Compass Chambers

Notice Appeals

Steve Love, QC

24th November 2017

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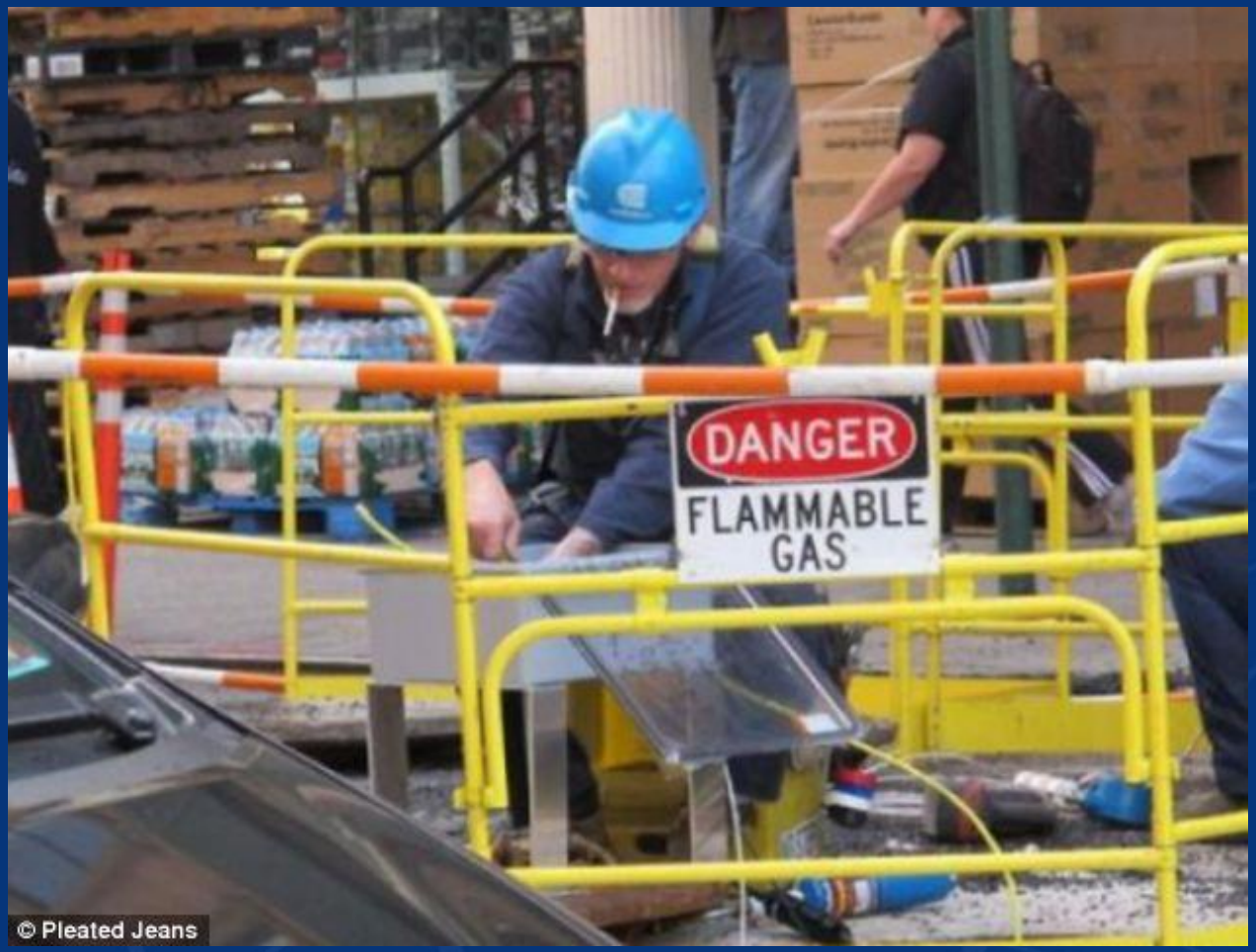

