman visited the site on 25 July 2014 and concluded that it appeared that changes had been made to the storage arrangements without the appropriate approval. Accordingly he wrote a formal letter of 7 August 2014 addressed to Mr Les Salvidge, the father of Adam Salvidge. Tanks containing petrol must be connected to a vapour recovery manifold. Other tanks should not be so connected. The note by Mr Sherman of the visit recorded that the vapour recovery system appeared to be connected only to diesel tanks. Mr Sherman said that he had observed that there had been alterations to the contents of underground storage tanks without prior notification, rendering the vapour recovery system ineffective. Mr Salvidge senior replied in a letter received on 20 August 2014 confirming that the unleaded tank number 4 did not have a vapour recovery valve, but diesel tank 3 did have such valve. He acknowledged that that should not have been the case. Mr Salvidge then added the following:

> Pricewatch purchased the station from United Petroleum. I spoke with a previous Director from United and he recalls a temporary grade change to get rid of a microbial growth infestation but he thought that the grade change had been reversed. Whilst we should have noticed that earlier we cannot be responsible for actions outside our control.

22 The ‘previous Director’ was Paul Salvidge. While it is of course true that the two companies are separate legal entities, at best we consider Leslie Salvidge to have been disingenuous in his reply.

23 Mr Sherman visited the site again or 4 September 2014. His note records that tanks 1 and 4 were connected to the vapour recovery manifold (and so suitable for the storage of petrol), but tank 3 had been removed from it. It also recorded that the person on site, Billy Smith, was not able to state what the contents were in tanks 1 and 5. A letter was then sent to the appellant dated 3 October 2014 requiring that a full tank inventory for the storage tanks at the site be provided. A reply was sent by Mr Les Salvidge, the father of Adam Salvidge, dated 22 October 2014. Information was supplied concerning tanks 2, 3, 4 and 6, but there was no information concerning tanks 1 and 5.

24 A further letter was written on 14 January 2015 by Mr Sherman, this time to Adam Salvidge. Mr Sherman noted that no records had been supplied in respect of tanks 1 and 5. The letter recorded that the fill pipes for the tanks showed tank 1 as holding leaded petrol and tank 5 as holding unleaded petrol. He said that he had been led to believe that those tanks were not in use. If they did hold petrol then appropriate precautions needed to be taken. If decommissioned then the PEA needed to be notified accordingly. Mr Sherman was seeking clarification of the position and he said that until the contents of the tanks could be established it was difficult to evaluate the risks of fire and explosion. He asked for a reply to the concerns by 26 January 2015.

25 Mr Salvidge then replied in a short letter on 3 February 2015. The relevant portion of the letter is as follows:

> Tank I. Is Unleaded and Tank 5., Gasoil: these are correctly labelled and correctly connected to the VRU manifold.

26 As a consequence of receipt of that letter, Mr Sherman wrote to Mr Salvidge on 6 February 2015. In that letter Mr Sherman said that what Mr Salvidge had said in his letter of 3 February 2015 indicated that the company was in breach of the 2014 Regulations. He said that an application for a petroleum storage certificate should be made because of the provisions of regulations 7 and 23(7). He said that the relevant forms were closed.

27 Mr Salvidge replied by email on 19 February 2015 as follows:

> I think there has been some confusion. Tank 1 is correctly labelled but it is not currently in use so we are certainly not storing any more petrol than you think. It has a gasoil vapour barrier and, should we need to put it in use in the future, we will update you.

28 Mr Sherman and Mr Gausden then visited the site on 20 February. During a telephone conversation with Mr Sherman before the visit Mr Smith of the Appellant confirmed that tank 1 contained petrol, according to the note made by Mr Sherman. However the notes made by Mr Sherman of the visit later that day, when he was accompanied by Mr Gausden, record that Mr Smith then said that tank 1 was out of use, and the relevant pipework had been removed. They were shown the plan of 1 November 2012 which records tank 1 as 'not used.'

29 An improvement notice was issued on 20 February 2015 but then withdrawn as it did not provide sufficient time for compliance. A revised notice was issued on 3 March 2015, and it is this notice against which the appeal has been made. The notice had set out in the Schedule to it matters which in the opinion of the Petroleum Enforcing Authority constituted failures to copy with the 2014 Regulations, and the steps to be taken by 1 April 2015 to remedy the failures.

