Reserved judgment

Between:

Appellant: **TNT UK Limited**

Respondent: **Zahir Agha (One of Her Majesty's Inspectors of Health and Safety)**

Heard at London South Employment Tribunal on 1, 2, 5 & 6 June 2017

Before Employment Judge Baron

Lay Members: **Ms C Edwards & Mr A Kapur**

Representation:

Appellant: ***Cyril Adjei***

Respondent: ***Ian Wright***

JUDGMENT

It is the unanimous judgment of the Tribunal as follows:

1 By consent, Improvement Notice number ZA/1/06042016 be cancelled; and

2 Improvement Notice ZA/2/06042016 be cancelled.

REASONS

Introduction

1 I apologise for the delay in issuing this judgment which has been caused by a shortage of judicial resources.

2 This case concerns appeals under section 24 of the Health & Safety at Work etc Act 1974 against two Improvement Notices dated 15 April 2016 issued by the Respondent under section 21 of the Act numbered ZA/1/06042016 and ZA/2/06042016. The parties consented to the Tribunal giving judgment that the first notice be cancelled. This hearing therefore concerned only the second notice, although a considerable amount of the evidence in the witness statements of the witnesses concerned the first notice also. We will refer to the first Notice as the 'Pedestrian Traffic Notice'.

3 Both Mr Adjei and Mr Wright provided opening notes and written submissions, and spoke to those submissions. We are grateful for the clarity of the submissions, and refer to them further below.

4 We heard evidence from Mr Agha, and also from Sarah Pearce.[1] At the time of the inspection of the Appellant's depot Ms Pearce had recently joined the Health & Safety Executive, and was effectively being trained by Mr Agha. Evidence for the Appellant was given by the following:[2]

Gareth Burge – Operations Manager
Tim Burge – Head of Real Estate
Michael Counsell – Traffic Clerk
Neil Griffiths – Director of Health and Safety and Environment
Sean McMullen – Depot Manager

We also heard evidence on behalf of the Appellant from Dr John Ford as an expert, and we refer to him below.

5 The Tribunal was provided with a bundle of something over 200 pages. During the hearing Mr Agha produced an Enforcement Assessment Record form EMM1 dated 15 April 2016. That had not previously been disclosed to the Appellant.

The legislative background

6 The following are the provisions of the 1974 Act to which our attention was drawn:

2 General duties of employers to their employees
(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

3 General duties of employers and self-employed to persons other than their employees
(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

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.

23 Provisions supplementary to ss 21 and 22
(1) In this section "a notice" means an improvement notice or a prohibition notice.

[1] We will refer to Mr Agha as 'the Inspector'.
[2] Set out in alphabetical order

(2) A notice may (but need not) include directions as to the measures to be taken to remedy any contravention or matter to which the notice relates; and any such directions--

(a) may be framed to any extent by reference to any approved code of practice; and

(b) may be framed so as to afford the person on whom the notice is served a choice between different ways of remedying the contravention or matter.

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) . . . .

(4) One or more assessors may be appointed for the purposes of any proceedings brought before an employment tribunal under this section.[3]

82 General provisions as to interpretation and regulations

(1) In this Act--

(c) "modifications" includes additions, omissions and amendments, and related expressions shall be construed accordingly;

7 Counsel also referred to regulation 12 of The Workplace (Health, Safety and Welfare) Regulations 1992. That regulation is set out below and refers to 'traffic route'. Submissions were made as to the meaning of that phrase, which is defined by regulation 2. That regulation was not before us, but we have noted that it was reproduced in the notes in *Redgrave's Health and Safety* to regulation 12 which notes were before us. We set out the relevant note as it also provides some guidance as to the meaning of the phrase.

12 Condition of floors and traffic routes

(1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.

(2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that--

(a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; and

(b) every such floor shall have effective means of drainage where necessary.

(3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.

(4) In considering whether for the purposes of paragraph (2)(a) a hole or slope exposes any person to a risk to his health or safety--

[3] No assessors were appointed.

(a) no account shall be taken of a hole where adequate measures have been taken to prevent a person falling; and
(b) account shall be taken of any handrail provided in connection with any slope.

(5) Suitable and sufficient handrails and, if appropriate, guards shall be provided on all traffic routes which are staircases except in circumstances in which a handrail can not be provided without obstructing the traffic route.