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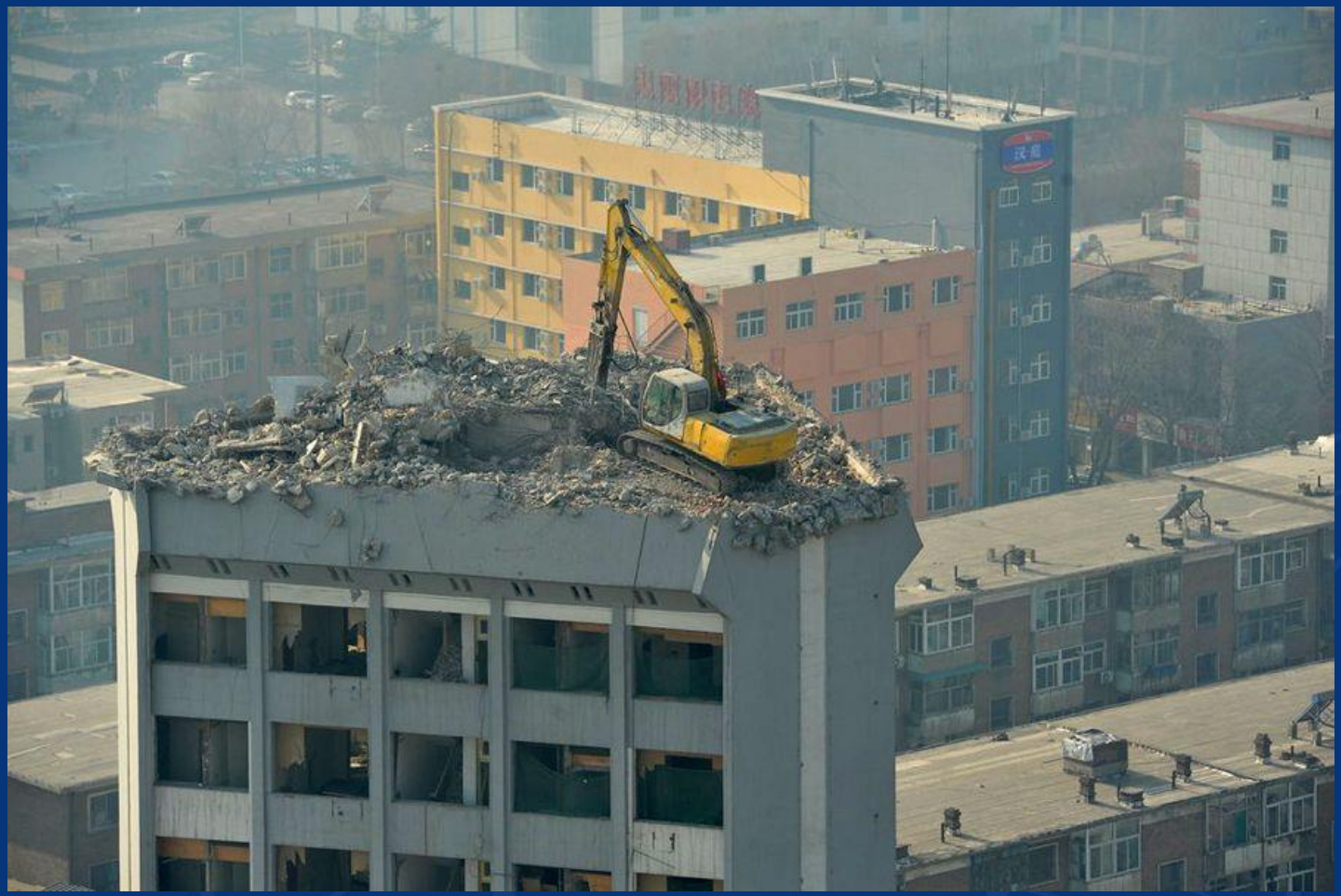

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Notice Appeals

- Improvement & Prohibition Notices may be appealed per section 24 of HSWA
- The nature of the test?
- *Railtrack Plc v Smallwood* [2001] ICR 714 per Sullivan J:

> "[the function of the Tribunal is] not limited to reviewing the genuineness and/or the reasonableness of the inspector's opinions. It was required to form it's own view, paying due regard to the inspector's expertise."

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Notice Appeals

- *Chilcott v Thermal Transfer Ltd* [2009] EWHC 2086 (Admin) per Charles J:

  "…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.'"

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Chilcott

"…the court's function is… to identify on the evidence before it, which is not restricted to matters that were in evidence before a particular date, what the situation was at that particular date. Did the relevant risk exist?"