> Failure under Part 2, Regulation 5(a) of The Petroleum (Consolidation) Regulations 2014
>
> *A person keeps petrol in compliance with this regulation if the petrol is kept on dispensing premises in respect of which there is:*
> *(a) a valid storage certificate.*

> **Failure**. The keeping of petroleum spirit within underground storage tank numbered 1, the purpose of dispensing has been facilitated without a valid storage certificate.
>
> **Remedy**. Make an application to the Petroleum Enforcing Authority for a petroleum storage certificate for the above premises for the storage of petroleum spirit in Tanks 1 and 3.

It was acknowledged by Mr Gausden that the reference to tank 3 should have been to tank 4.

30 Mr Gausden and Mr Sherman visited the site again on 17 April 2015 as there had not been any response to the improvement notice. There were contractors on site with a pump. Mr Gausden spoke to Mr Salvidge and the contractor. From those conversations Mr Gausden concluded that tank 1 held petrol and what was proposed was that both tanks 1 and 2 were to hold unleaded petrol. Mr Gausden pointed out that neither tank was licensed for that purpose.

31 As set out in the PETEL Guidance above the PEA prepared the transitional notification letter and information packs. They were dated 1 April 2015, but were not sent out on that date. The documents were received on 24 April 2015. Mr Salvidge obtained copies of the information forms from elsewhere and submitted them to the PEA before he received the originals from the PEA. On the form for Horam dated 14 April 2015 Mr Salvidge identified tank 4 as being the only tank in which petrol was to be stored, and that it held 18,624 litres.[4] He then received the pre-printed form from the PEA which showed tanks 1, 2 and 4 all as having been licensed under the old regime for the storage of petrol. Mr Salvidge signed that form and returned it, noting that it was to replace the earlier form.

32 A storage certificate was issued dated 1 May 2015 in respect of tanks 3 and 4, which were two compartments of the same tank. Mr Gausden specifically stated in a letter dated 1 May 2015 that the certificate was issued under the transitional arrangements. The reason that both tanks 3 and 4 were included was because they are effectively part of the same tank, although only tank 4 was being used at the time for the storage of petrol. It was agreed that this is not a point of any substance. However it appears that Mr Gausden thought at the time that it was tank 3 which was being used for petrol.

33 There was subsequent correspondence concerning an apparent delay in the Appellant receiving the certificate for Horam, and also for Selmeston mentioned below. We have noted that in a letter from Mr Salvidge of 22 May 2015 he said that certificates had been issued for tanks 3 and 4, but they should have been issued for tanks 1, 2 and 4. He said that tanks 1 and 2 were installed as split compartment petrol tanks. A formal reply was sent to that letter on 29 May 2015 by Mr Gausden saying that he was not able to comply with the request, and Mr Salvidge wrote again on 2 June 2015 saying that corrected certificates must be issued.

[4] Mr Salvidge appears to think that this form was actually dated 13 April 2015.

34 Mr Daniels made submissions for the Appellant. He first of all dealt with tank 3 as referred to in the Notice, pointing out that it was conceded that that was an error, and the reference should have been to tank 4. He said, without it having been contradicted, that it was only shortly before the hearing that the error had been noticed by Mr Gausden despite the fact that he had issued a certificate covering tank 3. That, he said, raised issues about the competence of Mr Gausden. Mr Daniels said that tank 4 (wrongly referred to as tank 3 in the notice) had been in fact certified pursuant to regulation 23. We are not sure about that as it appears from the letter of 1 May 2015 that Mr Gausden considered that tank 3 had a licence and was therefore covered by the transitional arrangements.

35 Mr Roberts did not go into detail concerning the issues relating to tanks 3 and 4. He did point out that there had at some stage been an apparent breach of the licence conditions in that there had been a change in the use of both tanks and also to the vapour control system.

36 Tank 1 is of more importance. Mr Daniels submitted that the principal test derived from *Chilcott v. Thermal Transfer Ltd* [2009] EWHC 2086 Admin involves the Tribunal assessing whether the risk or the breach of the Regulations existed at the relevant date, rather than whether the inspector believed it existed. He cited paragraphs 11 and 12 from the judgment in *Chilcott* where reference was made by Charles J to risk of serious personal injury.