Traffic route
Defined in reg 2 as 'a route for pedestrian traffic, vehicles or both and includes any stairs, staircase, fixed ladder, doorway, gateway, loading bay or ramp'. A route which it is custom and practice to use without objection, even if to do so is fraught with obvious risks, can be a traffic route covered by the Regulations: *McCully v Farrans Ltd [2003] NIQB 6* (decided under the identically worded provisions of the Workplace (Health, Safety and Welfare) Regulations (Northern Ireland) 1993). A route which is known to be used as a short-cut between purpose-built routes can itself be a traffic route: *Farmer v FTV Proclad (UK) Ltd [2013] CSOH 165*, *2013 Scot (D) 16/10*. See too *Button v Caerphilly CBC [2010] EWCA Civ 1311*, in which Pill LJ, at [20], took a `broad approach' to the meaning of traffic route. In *Proctor and Young [2009] NIQB 56* (decided under the same Northern Irish Regulations) Gillen J said that the reference to the pedestrian and vehicular traffic shows that Parliament did not intend to include routes for animals, therefore so much of a sandy beach as was used for exercising horses was not a 'traffic route' to which reg 12 applied.

Authorities

8 We were referred to the following authorities:

Chrysler (UK) Ltd v. McCarthy [1978] ICR 939 QBD
Readmans Ltd v. Leeds City Council [1992] COD 419
BT Fleet Ltd v. McKenna [2005] EWHC 387 (Admin)
Chilcott v. Thermal Transfer Ltd [2009] EWHC 2086 (Admin)
MWH UK Ltd v. Wise [2014] EWHC 427 (Admin)
Freedom Group of Companies Ltd v. Wilson 24.10.14 Newcastle ET
Hague v. Rotary Yorkshire Ltd [2015] EWCA Civ 696
Dean and Chapter of Rochester Cathedral v. Debell [2016] EWCA Civ 1094

The issues

9 I held a preliminary hearing on 20 October 2016. Mr Adjei produced a note for that hearing, with which Mr Wright agreed. The relevant part is below.

BACKGROUND FACTS AND LAW

This is an appeal against two Improvement Notices both dated 15th April 2016, which were served by the Respondent Inspector on the Appellant on 19th April 2016.

The Appellant is a transport company which collects and delivers parcels on behalf of third party customers on a national and international basis. The Appellant operates its business in the United Kingdom from over 50 sites including a site in Croydon ("the Depot").

On 6th April 2016 the Respondent Inspector, together with another Inspector, made an unannounced visit to the Depot.

Following this visit on 15th April 2016 the Respondent Inspector issued an Improvement Notice in relation to the state of the surface of the yard at the Depot

(serial number: ZA/2/06042016). This will be hereafter referred to as ("the Surface Notice").

. . . .

Both Notices were served pursuant to s.21 of the Health and Safety at Work etc. Act 1974 ("HSWA"). The Appellant appeals against both Notices pursuant to s.24 of HSWA.

An appeal against an Improvement Notice lies to an Employment Tribunal, pursuant to s.24 (2) HSWA.

. . . .

The powers of the Tribunal on hearing an appeal are to cancel or affirm the Notice and if it affirms the Notice, the Tribunal may modify it (s.24 (2) HSWA).

On an appeal the Tribunal must decide whether it would have served the Notice at the time it was served on the basis of the information which was available to the Inspector or ought reasonably to have been made available following such investigation as ought reasonably to have been undertaken.

1. **MATERIAL ISSUES:**

1.1 Whether at the time the Notices were served the Appellant had contravened one or more of the relevant statutory provisions set out in each of the Notices, or contravened one or more of the provisions in circumstances which made it likely that the contravention would be continued or repeated;

1.2 Whether by the time that the Notices were served the Respondent had carried out a reasonable investigation in all the circumstances;

1.3 Whether a correct and full assessment of any material risk and the level of the risk was made having considered all the information available;

1.4 Whether the justifications and reasons for the Respondent's opinion(s) were precise and accurate;

1.5 Whether service of the respective Notice(s) was necessary and proportionate;

1.6 In considering the above, the Appellant considers that the following are relevant: -

The Yard Notice:[4]

(a) the Respondent was aware or ought to have been aware that the Appellant had commissioned work to take place imminently in order to remedy the condition of the yard.

(b) . . . .

The facts

10 The Appellant is a well-known international collection and delivery company. It has a depot in Jessop's Way, Beddington Lane, Croydon. That depot consists of an office / administrative block, a warehouse, car parking areas, and a yard for the use of the Appellant's vans and heavy

[4] This clearly ought to have read 'The Surface Notice'

lorries. There are 100 or so vehicles based at the depot, which is open all day and night.

11 We had various plans of the site in the bundle, and it is not straightforward to explain in words, but we will do our best. All the plans are in landscape format, without a north point being marked. The site is broadly rectangular in shape. The entrance to the site is in the middle of the right hand side. The 'bottom' two-thirds of the site (approximately) is occupied by the offices and warehouse. The office building is narrow and adjoins the right hand side of the warehouse building along the whole of its depth. Around the sides and rear of the building is a relatively narrow strip of land. The top one-third of the site is for the circulation and parking of cars and the Appellant's vans and lorries. The car parking area is towards the top right corner, with the left side being reserved for commercial vehicles.