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Notice Appeals

- *Hague v Rotary Yorkshire Ltd* [2015] EWCA Civ 696 per Laws LJ:

  "In my judgement, 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. …"

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Rotary

"He or she is concerned with the prevention of injury at that time…The Employment Tribunal on appeal are and are only concerned to see whether the facts which were known or ought to have been known justify the inspector's action…The primary question is whether the issue of the notice was justified when it was done…"

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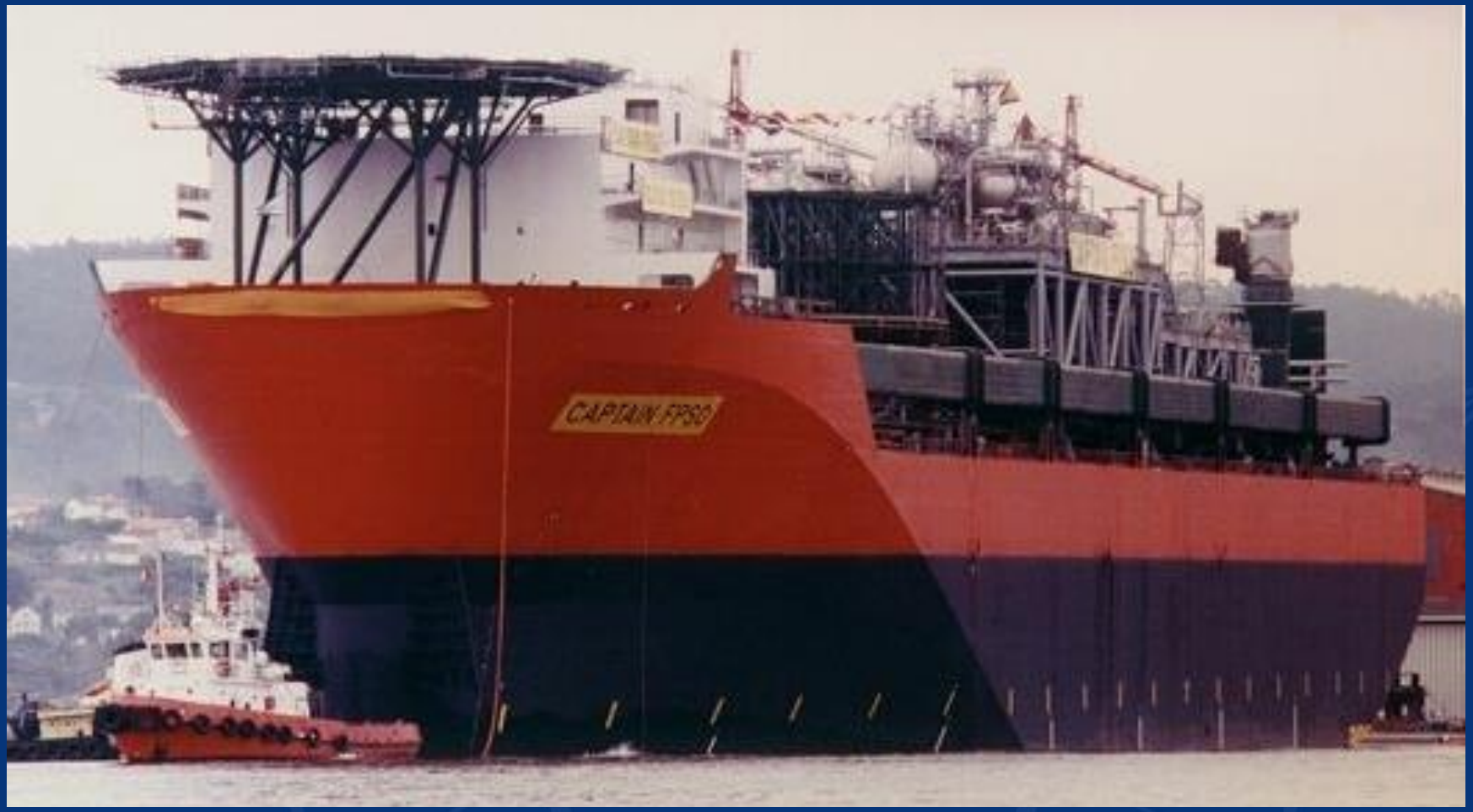
Captain FPSO



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Notice Appeals

- *Chevron North Sea Ltd v HM Inspector*
- Facts:
  - Planned inspection of Captain FPSO
  - Corroded gratings on port, starboard & forward access points to helideck
  - "Hammer test" conducted by HSE using fire axe
  - Remedial works agreed and implemented
  - Prohibition Notice served