> 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 is 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 being carried on, or likely to be carried on by the relevant person or under the control of that person. So, the focus is to as to risk flowing from an activity then being carried on or likely to be carried on as at time
>
> 12. In that context, it seems to me, by reference and analogy to other areas where risk of significant harm falls to be assessed, and I take by analogy the jurisdictional trigger for intervention by making a public law order in Children Act cases where the relevant risk has to be assessed when the process is started by the relevant local authority, that what has to be established is the relevant risk as at that time. In determining whether or not that risk exists as at that time, the court does not close its eyes to matters that occurred after that time, but that is not the same approach as I would understand generally to be the expression 'judged with the benefit of hindsight'. What the court's function is, is to identify on the evidence before it, which is not restricted to matters that were in existence before a particular date, what the situation was as at that particular date. Did the relevant risk exist? What would happen if it came to fruition? Matters of that type, and in that context to determine, paying due regard to the views of the Inspector, whether a notice should have been served to promote the underlying purposes of the Act, and in particular section 22. The purpose of that, it seems to me, is moderately clear, namely, that a notice should be served if the risk identified of serious personal injury warrants it.

37 That was, however, a case of a prohibition notice, and not an improvement notice, and we consider that the judgment must be read in that light. Section 22 requires that the inspector must be of the opinion that the 'activities involve, or as the case may be, will involve a risk of serious personal injury'. Section 21, on the other hand, refers to a

contravention of statutory provisions. We do not accept that the analysis by Charles J as to the purpose of section 22 applies to the same extent to section 21. We do not therefore accept the submission of Mr Daniels that the relevant question is whether in fact petrol was being stored in tank 1 at the time when the improvement notice was served. The first sentence of paragraph 11 is relevant in that there is reference to the time when the notice is served. That point was repeated in *MHW UK Ltd* cited above.

38 We prefer the submission of Mr Roberts which concentrated on whether the inspector, Mr Gausden, had good grounds for having the opinion that the conditions of the original licence had been breached. The significance of that point is that in the event of a breach then the transitional provisions in the 2014 Regulations would not apply. That then begs the question as to the meaning of the original licence.

39 As we understand it, it is the position of the Appellant that the licence issued under the 1928 Act covers the whole of the premises to which it refers, and is not related to a specific tank or tanks. Therefore, says the Appellant, the effect of the licence of 1 May 2009 was to allow 26,772 litres of petrol to be stored in any one tank (or indeed a combination of tanks) rather than the tank in which it was being stored at the time when the licence was granted. If that were correct then there had not been a breach of the licence conditions. Mr Roberts submitted that the natural reading of the licence was that it related to one tank, and only one tank. We prefer the submission of Mr Roberts on this important point. The licence states that it is granted subject to the conditions attached to it. We have summarised those conditions above. The requirements to obtain the written consent of the licensing authority to a change in the nature of the fuel stored in any one tank would be superfluous if the interpretation of Mr Daniels were correct.

40 We note the point made by Mr Daniels about the plan attached to the original licence as being inaccurate. We consider that to be unfortunate, and do not know how the error occurred. However, it is the change in use of the tanks which is the material point, and not the numbering of the tanks on the plan.

41 The consequence of that conclusion is that regulation 23 of the 2014 Regulations does not apply to the Horam site. Regulations 23(2)(b) and 23(4) clearly mean that there must have been compliance with the conditions subject to which the licence was granted before the transitional provisions apply. We conclude as a fact that there had been a breach, or breaches, of the licence in that there had been changes in the fuels stored in tanks 3 and 4 at least. The consequence is that the transitional provisions did not apply.

42 The question before us is, whether on the information available to Mr Gausden, or which would have been reasonably available to him after a reasonable investigation, we would have served the notice, but taking into account the views and expertise of Mr Gausden.

43 Mr Daniels submitted that the only information upon which Mr Gausden relied was what he had been told by Mr Sherman about what Billy Smith had said on the telephone, but then Mr Smith told Mr Gausden himself that Tank 1 was not being used for the storage of petrol. Mr Daniels used the phrase that 'at best the situation was confused' and that Mr Gausden should have taken steps to investigate by one means or another whether the tank was being used for petrol storage.