12 There had been problems with drainage at the site for some years. The result was that ponds several inches deep were created around the building when it rained heavily as the water was not able to drain away through the drainage channels. The building became surrounded by water on occasions. One plan in the bundle shows drainage channels running all the way around the building, which explains why it was that the ponding or flooding occurred around the building. We accept the very clear evidence of Mr Tim Burge that the problems were caused by a combination of tree roots in the drains in Jessop's Way, then the silting up of the drain in Beddington Lane, and the blockage of an outfall further along the drainage route. We further accept his evidence that the Appellant had had considerable difficulty in their discussions with Thames Water to get Thames Water to undertake the necessary remedial works. The second and third elements had been dealt with by the end of February 2016, and the tree root issue was resolved finally on 14 April 2016.

13 Iain Thorpe, the then Regional Manager of the Respondent responsible for health and safety, visited the depot from 18-21 May 2015 as a routine visit for a health and safety and environmental risk assessment. He completed a schedule of property maintenance form on which he recorded (for current purposes) three areas where repairs were required. They were as follows:

> Repair concrete on pedestrian walkway, leading from reception to management parking bays, to prevent a trip hazard.
>
> Repair concrete running along side of pedestrian walkway, leading from reception to the guard hut. To prevent a trip hazard.
>
> Repair drainage gulley surround (loose and broken up) leading from rear entrance to smoking hut. To prevent trip hazard.

14 There was a photograph of each area included in the schedule. The report form provides for three levels of priority for works to be undertaken, these levels being immediate, within two months, or within six months. Mr Thorpe specified that these works were to be done within

six months. That report was referred to the Appellant's Real Estate and Property Services department ('REPS') on 3 June 2015. REPS is based at the Appellant's head office in Warwickshire. It was the responsibility of REPS to commission the works. Mr Counsell created an entry (or entries) onto the Appellant's Facilities Management System ('FMS') on 21 May 2015.[5] The FMS record states that it was created as a result of Mr Thorpe's audit and refers to that date.

15 We were referred to a history of the Appellant obtaining quotations for those works and also works to the interior of the warehouse. We do not intend to set them out in detail. The first entry on the FMS system was on 21 May 2015, as already mentioned. Thereafter there are regular entries concerning the various steps which had been taken in obtaining quotations, the issuing of purchase orders and so on, leading to 'Changed Sub-Status from Acknowledged to Completed' on 11 May 2016. Our conclusion is that the Appellant had certainly not ignored the fact that works needed to be undertaken, but more diligence could have been applied. There was also a misunderstanding between the Appellant and a contractor as to the extent of the works to be carried out resulting in the contractor recording on a job sheet on 10 March 2016 that the internal works had been completed, but that the external works had been cancelled. Because of the relatively minor nature of the works the contractor, which is based in Manchester, had not visited the site and had relied when quoting upon a rough plan and some photographs supplied by the Appellant in October 2015.[6] In broad terms there were 33 m^2 of concrete to be replaced and the contractor had quoted for 18 m^2. Further photographs were then supplied in March 2016.[7]

16 There were exchanges of emails between Gaynor Watson in REPS and the contractor and on 21 March 2016 a revised quotation was provided. A Purchase Order in respect of the revised quotation was issued by the Appellant on 7 April 2016. It was agreed that the works would start on 19 April 2016, but on the preceding day the contractor sent an email to Ms Watson at 12:19 hrs to say that the works were to be delayed to 25 April 2016 because of difficulties in finding accommodation for the operatives. The works did commence on 25 April and were completed by 9 May 2016.

17 We now turn to the visit of the Inspector. As mentioned already, he was accompanied by Ms Pearce. She was shadowing the Inspector at the time having only joined the HSE two months or so previously, having come from an aviation background. The visit was on 6 April 2016 and was occasioned by an accident which had happened on site some time beforehand. That accident is only relevant in these proceedings as it was

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[5] Three separate numbers were given for each element of the works, but they were consolidated under number I-28037

[6] **[118.6-118.11]** are the material ones.

[7] **[145-152]**

the cause of the Inspector's visit. According to the notes made by the Inspector and Ms Pearce the visit lasted from 10.40 to 12.45 am.

18 The Inspector and Ms Pearce parked their vehicle after checking in at the security hut. They were met in the car parking area by Mr Counsell, and the three of them then went to the reception area. The Inspector and Ms Pearce were met briefly by Mr McMullen. He was not able to spend any time with them as he was about to hold an interview for a prospective new senior member of staff. He introduced the Inspector and Ms Pearce to Mr Gareth Burge. There was then a meeting round a table when the paperwork concerning the accident was considered.

19 The Inspector then asked for a general tour of the depot, and Mr Burge agreed to show it to them. We do not accept the Inspector's evidence that he and Ms Pearce were escorted by both Mr Counsell and Mr Burge for a tour of the yard (as he put it). They did meet Mr Counsell again briefly during the tour, but that was it. Mr Counsell was using a fork lift truck at the time, and Mr Burge asked him a question. There was no further conversation between Mr Counsell and the Inspector.