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Chevron

- Appeal to ET heard in Aberdeen in 2014
- Judgment issued March 2015
- Report of testing of gratings (Exova Report dated 2014) taken into account
- Appeal allowed

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Chevron

- HSE appeal to Court of Session
- *HM Inspector v Chevron North Sea Ltd* 2016 SC 709

- Issue for appeal:
  - Scope of appeal per section 24
  - Whether *Rotary* correct

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HM Insp v Chevron

- *HM Inspector v Chevron North Sea Ltd* 2016 SC 709 per Lord President (Carloway):

  "In normal course, the appellant ought to be able to lead such evidence as he wishes to demonstrate that, at the material time…the metal was not in the averred condition. It is thus not immediately apparent why an appeal "against" a notice should be confined to an enquiry into the correctness or reasonableness of the inspector's decision"

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HM Insp v Chevron

"The fundamental problem with the approach of Laws LJ (in *Rotary*) is that it prohibits an appeal on the facts in a situation where it can be demonstrated that the facts or information upon which the inspector proceeded were wrong. That is the essence or purpose of many appeals on the facts."

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HM Insp v Chevron

- **Lord Menzies**
- "The construction of section 24, which I favour, does not, it seems to me, appear to call in question the propriety of a Notice which it may well have been the inspector's duty to issue at the time, because the focus of the Tribunal is not on the propriety of the Notice, but on whether (on the basis of all the evidence before it) the activities involved, or would involve, **a risk of serious personal injury at the time**. That question may well be answered in the negative, but nonetheless cast no doubt on the propriety of the inspector's decision. An inspector may quite properly and reasonably take a decision to issue a Notice under section 22, and yet a Tribunal may (equally properly and reasonably) cancel the Notice on a section 24 appeal. I do not consider that this weakens the enforcement provisions of the Act, nor does it undermine the authority or responsibility of an inspector who is considering issuing a Prohibition Notice under section 22. On the contrary, it merely recognises that an inspector's assessment and decision under section 22 often requires to be taken as a matter of urgency, when all the relevant knowledge and information may not be to hand. The alternative construction would have the result that the person on whom a Notice is served may have no redress and would not be able to appeal it successfully, with potentially serious consequences in terms of cost, possible criminal sanctions, and reputational damage. That is not an intention that I should readily attribute to Parliament when it enacted sections 22-24 of the 1974 Act…"

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HM Insp v Chevron

- **Lord Bracadale**
- "…While recognising the highly persuasive authority of this decision of the Court of Appeal I have come to the view that this court should not follow it. I would respectfully make three points. First, as your Lordship in the chair has pointed out, the Court of Appeal while approving the approach of Charles J in *Chilcott*, made no reference to what was said by him at paragraph 12 of his judgment, namely, that the court's function was to identify on the evidence before it, which was not restricted to matters that were in existence before a particular date, what the situation was at that particular date.
- …Secondly, I agree …that if it were subsequently to be discovered, through some form of subsequent investigation, that the factual basis for the imposition of the notice was actually incorrect and there was in fact no risk, there would plainly be an injustice if the admission of subsequent evidence were impermissible and were to prevent the notice being cancelled. That would enable an enforcement notice to remain in place against an employer even when the factual basis for its service had been shown not to have existed or to be erroneous.
- Thirdly, I would respectfully disagree with the conclusion that the approach which in this case was adopted by the Tribunal is liable to distort the section 22 function. It was argued on behalf of the appellant that there should be nothing to inhibit the inspector serving a prohibition notice. I do not see why the possibility of the factual situation being demonstrated by later evidence to have been different should inhibit an inspector in serving a notice. An inspector who decides to serve a notice must do so on the basis of his factual judgement at the time. It is not readily apparent why the possibility that later evidence may demonstrate that there was in fact no basis for serving the notice should create an additional burden on the inspector carrying out his function. As was pointed out by the Tribunal at paragraph 162 of the judgment, its decision did not weaken the ability of inspectors to prevent risk of serious personal injury. The decision had no effect on an inspector's power to remove what he perceived as a risk of serious personal injury, and to do so instantly.

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HM Insp v Chevron

- HSE appeal refused
- Appeal to Supreme Court (a first re a Notice)

- Issue for the SC:

  The scope of an appeal under section 24
- The outcome of this case will have a material effect on how future appeals are determined by employment tribunals
- HEARING DATE TO BE CONFIRMED BUT LATE 2017 - SIST PENDING APPEAL?

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- **QUESTIONS?**

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