44 Mr Roberts submitted that there were good grounds for Mr Gausden holding the opinion that there had been a breach of the licence conditions and that tank 1 was being used for the storage of petrol. They were as follows. Tank 1 had been connected to the vapour recovery manifold, so being appropriate for the storage of petrol. Despite written requests for a full tank inventory, the records for tanks 1 and 5 were not provided. The fill pipe was labelled when photographed in July 2014 to show that the tank held petrol. The letter from Mr Salvidge of 3 February 2015 stated that tank 1 was for unleaded fuel. Mr Smith was recorded as having said on 20 February 2015 that the tank was used for petrol, although on the preceding day Mr Salvidge had stated that it was not currently in use, and Mr Smith later stated that the tank was out of use.

45 Mr Roberts further submitted that what occurred in relation to tank 1 had to be seen against the background of the earlier changes for which a modification of the licence or consent had not been obtained. He also commented that the Respondent had not been cooperative or acknowledge breaches.

46 We now turn to our conclusions concerning the Horam site. Under regulation 24 of the 2014 Regulations the Tribunal has the power to affirm the notice with modifications. As stated above, 'modifications' has a wide meaning. The first conclusions to which we have come, and which really is not contentious, is that the reference in the Notice to tank 3 is to be deleted.

47 The real issue relates to tank 1. We have to assess whether we would have served the Notice at the time when it was served, but subject to that modification. The notice is dated 3 March 2015, and we must therefore ignore the information obtained by Mr Gausden on his visit to the site on 17 April 2015.

48 We agree with Mr Roberts that the issue concerning tank 1 is to be seen against the background of there having been changes made to the storage arrangements subsequent to the issuing of the licence on 1 May 2009 without there being any record of the approval of the PEA having been obtained. We are satisfied that Mr Gausden had reasonable grounds for believing that tank 1 was being used for the storage of petrol for the reasons enumerated by Mr Roberts and summarised above. We will not repeat them. It was not just a question of a label having been inadvertently left on a fill pipe. Both Mr Smith and Mr Salvidge had specifically stated that the tank was used for unleaded petrol, although each of them later contradicted themselves. If tank 1 had in fact been decommissioned in 2009, and was still not being used in 2012, then we

entirely fail to understand why that information could not simply have been provided when requested.

49 Mr Daniels submitted that Mr Gausden should have gone further and satisfied himself that there actually was petrol in tank 1 by one means or another. He referred to the reference in paragraph 12 of *Chilcott* to information not being limited to that which was available at a particular date. Mr Roberts, quite rightly in our view, commented that the distinction between that approach and 'judged with the benefit of hindsight' may be difficult to apply in practice. Mr Roberts submitted that there was sufficient evidence before Mr Gausden already. We have agreed with that submission. Further, we note that what has not been explained is the information gained by Mr Gausden when he visited the site on 17 April 2015. If further enquiries had been made, then based upon the information obtained on 17 April 2015, Mr Gausden would have concluded without any doubt that there was petrol in tank 1.

50 We therefore allow the appeal, but only to the extent that 'and 3' be deleted from the section of the notice headed 'Remedy'.

51 Finally we mention two points made by Mr Daniels. In his opening skeleton argument he said that the requirement imposed by the notice to apply for a certificate was fundamentally flawed on the basis that the Respondent did not have to apply for a certificate, but that if petrol was stored without one then an offence was committed. It was not a point pursued later during the proceedings, but we considered it during our deliberations. In our view that submission is not in accord with the test which we have accepted as being the correct one. It is another way of saying that there must in fact have been petrol in the tank, which is a proposition which we have not accepted.

52 The second point is that the evidence of Mr Salvidge was not challenged in certain respects, and in particular as to whether the tank did contain petrol. Again, our approach has been as to the information available to Mr Gausden at the time that the notice was served.

<u>The Selmeston site</u>

53 The earliest document which we were shown is a licence dated 4 October 1974 which is a licence under the 1928 Act authorising the storage of 5,000 gallons of petrol in three underground tanks. There were endorsements renewing that licence to 30 September 1996. We then have a renewal to 1 October 1998 granted to SSL in respect of 22,500 litres, shown on a plan as being in tanks 1, 2 and 3. Tanks 4 and 5 were shown as being for the storage of diesel. There were then various renewals, but without any details of the fuel being stored in each of the tanks being provided. The last renewal we have is to 30 April 2008. We do not know the position between that date and the granting of the next licence in September 2009.