20 The evidence of the Inspector was not entirely clear as to the part(s) of the site visited. Further, he could not recall whether after the tour he and Ms Pearce went back to the offices, although Ms Pearce was clear that they did. The important point is that we find that during the tour of the open area of the site the Inspector and Ms Pearce only visited what may be described as the top left one-third of it, being the area reserved for commercial vehicles. The Inspector told us that he made the visit as short as possible so as to reduce the fee payable by the Appellant to cover the cost of the visit.

21 In his witness statement the Inspector referred to potholes being in the 'walkway nearest to the car park' which was 'adjacent to the road area where heavy vehicles pass'. The car park area consists of three rows of bays. One row is against the boundary. The other two rows are 'nose-to-tail'. There is a marked walkway immediately around the block of two rows. The 'bottom' row adjoins the main entrance to the site. The potholes in question must therefore have been in the bottom walkway. That accords with the evidence of Mr Burge who said that there was a conversation concerning 'divots near the entrance to the site.'[8] It probably also accords with the first or second item identified by Mr Thorpe. The Inspector did not visit the third area identified by Mr Thorpe.

22 The Inspector did not make a plan nor take any measurements of the width or depth of any areas about which he says he was concerned. At some stage during these proceedings, as we understand it, the Inspector provided the Appellant's solicitors with a site plan.[9] There were four manuscript entries on it relating to the Notice not the subject of these

[8] The Inspector denied using the word 'divots' but we do not consider that to be material.
[9] **[23.2]**

proceedings. Towards the top right hand corner of the plan the Inspector had circled an area on a walkway between two rows of car parking bays and marked it 'pothole' and also 'photo'. No mention of this was made in the Inspector's witness statement. During cross-examination the Inspector confirmed that he had not walked in that area, and also that it was not of concern to him. It is not close to the entrance to the site. Further he did not take a photograph of that area. He said that the plan was prepared some months later from a general recollection. It was, he said, not necessary to mark other areas. The one area he had marked was said to be as an example. The Inspector also said that he had spoken generally to Mr Burge about the state of the yard at the time of his visit, but that he did not make any detailed notes. That again accords with the statement of Mr Burge who said that the Inspector had referred to 'divots' but that '[h]e did not refer to anything in particular and only mentioned them generally.'

23 In the bundle were three photographs indexed as 'Respondent's Photographs x 3 of External Yard'.[10] There was no mention of them in the Inspector's witness statement, nor that of Ms Pearce. In additional evidence-in-chief he said that they were taken on 6 April 2016. No date is printed on them but we accept that they were taken on that date. The first photograph is apparently of part of the surface, and there are some blotches on it. The Inspector stated that it was in the 'car park area'. We do not know exactly where the photograph was taken, and it is wholly impossible to tell whether the blotches created a hazard. The other two photographs show a clearly delineated walkway and to the left of the walkway a strip of concrete with some defects in it. That strip runs parallel to the walkway and some distance from it. Again there is no scale, nor did the Inspector take any measurements. Neither the area nor the depth of the areas in question can be ascertained from the photographs. The Inspector said that he had not needed to take any measurements as he made a judgment on the day. The Inspector accepted that the photographs were not of the walkway, but asserted that people walked in the areas in question. This walkway is not the one mentioned above but is one towards the top left corner of the site near the Pallet Store.[11]

24 It is indeed odd, as pointed out by Mr Adjei, that the Inspector took these three photographs when he was not at the site to investigate surface defects, and then in the Notice he referred to defects near the entrance, but did not see fit to take any photographs of the areas which he now says were of principal concern to him.

25 Although the first Improvement Notice is not in issue before us it is pertinent to record that the alleged breach was:

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[10] **[169-171]**

[11] We accept the evidence of Mr Burge on this point who told us where the Inspector took the photographs.

> Your yard area outside the depot is not organised in a way in which pedestrians and vehicles and pedestrians (*sic*) can circulate in a safe manner.

26 The reason that that is material is that the Inspector was obviously paying attention to those matters when touring the site. Indeed, much of the Inspector's witness statement refers to there being an absence of walkways, lines demarcating walkways having faded, and walkways being obstructed.

27 In his witness statement the Inspector says that in the walkway nearest to the car park there were potholes. He continues by saying as follows:

> I informed Mr Burge that this [. . .] constituted a material breach of health and safety legislation and that I would be considering issuing an Improvement Notice. He stated that remedial works had been planned for months but never carried out, and Mr Counsell confirmed this. During our conversation both Mr Burge and Mr Counsell indicated that Improvement Notices would be welcomed by them as it would effectively force the company into action, and that the delays were long running. I do not remember exactly what they said.

