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FEES FOR INTERVENTION
HOW THE HSE WAS FORCED TO CHANGE

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BACKGROUND

- FFI was implemented on 1 October 2012 in terms of regulation 23 of the Health and Safety (Fees) Regulations 2012.
- It introduced a system for charging businesses for the cost of investigations carried out by the HSE when it found material breaches of Health and safety law by those businesses during inspections.
- It allowed an inspector to reach an opinion that there was a breach and to serve written notice.

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- The notification of contravention issued in writing by the Inspector was the trigger for a Fee for Intervention to be raised.
- The decision on whether there was a material breach was solely one for the inspector in his opinion.

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- The inspector recorded the time spent in addressing the breach and dealing with it and the business was charged an hourly rate for the work carried out.
- Once an invoice was issued a business had 30 days to dispute it.
- If the invoice was disputed, it could be queried with the HSE within 21 days. The HSE decided whether to uphold or reject the query.

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- If it rejected the query the next step was for the business to raise a dispute.
- The dispute required to be intimated to the HSE in writing setting out the basis for the dispute.
- The dispute was considered by a panel of HSE staff and an independent representative. After consideration, the HSE wrote back with its decision on the dispute. So much for independence.

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- If the panel did not uphold the dispute, the business was further charged for the cost of dealing with the dispute.
- Inspectors carrying out visits generally found a material breach.
- The construction and manufacturing sectors received a particularly high number of notifications of contraventions.

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- In June 2014 An independent panel that carried out a review of the FFI scheme found that between the scheme's inception in October 2012 and January 2014, 21,261 invoices were issued under the FFI scheme, raising over £10.6m for the HSE.
- 697, or 3.3%, were queried and three went to the dispute stage.

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- It was the generally held view that there was little point in challenging an invoice because the FFI review process was so arbitrary and most reviews came down on the side of the inspector.
- Given the additional cost of disputing an invoice, most business made a commercial decision to pay the FFI invoice.

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THE HSE AND THE FFI SCHEME

- The Law of Unintended Consequences
- When FFI was introduced, it was heralded by the HSE as "Shifting the cost of Health and Safety regulation from the public purse to businesses and organisations that break health and safety law."
- In 2012-13, in the first year of operation, the HSE had optimistically said it would recover £17m from businesses and organisations that break health and safety law.

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- It recovered £9.6m.

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- In the HSE annual report for 2015/2016 which covered the year to the end of March 2016, it was noted that income from FFI had increased sharply from £10.1m in 2014–15 to £14.7m in 2015-2016.

- But – the operating costs of the FFI scheme was £5.6 million more than it had the year before. It had increased from £11.9m to £17.5m

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- So, in 2015-2016, to get additional income of £4.6m, the HSE had to spend £5.6m.

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- The HSE could only retain a maximum of FFI income of £11m in any financial year so had to pay the rest of the money it did bring in to the treasury.
- It had to hand over £3.7million to the Treasury.
- In 2015-2016 to get an additional income of £900,000, the HSE spent £5.6m

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- Another way of putting “Shifting the cost of Health and Safety regulation from the public purse to businesses and organisations that break health and safety law” is “the making money for the HSE out of alleged breaches of health and safety law by businesses where the sole decision maker of whether there has been a material breach is the HSE Inspector”

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- As a money-making scheme, you might think they would have made more money for less cost sitting with a paper cup on Princes Street

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- BUT the HSE is not daft so came up with a way to increase its income from FFI.
- It increased the amount charged under FFI by 4%. Increasing the hourly fee from £124 to £129 which came into effect on 6 April 2016.
- A move that did not please those already the subject of proceedings felt to be unfair.

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- Notwithstanding that, this was the first price hike since the scheme was introduced in 2012.
- If the idea was to raise revenue, you would think that someone in the HSE would have worked out that an increase of £5 an hour was never going to fill its shortfall.
- In fact, to increase the FFI hourly rate to cover the operating costs, the HSE would have had to increase the hourly rate to £147 per hour, an 18% increase.