54 There is then a letter from Mr Leslie Salvidge to East Sussex Fire and Rescue Service of 4 May 2009 which refers to a copy of a plan being enclosed showing details of grade changes. It appears that the plan was

a slightly earlier version of the plan mentioned in the next paragraph, but it did contain the relevant details.

55 Mr Leslie Salvidge wrote on 3 August 2009 to a Petroleum Officer, Mr Huckstepp, enclosing a revised plan showing tank and pipework layout. The plan had on it the following details:

Tank 1 - 6,800 ltrs Diesel (was unleaded)
Tank 2 - 6,800 ltrs Unleaded
Tank 3 - 9,500 ltrs Unleaded (was diesel)
Tank 4 - 4,500 ltrs Diesel (was Gasoil)
Tank 5 – 8,000 ltrs Diesel
Tank 6 – Gasoil to follow

56 There was a site meeting of Mr Huckstepp and Mr Leslie Salvidge on 4 August 2009. Mr Salvidge was proposing to redevelop the site by building a new kiosk / retail outlet. The notes of the meeting record Mr Huckstepp as being less than content with the failure of Mr Salvidge to have notified him of all the proposed alterations at an earlier date. He noted that he did not consider that the restricted consultations complied with the conditions of the Licence. Mr Salvidge had said that he had wanted to seek to restrict objections to the development. There was no suggestion in the notes that Mr Huckstepp objected to the use of each of the tanks as marked on the plan sent with the letter of the preceding day. Indeed, the notes record that Mr Salvidge agreed to provide a plan of the underground pipelines.[5]

57 A licence was issued dated 8 September 2009 authorising the keeping of 13,230 litres in two underground tanks for the period to 30 April 2010. Those were identified on the plan attached to the licence as being tanks 1 and 2, and not tanks 2 and 3 as referred to on the plan attached to the letter of 3 August 2009. There is no suggestion that, unlike the Horam site, the numbering on the plan is wrong. No explanation was proffered to us as to why the licence plan shows tanks 1 and 2 as being used for the storage of petrol when it had twice been made clear by Mr Leslie Salvidge that it was tanks 2 and 3 that were to be used for that purpose. The same form of conditions was attached to the licence as for Horam. Importantly from our point of view the licence was specifically renewed by Mr Huckstepp in 2010 and that was confirmed in a letter of 18 May 2010.

58 Mr Huckstepp inspected site on 20 August 2014, and completed that standard inspection form. We did not hear evidence from him, but we note that apart from a couple of irrelevant minor matters, the site was given a clean bill of health. In particular the box indicating that there had been compliance with the licence conditions was ticked. We comment that we do not know the extent of investigations carried out during such an inspection.

[5] We do not know to which plan that refers.

59 The licence was renewed thereafter on the same basis as previously, the final renewal apparently being to 30 April 2015. The licensee was changed to the Appellant from SSL with effect from 28 May 2012, the contact being noted as being Leslie Salvidge.

60 As for Horam a transitional notification letter was issued in mid/late April 2015. In the letter the PEA reproduced the information on the licence, that being that 6,615 litres of petrol were being stored in each of tanks 1 and 2. Because he had not received the printed form from the PEA Mr Adam Salvidge had previously completed his own version of the form showing petrol as being in tanks 2 and 3, such tanks holding 6,596 and 9,215 litres respectively.

61 Mr Gausden visited the site on 30 April 2015 and met Mr Doughty, the attendant on duty. The contemporaneous note by Mr Gausden records that Mr Doughty showed him the dip record book, which showed tanks 1 and 3 as being used for the storage of petrol, although a plan on the wall showed that petrol was stored in tanks 1 and 2. Mr Gausden concluded that there had probably been a change in the storage arrangements when the site was redeveloped in 2009 and that that change had not been identified during subsequent site visits.

62 Mr Gausden did not raise the issue with Mr Salvidge. He did not look at the plans which had been supplied to Mr Huckstepp.

63 Mr Gausden sought authorisation to issue an improvement notice noting that it was not possible to issue a certificate under the transitional arrangements in respect of tank 3 as it was not licensed on 1 October 2014 when the 2014 Regulations came into force. He added that it was unlikely that a certificate would be issued as the tank was more than 50 years old. Under cross-examination Mr Gausden said that with the benefit of hindsight he should not have made that comment. He insisted that any application would be properly considered on its merits. We do not make any finding on that point.