28 Ms Pearce corroborated that evidence to a large extent. Mr Burge gave different evidence. He denied making the statement alleged because he knew, he said, that the works were planned, and that he told Ms Pearce he would inform her when they were due to start. Mr Burge said that he told the Inspector that the works had been planned for some time but that they had not been carried out because of the drainage issue causing flooding.

29 We have found that Mr Counsell was not involved in any second conversation with the Inspector. Each of the Inspector and Ms Pearce made notes of their visit at some stage. We do not know exactly when. Neither of the notes refer to this alleged conversation. The Inspector's reason given in cross-examination for not noting it was that it was not important, and he knew that it would be denied anyway.

30 We find that extraordinary. The Inspector accepted that there had been occasions in his experience when he had been told that a Notice under the 1974 Act would be welcomed, although it was a rare occurrence. The alleged comment is now considered to have been important, and the Inspector seeks to rely on what Mr Burge is alleged to have said. It appears to us that if he expected that Mr Burge would deny it then it would be even more important to note it, and to ensure that Ms Pearce, as his trainee, also noted it.

31 We prefer the evidence of Mr Burge. We find that there was a conversation about works being planned, about delays due to the drainage issues and flooding. We also find that Mr Burge told the Inspector that the commencement of the works was imminent and he promised that the Inspector (or Ms Pearce) would be informed when a date for that commencement was known. We do not accept that he (nor indeed Mr Counsell) said that the service of Improvement Notices would be welcomed.

32 The Inspector made notes of the visit. The only relevant entry is:

> Potholes in yard – IN

No further details were included. Dr Ford gave evidence as to standards for entries in notebooks and we mention that below. It suffices to say at this stage that the entry does not accord with the recommended standard. The note by Ms Pearce is similarly brief:

> Pot holes in forecourt.

33 Mr Burge reported the Inspector's visit to Mr Griffiths by email on 6 April. What had occurred was therefore fresh in his mind. Mr Burge said that there were four areas of concern 'to which they will serve notice to get corrected over a certain time frame (unknown at this time)'. The point relevant for these proceedings is the first one as follows:

- Pot holes in yard - These works have been awaiting completion since last year after first being noticed by Iain Thorpe, Jonathan Allwood and Gaynor have been working towards a start/completion date for this project, however I understand we are still only at the 'quote stage' as this was raised through H&S dept, the job however was not raised on FMS system until today.[12] Our concern now is that we need to confirm an end date of completion with the inspectors so they can tie our dates into their own report timeline. Once we can advise HSE inspectors of proposed date, they will work with that date providing the work must be completed.

34 There is something of a mystery about the reference to the FMS system and that day. We have already recorded that by 6 April 2016 significant steps had been taken to have certain works to the yard completed. Mr Burge told us that he thought he had been told about an FMS entry of 6 April 2016 by someone. We do not consider that to be significant.

35 Mr Griffiths replied to Mr Burges thanking him and saying that it appeared that the HSE classified the issues as a 'material breach' of various Regulations. He added:

> The potholes in the yard I agree with and am sure REPS will now action as a matter of priority

36 On 6 April also Mr Griffiths sent an email to Ms Pearce (as Mr Burge had mentioned her name first in his email) asking that any correspondence be sent to him as Director of Health and Safety and Environmental. There was no reply to that email.

37 Mr Tim Burge sent an email to Mr Griffiths, Mr Gareth Burge and others on 7 April 2016 saying that the contractors were to be on site on 12 April 2016. He apologised for the delay which he said had been caused by re-scoping the works following a further deterioration of the yard. At some stage the commencement date for the works was delayed for a week to 19 April 2016.

38 The Inspector telephoned Mr Griffiths on 18 April 2016. The time is important – it was about 11:45 am. Mr Griffiths then sent an email to the Inspector at 13:54 hrs. We accept that email as containing an accurate record of what was said during the conversation. In any event, the

[12] Wrongly referred to as 'IMS' – it was agreed that that was a simple error.

information was set out in writing to the Inspector in the email. Mr Griffiths said that there had been flooding and drainage problems throughout 2015 causing deterioration of the yard. Mr Griffiths then gave some details of the problems and said that 95% of the works had been completed and the remaining work to remove tree roots would be completed that week. Mr Griffiths then said that the yard repairs could be completed, and most importantly that the works were to start on the following day. Thereafter, he said, the re-marking of pedestrian walkways, the subject of the Pedestrian Traffic Notice, could be carried out. Mr Griffiths concluded by saying that the delay to the completion of the works was due to the drainage problems which were outside of the Appellant's control. We do not accept the evidence of the Inspector in his witness statement that Mr Griffiths had only told him that 'works were planned for the potholes'.