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- **THINGS CAN ONLY GET BETTER**

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Step forward OCS Group UK

- OCS Group UK is a facilities management company that provides services across a wide range of sectors.
- It received a notification of contravention from an inspector in August 2014 in respect of its use of strimmers at Heathrow airport, where the HSE alleged that it had breached Regulations 6(2) and 7(2) of the Control of Vibration at Work Regulations.

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- OCS Group UK was issued with two FFI invoices totalling £2306 because in the opinion of the Inspector there had been material breach of the Regulations.
- OCS Group UK denied that it was in material breach of the Regulations. It raised an official query with the HSE.
- That query was rejected by the HSE internal team.

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- OCS Group then raised a dispute, the next level of challenge.
- At this level, the challenge was dealt with by the HSE dispute panel. It consisted of HSE employees and an independent representative who was ordinarily someone from industry or a trades union.
- The Dispute was also rejected by the HSE panel.

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- OCS Group UK decided to seek a Judicial Review to challenge the HSE system and decision-making process.
- In its application it contended that the HSE acted as "prosecutor, judge and jury" during its own procedure for challenge.

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- OCS Group was seeking a fair procedure and an independent means of resolving disputes where witnesses could be called to give evidence and submissions made to an independent tribunal.
- The company questioned whether the process for establishing the legitimacy of an FFI notice complied with natural justice; the principle that a person cannot be a “judge in their own cause” and;
- the right of the defence to be fairly heard.

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- OCS Group UK said that the HSE had a "financial interest in imposing, maximising and upholding fees for intervention".
- Further, it contended that paying an FFI invoice amounted to admitting a criminal offence because the condition precedent to issuing and upholding the FFI was the opinion of an HSE Inspector that the dutyholder was in material breach of a statutory provision.

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- OCS Group UK said that the issuing of a notification of contravention and a FFI was recorded and retained by the HSE.
- If the notification and FFI were not challenged, there was an implied admission of guilt by the company.

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- If it was challenged, unsuccessfully, there was a recorded finding that the opinion of the HSE Inspector that an offence had been committed was correct.

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- In terms of the HSE's procedure for challenging a notification of contravention, at that time, the company had no opportunity to be heard or to have submissions made on its behalf.

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THE JUDICIAL REVIEW

- Permission was granted for the judicial review to proceed.
- In granting permission, Mr. Justice Kerr said: “It is arguable that the HSE is, unlawfully, judge in its own cause when operating the FFI scheme; and that the scheme is either unlawful or being operated in an unlawful manner”
- A huge hint to the HSE you might think

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THE CONSULTATION PROCESS

- The hearing was scheduled to take place on 8 and 9 March 2017.
- On 9 February 2017, the HSE issued a statement outlining its plans to hold a consultation on the make-up of the panel that adjudicates on disputed FFI invoices.

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- That was one of the issues at the heart of the application for judicial review brought by OCS Group UK.
- It had complained that the exiting scheme lacked independence, fairness and transparency.

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- The claim by OCS Group UK was settled by consent.
- The HSE agreed that is would introduce a revised process for determining disputes on or before 1 September 2017 which addressed the concerns raised by OCS Group.
- It also agreed to withdraw the two notices issued to the company and to pay the company's expenses.

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- **ANOTHER GOOD DAY AT THE OFFICE FOR THE HSE**

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WHAT HAPPENED NEXT?

- HSE consulted on a revised and fully independent process for considering disputes in relation to FFI.
- The Consultation ended on 2 June 2017.
- With uncharacteristic speed, the HSE got the new scheme out on time

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WHAT HAS CHANGED?

- The document called "Fee for intervention – query and dispute process" is available on the HSE website.
- It sets out the parts of the procedure that have changed.

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- In terms of the Health and Safety and Nuclear (Fees) Regulations 2016 ('the Fees Regulations'), those who break health and safety laws are liable for recovery of HSE's related costs, including inspection, investigation and taking enforcement action.
- No change there then.