64 The notice was issued on 1 May 2015.

> Failure under Part 2, Regulation 5(a) of The Petroleum (Consolidation) Regulations 2014
>
> *A person keeps petrol in compliance with this regulation if the petrol is kept on dispensing premises in respect of which there is:*
> *(a) a valid storage certificate.*
>
> **Failure.** The Keeping of petroleum spirit within underground storage tank numbered 3, for the purpose of dispensing has been facilitated without a valid storage certificate.
>
> **Remedy.** Make an application to the Petroleum Enforcing Authority for a petroleum storage certificate for the above premises for the storage of petroleum spirit in Tank 3.

On the same date a certificate was issued by the PEA authorising the storage of petrol in tanks 1 and 2 in accordance with the transitional notification letter. A covering letter explaining the position was sent to the Appellant.

65 On 2 May 2015 Mr Gausden sent emails to other bodies. It is the information in those emails that is relevant. Mr Gausden stated that

since issuing the notice he had 'reviewed all the evidence in the file in great detail'. He had then discovered the history as set out above.

66 In his letter of 22 May 2015 mentioned above, Mr Salvidge said that the certificate should have been in respect of tanks 2 and 3, and not tanks 1 and 2 as tank 1 was a diesel tank, and tank 3 had been converted to unleaded in 2009, and that the PEA had been informed of that fact. We have mentioned the further correspondence above.

67 Mr Daniels submitted that the Respondent's case was contingent upon tank 3 not being licensed under the 1928 Act, and that was contingent upon the accuracy of the plans relied upon by the Respondent. Mr Daniels pointed out that on two occasions in 2009 plans were sent to Mr Huckstepp showing the fuel to be stored in each of the tanks. Further, he had completed the inspection in August 2014. Mr Daniels submitted that it appeared that neither the Appellant nor Mr Huckstepp appeared to have noticed the discrepancy between the licence plan and the actuality.

68 Mr Daniels further submitted that what Mr Gausden should have done was to raise the matter with the Appellant, and also consult with the PEA's own records, and possibly also speak to Mr Huckstepp. If that had been done, then the fact that the PEA had been notified of the changes effected in 2009 would have come to light. The Respondent was therefore estopped from issuing an improvement notice in such circumstances, or it was against natural justice so to do.

69 Mr Roberts' position was that it was the plan attached to the licence which was paramount and that the plans provided on an informal basis in 2009 in connection with the redevelopment were not relevant. It was apparent to Mr Gausden that the storage arrangements on site were not in accordance with the licence plan. There had therefore been a breach of the terms of the licence and the transitional provisions did not apply.

70 Mr Roberts further submitted that the grounds of appeal were not relevant to the question as to whether the inspector properly held the opinion that it was proper to serve the notice.

71 Our conclusions are as follows. For reasons which are not known the plan attached to the licence in September 2009 did not accurately record which tanks were to be used for the storage of petrol. That is despite Mr Huckstepp, the relevant officer at the time, having been made aware of exactly what was proposed, and apparently not having raised any objection. The Appellant was in breach of the terms of the licence as petrol was stored in tank 3 which was not referred to in the licence. There was no written approval from the PEA of the change. Thus the transitional provisions did not apply so as to validate the continued storage in tank 3.

72 We go back to the brief citation from *MWH UK Ltd* set out above. By his own admission Mr Gausden did not raise the apparent breach with the Appellant, nor did he adequately research the PEA's own records before issuing the notice. He did so shortly afterwards, and what he discovered was set out in the emails of 2 May 2015. We have to assess what we

would have done at the time, but taking into account the inspector's expertise. We consider that we are also entitled to take into account the position of Mr Gausden as accepted by him in cross-examination.

73 In the circumstances which prevailed at the time, we are quite clear that we would not have served the improvement notice. We would first of all have checked the files relating to the site, and then raised the matter with the Appellant, possibly in an informal notice. Mr Gausden did of course check the files, but by then it was too late. The notice had been served. The existence of the earlier plans must surely have led to questions being raised as to whether there had been an administrative error in preparing the plans (as at Horam) so that the licence did not accurately represent what was intended in 2009 when Mr Huckstepp was involved. To some extent that is of course speculation because Mr Gausden did not take those steps.

74 For those reasons we decide that the improvement notice relating to the Selmeston site is to be cancelled.

Employment Judge Baron
10 January 2017