39 The Inspector made a note of the conversation also. It refers to issues other than the subject of the Notice. Part of the note states that Mr Griffiths 'had no idea of the conditions at Weir Road and was presuming that is was as per the generic risk assessment. He did not accept that there were problems at Weir Road.' The references to 'Weir Road' are clearly an error by the Inspector. In cross-examination he said that he had mixed up his notes with those from another inspection. As Mr Griffiths said in his witness statement, he had been made fully aware of the issues at the site, and we do not accept that the note that he 'had no idea of the subject of the Notice' is correct.

40 On 19 April 2016 the Inspector visited the site again in connection with the Pedestrian Traffic Notice, and again did not take any measurements or photographs relevant to the Notice in issue at this hearing.

41 Mr Griffiths was informed by REPS of the further delay in the commencement of the works to 25 April 2016, and at 14:43 he sent another email to the Inspector to inform him. Unfortunately he referred to March and not April, and that was corrected five minutes later.

42 There was no further contact between Mr Griffiths and the Inspector that day. At some stage after 15:00 hrs the Inspector had the Improvement Notice sent in the post.

43 The Notice is dated 15 April 2016. That was a Friday. It was posted on the following Monday. It was accompanied by a Notification of Contravention Letter also dated 15 April 2016. The Notice stated that the Inspector was of the opinion that the Appellant was in breach of sections 2(1) and 3(1) of the 1974 Act, and regulation 12(2)(a) of the 1992 Regulations.[13] The reasons for the opinion were stated to be:

> In your yard area, most notably but not exclusively near the entrance, the ground has worn away leading to potholes and an uneven surface which could cause persons to slip, trip or fall.

[13] Wrongly referred to as 1999 Regulations

44 The Inspector directed that the measures set out in the schedule to the Notice be taken by 20 May 2016. Those measures were as follows:

> **Either:**
>
> 1. Identify all areas of the yard where remedial work is necessary to provide a smooth surface for vehicles to operate over without loss of stability; and for pedestrians to walk over without the risk of injuring themselves.
>
> **And:**
>
> 2. Select material that will provide a durable, even surface over time and which are sufficiently robust to avoid deterioration due to vehicle movements;
>
> **And**
>
> 3. Ensure that work on the yard surface is completed to a good standard and is subject of regular inspection and maintenance in the future;
>
> **OR**
>
> Any other equally effective measure to remedy the said contraventions.

45 In Appendix 1 to the Notification of Contravention letter the Inspector set out his reasons for his opinion as to there being a contravention of contraventions. The relevant passage is as follows:

> In the yard area outside the depot, most notably but not exclusively in the area near the entrance, the ground has worn away and there are potholes which could cause persons to trip or twist their ankles etc..
>
> The above legislation requires that the floor or surface of traffic route shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety.
>
> I have been informed that work to remedy this situation is being planned, but as it stands it is a material breach and therefore I have decided to take action.

46 This appeal was presented to the Tribunal on 9 May 2016 and served on 12 May 2016.

47 On 31 May 2016 the Inspector visited the site again to conduct an interview in connection with the accident which had been the cause of the original visit on 6 April 2016. The Inspector took seven photographs relevant to the Pedestrian Traffic Notice, but despite the fact that this appeal had been presented he did not take any photographs of the surface of the depot yard. We do of course accept that by then the works the subject of the Purchase Order of 7 April 2016 had been completed.

48 As mentioned above the Tribunal heard evidence from Dr John Ford, an expert instructed on behalf of the Appellant. Although I had given leave at the preliminary hearing for each of the parties to provide expert evidence, the Inspector did not call an expert. In the section of his report headed 'Comments and Opinions' Dr Ford made the following points:

48.1 That having been informed that works were pending, it was his experience that an Inspector would take the matter up with the site owner's property department to ascertain when repairs were to be undertaken;

48.2 There was no evidence as to the size of the 'pothole' marked by the Inspector on the plan mentioned above;[14]

48.3 Although the Notice referred to areas 'not exclusively near the entrance' there was no information as to those other areas;

48.4 The 'photo' mentioned on the plan had not been identified;

48.5 None of the twenty-six photographs which he had seen of surface defects included measurements or scales which would be standard practice, but subject to that point, the defects probably did not represent a slip, trip or fall hazard;

48.6 He had not seen an EMM1 form relating to the Notice;

48.7 After following the EMM and taking all factors into account it was his opinion that an advisory letter would have been a more appropriate line of enforcement;

48.8 The requirement to provide a 'smooth surface' would probably have created a hazard as being too slippery;

48.9 It is not possible to select materials which will not deteriorate over time;

48.10 The requirement of regular inspection and maintenance is an ongoing requirement;

48.11 It was inappropriate for an Inspector to rely on a site owner's own CCTV system for evidential purposes.

49 Dr Ford also referred to training which he had received as an HSE Inspector in connection with the writing up of notebooks. Some of the points made were that the notebook should be clear what any entry relates to, the entries must be clear and unambiguous, that all detail that is needed should be recorded, and that verbal and other communications, admissions and statements should be recorded.

