Compass Chambers

Enforcement Notice Appeals post-*Chevron*

Peter Gray Q.C.
Barry Smith, Advocate
25 April 2018

Compass Chambers

1. **Background – legislation & authorities**
2. **Chevron – facts & appeal before Employment Tribunal**
3. **Court of Session Appeal**
4. **Supreme Court**
5. **Practical Implications**

Compass Chambers

1. Background – legislation & authorities

- 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:

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

Compass Chambers

Chilcott

- *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.'" *(sic)*

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?"

Rotary

- *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…"

Compass Chambers

Rotary

"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."

Compass Chambers

2. Chevron – facts & appeal before Employment Tribunal

Compass Chambers

Chevron

- *Chevron North Sea Ltd v Conner*
- 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
  - PN served

Compass Chambers

Chevron

- Chevron appealed the PN
- Obtained a report of testing of gratings (Exova Report)
- Appeal to ET heard in Aberdeen in Sept 2014
- Judgment issued March 2015
- Report of testing of gratings (Exova Report) taken into account
- Appeal allowed

Chevron

- ET expressed view that (information obtained post service of a Notice),
  - "…surely quite a commonly used example of circumstantial evidence from which inferences might be drawn quite properly as to an event or state of affairs at an earlier date".

3. Court of Session Appeal

- HSE appeal to Court of Session (First Division, Inner House)
- *HM Inspector v Chevron North Sea Ltd*, [2016] CSIH 29
- Issue for appeal:
  - Whether ET entitled to take into account Exova Report
  - Scope of appeal per section 24
  - Whether *Rotary* correct

HM Insp v Chevron

- *HM Inspector v Chevron North Sea Ltd*, [2016] CSIH 29 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"

HM Insp v Chevron

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

Compass Chambers

HM Insp v Chevron

HM Inspector v Chevron North Sea Ltd, [2016] CSIH 29 per Lord Menzies at para. [39]:

"The construction of sec 24, which I favour, does not , it seems to me, appear to call into question the propriety of a notice it may well have been the inspector's duty to issue at the time […]"

Compass Chambers

HM Insp v Chevron

"An inspector may quite properly and reasonably take a decision to issue a notice […] and yet a tribunal may (equally properly and reasonably) cancel the notice on a sec 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…"

Compass Chambers

4. Supreme Court

- HSE appeal refused
- Conflicting decisions of Court of Appeal & Court of Session
- Appeal to Supreme Court
- Issue for the SC:

  The scope of an appeal per section 24

  Classic SC case on statutory interpretation

Compass Chambers

HM Insp v Chevron

- Appellant effectively introduced new arguments:

  a) Robens Report of relevance in establishing Parliamentary intention

  b) Respondent's approach contrary to the purposes of the legislation

  c) Respondent's approach may inhibit Inspectors

HM Insp v Chevron

- SC Justices' Response (at outset):
  - Robens Report of no assistance
  - Preceding case law of little or no assistance
  - No authority or support for proposition that Respondent's approach undermined the purpose of the legislation

HM Insp v Chevron

- Supreme Court Hearing
- Lord Hodge: "we have to look at section 24 to determine the scope of the appeal. The section speaks of cancelling or affirming the Notice."
- Lord Sumption: "if the question is whether the employer was in breach, surely that is answered by the subsequent testing carried out..?"

HM Insp v Chevron

- Focus of SC questions of Appellant:

a) In what way, if any, would the effectiveness of a notice be impaired by an appeal process which enabled the reality of the position to be examined?
b) Whether it was accepted that *Rotary* interpretation of section 24 could lead to obvious injustice.

HM Insp v Chevron

- Supreme Court Judgment (*per* Lady Black at para. 17):

"The answer to the issue which has divided the Court of Appeal and the Inner House does not jump out from the wording of section 24, and the matter must be considered in light of the statutory scheme as a whole."

Compass Chambers

HM Insp v Chevron

- Supreme Court Judgment (*per* Lady Black at para. 14):

  "Section 24 is not limited to a review of the reasonableness of the inspector's opinion."

  "The tribunal should be focusing on the risk existing at the time when the notice was served."

Compass Chambers

HM Insp v Chevron

- Supreme Court Judgment (*per* Lady Black at para. 18):

  "The appeal is not against the inspector's opinion but against the notice itself… Everyone agrees that it involves the tribunal looking at the facts on which the notice was based […] I can see no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector."

HM Insp v Chevron

- Supreme Court Judgment (*per* Lady Black at para. 19):

  "There is no reason for him to be deterred from serving the notice…indeed, he might just as well feel less inhibited about serving it, confident that if it turns out there is in fact no material risk, the position can be corrected on appeal".

HM Insp v Chevron

- Supreme Court Judgment (*per* Lady Black at para. 20):

  "The effectiveness of a prohibition notice is in no way reduced by an appeal process which enables the realities of the situation to be examined by a tribunal with the benefit of additional information."

HM Insp v Chevron

- Supreme Court Judgment (*per* Lady Black at para. 23):

  "Turning to the situation of an employer in receipt of a prohibition notice, it is clear that there are potent considerations in favour of the wider interpretation of section 24".

5. Practical Implications

- A very different approach required to advising on merits of appeal.
- A need to consider whether there may be material already in existence which may provide basis for appeal.
- A need to consider any new line of inquiry which may assist.
- Marking an appeal to preserve position.

Questions?

Contact

Compass Chambers
Parliament House
Edinburgh
EH1 1RF
DX 549302, Edinburgh 36
LP 3, Edinburgh 10
www.compasschambers.com

Peter Gray Q.C.
E: peter.gray@compasschambers.com

Barry Smith, Advocate
E: barry.smith@compasschambers.com

Gavin Herd
Practice Manager
Phone: 0131 260 5648
Fax: 0131 225 3642
gavin.herd@compasschambers.com