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- In terms of Regulation 24(5) of the Fees Regulations, the HSE must provide a procedure by which disputes relating to FFI will be considered.
- The guidance now sets out the procedure for responding to queries and resolving disputes promptly, fairly and in a transparent way.
- Progress.

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- Queries must be raised within 21 days of the date of the invoice. The HSE guidance states that all enquiries will be treated as queries in the first instance. This means that while they are queries, they do not attract any fee.
- Queries still go to the HSE FFI Team but where the query relates to the opinion of the inspector who issued the notification of contravention, his decision is reviewed by a principal inspector.

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- This review process can include the principal inspector speaking to the dutyholder to get a better understanding of what the query is.
- The options of upholding, partially upholding or not upholding the query remain.
- If the dutyholder is not happy with the decision of the principal inspector, it can dispute all or part of the invoice.

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DISPUTES

- A dispute must be raised within 21 days of intimation of the principal inspector's decision to reject the query.
- The dispute should include:
- invoice number – included on the HSE invoice;
- customer reference– included on the HSE invoice;
- name of the organisation to which the invoice was sent;

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- name of the individual disputing the invoice;
- specific reason(s) for disputing the invoice
- confirmation of whether the dispute relates to the entire invoice or only part, specifying the appropriate entries.
- If part of the invoice is not in dispute, it must be paid either within 30 days of the invoice or 10 days after the outcome of the query has been intimated.

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DISPUTES PROCESS

- Disputes are now considered by a Disputes Panel which is independent of the HSE.
- It consists of a lawyer as the chair, and two members with practical experience of health and safety management.
- The HSE will choose the chair from the Attorney General's civil panel. The equivalent of standing junior counsel.

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- The details and experience of the Chair and panel members will be provided to the dutyholder before the Disputes Panel meets.
- It is to be hoped that the Chair chosen would have relevant health and safety experience before chairing a Disputes panel considering the reasonableness and proportionality of the decision of an inspector to issue a notification of contravention.

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- A lack of relevant knowledge and experience of the panel members would form cogent reasons for declining to accept the Dispute Panels decision on the Dispute.
- We shall have to see how the system works in practice when the HSE chooses the Chair.
- The HSE does not get to choose the Chairman of the Employment tribunal that decides disputes about improvement or prohibition notices.

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- In advance of the Disputes Panel meeting, the HSE must engage in a process of disclosure.
- Within 21 days of the dispute being raised, the HSE is required to provide all the relevant information that was available to the inspector and on which his decision to issue the notification of contravention was based.
- It requires to set out why a contravention was considered to be a material breach.

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- Depending on the nature of the dispute, it will require to include:
- what provisions it says have been contravened;
- why HSE has reached that opinion;
- evidence upon which that opinion has been based.

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- It is important to note that any additional information that becomes available during the process of compiling the papers for the Disputes Panel that was not available to or known to the inspector at the time he issued the notification of contravention cannot be included in the papers submitted to the panel by the HSE.

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- The Disputes Panel requires to consider only the information that was available to the inspector at the point at which he issued the notification of contravention.
- This is interesting.
- HM INSPECTOR OF HEALTH & SAFETY v CHEVRON NORTH SEA LTD**[2016] CSIH 29XA41/15. This case related to an appeal by the Inspector of the decision of a tribunal to cancel a prohibition notice.**

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- The Inner House held that an inspector can only form a view based on his perception of the facts and his assessment of risk. However, that does not affect the scope of an appeal against a notice on the facts. The court noted that the Tribunal requires to ascertain whether a risk existed at the time of the notice, but that it is not restricted to looking at information known at the time (of the service of the notice).

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- It noted that the tribunal can take into account evidence, bearing upon the facts in existence at the time of the notice, which only emerge at a later date.