50 The Health & Safety Executive has produced an Enforcement Management Model – 'EMM'. Paragraph 1 of the Summary is as follows:

> What is the EMM?
> 1 The Enforcement Management Model (EMM) is a logical system that helps inspectors to make enforcement decisions in line with the Health and Safety Executive's (HSE's) Enforcement Policy Statement (EPS). The EPS sets out the principles inspectors should apply when determining what enforcement action to take in response to breaches of health and safety legislation. Fundamental to this is the principle that enforcement action should be proportional to the health and safety risks and the seriousness of the breach.

51 It is made clear that the EMM is intended to be for guidance, and that it does not fetter the proper exercise of the Inspector's discretion. There is

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[14] **[23.2]** In this connection Dr Ford referred the Tribunal to Table B1 *Code of Practice for Highways Maintenance Management w*hich refers to a depth of 15 mm in respect of 'trip/pothole' as the Investigatory Level and also the requirement to consider the surface area and location of the defect.

a flow chart, which commences with identifying a risk of serious personal injury justifying a Prohibition Notice, which clearly does not apply here. Then what must be identified is the 'Risk Gap' which is the difference between the risk inherent in the activity being undertaken, and that arising from the way in which the activity is in fact being undertaken. The risk in each case is of personal injury being caused. The Risk Gap could be any of 'Extreme', 'Substantial', 'Moderate' or 'Nominal'. Having ascertained the level of the Risk gap the EMM the provides the Inspector with guidance as to the 'Initial Enforcement Expectation'. In the case of a Substantial or Moderate Risk Gap where there are defined standards the Initial Enforcement Expectation is of an Improvement Notice.

52 The next step is to apply the Dutyholder Factors, and then Strategic Factors. The Dutyholder Factors and the Strategic Factors and the application of each of them to this case are mentioned briefly below. The introductory paragraph to each section is as follows:

> ***Dutyholder factors***
> 98 Dutyholder factors are, on the whole, specific to the dutyholder and their activities, and usually confirm the initial enforcement expectation or alter the action up or down the hierarchy by one level, eg from an Improvement Notice to an Improvement Notice plus prosecution, or from an Improvement Notice to a letter.
>
> **Strategic factors**
> 104 There is a range of strategic factors which may impact on the final enforcement decision. Inspectors have to ensure that public interest and vulnerable groups (eg children and patients) are considered, and that the broader socio-political impact of the enforcement action is taken into account. Strategic factors qualify the decision they do not determine it.

53 During the giving of his evidence the Inspector suddenly disclosed that he had completed a form EMM1 and that he had it with him. The Tribunal adjourned for 10 minutes to have the document copied and to let Mr Adjei and Mr Wright take stock of its contents. It is a 'tick box'[15] type form. The description of circumstances giving rise to the completion of the form was stated to be 'Potholes in the yard area'.

54 The Inspector had indicated that there was no risk of serious personal injury so as to justify a prohibition notice under section 22. In identifying the 'Risk Gap' the Inspector had marked the consequence of the actual risk as serious and the likelihood as possible. The benchmark risk was a serious consequence and a remote risk. The Risk Gap was identified as substantial. Having applied the relevant table, the Initial Enforcement Expectation was an Improvement Notice.

55 The Inspector then considered the Dutyholder Factors. There was no history of related incidents, nor of previous enforcement. The Inspector indicated in the relevant box that the Respondent gained, or deliberately sought economic advantage, from non-compliance. The inspection history was shown as reasonable, and the standard of general conditions as poor. Finally in this section the Inspector stated that he had

[15] Or rather 'cross box'

little or no confidence that the Respondent would comply with the law and ensure the efficient management of health and safety. The indicated enforcement action was again an Improvement Notice. In the Strategic Factors section the Inspector stated that vulnerable groups would be protected by the action. 'Vulnerable groups' are referred to in the EMM for example as 'children, members of the public and patients.'

56 Although at the commencement of the form it was stated to have been completed in respect of '[p]otholes in the yard area' the Enforcement Action Plan at the conclusion of the form was 'Improvement Notice for condition of floors'.

57 There were three sets of photographs before us taken on behalf of the Appellant on 22 May, 14 October 2015 and 10 March 2016 in connection with the proposed remedial works. They all show defects in the surface of one form or another. None of them were of the area marked 'potholes' on the plan prepared by the Inspector.

The law

58 The statutory and regulatory provisions are set out above, together with a list of the authorities to which we were referred. Each of Mr Adjei and Mr Wright summarised the law in their opening notes. We summarise the position based on part pf the note prepared by Mr Adjei which we find to be helpful, and which does not conflict with the relevant part of Mr Wright's note.