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- It said it is undoubtedly correct that an inspector can only form a view based on his perception of the facts and his assessment of risk. However, that does not affect the scope of an appeal on the facts. It can take into account evidence, bearing upon the facts in existence at the time of the notice, which only emerge at a later date.

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- Continuing in the list of required information:
- why contraventions are considered to be material breaches relating to legislation for which HSE is required to recover its costs;
- an explanation of the decision in the context of the Enforcement Management Model (EMM);

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- what functions have been performed by the HSE as a result of the contravention that led to the issue of the notice of contravention;
- how the performance of those functions can be attributed to the dutyholder;

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- HSE's opinion as to how and why the costs have been reasonably incurred within the meaning of the Fees Regulations, i.e. the HSE is saying that the time taken to undertake the intervention was appropriate and accurately recorded;
- HSE's response to any issue raised by the dutyholder as a query or in requesting the dispute;

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- any information in HSE's possession which could reasonably be considered to indicate that the fees were not payable.
- This requires the HSE to recognise information that it should provide to the dutyholder.
- If there is information that it not in the documents provided, the HSE will provide a summary. Sensitive information may be redacted.

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- Again this requires the HSE to recognise that it must disclose relevant information to the dutyholder.
- The disclosure regime for the Crown has been set out in the Criminal Justice and Licensing (Scotland) Act 2010.

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- There is no such regime for the HSE and it remains to be seen how the HSE will discharge its obligations.

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- Within 21 days of receipt of the relevant information from the HSE,, the dutyholder may make any further representations to the HSE or provide further information to the HSE for onward transfer to the Dispute panel for it to consider.
- The HSE has a duty to send all relevant information to the Dispute Panel for its consideration.

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THE DISPUTES PANEL

- This meets at a time and at a place arranged by the HSE.
- That might be an issue for scrutiny.
- The Disputes Panel decision is normally based on the information provided to it in writing.
- It can request additional information from both the HSE and the dutyholder.

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- It can convene a meeting with the HSE and the dutyholder, with the agreement of both sides, to expedite a decision.
- This is not a hearing and there is no provision for witnesses to be called.
- Having regard to the issues intimated by OCS Group in its judicial review application, it falls short of what it sought.

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- The Disputes Panel can uphold, partly uphold or reject the dispute. The chair records the decision and the reasons for it in writing.
- The decision is intimated to parties

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- If the dutyholder has been unsuccessful, the HSE will expect payment of the original invoice.
- It will also issue an invoice to cover the costs reasonably incurred in handling the dispute although not any cost incurred by the HSE in preparing for the panel
- Decisions of the disputes panel do not bind dutyholders or HSE.

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WHAT IF THE BUSINESS DOES NOT ACCEPT THE DECISION?

- The HSE states in the guidance that it will normally accept the decision of the panel.
- The High Court in England has previously held that judicial review cannot be used to challenge enforcement costs.
- ***Grosvenor Chemical Ltd v HSE [2013] EWHC 999(Admin)***

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- This case related to HSE and environmental agency investigations into an explosion at GCL's premises.
- The Control of Major Accident Hazard Regulations operate in the same way as the FFI regulations.
- GCL challenged the level of fee imposed on it and the HSE dispute panel reduced the fee but GCL still had to pay £378K.

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- It sought a judicial review and the judge held that if the HSE were to bring civil proceedings to recover the outstanding amount, GCL had the possibility of making legal submissions on the level of the fee before the court which is an independent tribunal.
- The HSE's legal department said at the time that it considered that the decision applied to FFI invoices.

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- So, if a dispute is rejected and the business still considers that there was no material breach and the FFI should not have been issued, it can choose not to pay it.
- The HSE would have to raise an action for payment and the business would be able to make submissions to the court in respect of whether there had been a material breach at all and whether the level of fee was proportionate.

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- The downside to this approach is, of course, is the cost associated with it.
- Let's watch how things develop in the coming year.
- Now there is a structure that should be transparent and fair, businesses can decide if they are willing to accept the decisions of the Disputes Panel.

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