58.1 Section 21 requires the Inspector to have a specified 'opinion';

58.2 In determining whether an Inspector had, or should have had, the requisite opinion the Tribunal must focus on the situation on the ground at the time the notice was served and reach its own decision, paying due regard to the view and the expertise of the Inspector and decide whether it would have served the notice at that time if it had been the inspector.

58.3 The Tribunal must decide 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.

58.4 An Improvement Notice should enable the recipient to know what is wrong and why it is wrong and it should be clear and easily understood.

58.5 An Improvement Notice and the letter that may accompany it can be read together and the letter can qualify the Improvement Notice.

Submissions

59 Mr Adjei, for the Appellant, submitted that the Notice should be cancelled for the various reasons he articulated and which will be examined below. Mr Wright submitted that the Notice should be simply affirmed or in the

alternative that it should be affirmed subject to minor modifications as follows:

59.1 The typographical error of 1999 mentioned above be corrected to 1992;
59.2 In the measures to be taken the word ‘even’ be substituted for ‘smooth’;
59.3 The words ‘and is subject of regular inspection and maintenance in the future’ be deleted.

60 Mr Adjei addressed the Tribunal on the issues as agreed between the parties for the purposes of the preliminary hearing held on 20 October 2016. Mr Adjei submitted that the fact of a contravention or otherwise is not conclusive, but is a material factor. What the Tribunal has to decide is whether it would have served the Notice, and the issue of a contravention is one element to be taken into account. Mr Adjei submitted that there was no credible evidence of any potholes or uneven surfaces in a traffic route which created a hazard. The Inspector had not at the time marked any of the areas in question on a plan, nor taken any measurements of them, and that was a serious failing. The Appellant of course acknowledged that there were defects in the surface, but denied that they created a health and safety risk.

61 Mr Adjei submitted that the Inspector did not investigate why the repairs to the yard had been delayed, nor whether they had been commissioned, before deciding to issue the Notice. There was no urgent reason why the service of the Notice could not be delayed until such investigations had taken place. Mr Adjei highlighted the point that the Inspector had been told on site that works were to be undertaken, and also the information which was supplied to the Inspector by Mr Griffiths before the Notice was posted. If he had investigated further, he would have been informed of the long history of drainage problems, and the efforts being made to have remedial works undertaken.

62 The fourth issue agreed between counsel is:

> Whether the justifications and reasons for the Respondent's opinion(s) were precise and accurate.

63 Mr Adjei submitted that there had been a failure by the Inspector to notify the Appellant of the location of the alleged defects, and therefore the Appellant had not been notified of what was alleged to be wrong, and it was not clear. It was, he submitted, necessary for the location to be specified, contrary to the assertion of the Inspector. Mr Adjei referred to an extract from the HSE Enforcement Policy Statement:

> 8.0 **Transparency**
> 8.1. Our enforcement action should clearly outline to duty holders not only what they have to do but, where relevant, what they don’t. Further guidance on complying with health and safety law can be found on the HSE website.
> 8.2 Where non-compliance has been identified, our inspectors will clearly and promptly explain the decision taken, their reasons, and the actions required to achieve compliance. They will

> discuss reasonable timescales with the duty holder and explain what will happen if they fail to comply.

64 There was also an inconsistency between the reasons for the service of the Notice which referred only to pedestrians, and the Schedule which referred to the provision of 'a smooth surface for vehicles to operate over'. The alleged justification which was given by the Inspector during this hearing that there was concern about vehicles overturning was simply an attempt to justify the inconsistency.

65 Mr Adjei further pointed out that in the Notification of Contravention letter the Inspector had referred to the works as 'being planned', whereas he had been informed by Mr Griffiths of a date when the works were to be commenced. The opinion that the works were only at a quote stage and were not guaranteed to go ahead, as stated by the Inspector in paragraph 19 of his witness statement, was not reasonable.

66 Mr Adjei relied upon various aspects of Dr Ford's report.

67 The final issue is:

> Whether service of the respective Notice(s) was necessary and proportionate;

68 It was neither necessary nor proportionate in all the circumstances for the Notice to be served said Mr Adjei. He referred in some detail to the EMM and the EMM1 form, and submitted that if the correct assumptions had been used, then the outcome would not have been that a Notice be served.

69 Mr Wright, for the Inspector, submitted that for the purposes of putting itself in the position of the Inspector the Tribunal must consider the factors taken into account by the Inspector. In summary those were the state of the yard, and Mr Wright referred to the photographs taken by the Appellant insofar as they were within the area seen by the Inspector, the communications with Mr Griffiths, and the Inspector's conclusion that he had little or no confidence that the repairs would be carried out. Mr Wright said that the documents disclosed, commencing with the risk assessment in May 2015, 'reveal[ed] a sad state of affairs regarding the yard repairs and strongly supported the enforcement decision.' Mr Wright referred to the attitude of the Appellant as 'lethargic'. He set out the history at some length which we will not repeat. It is summarised above.

70 Mr Wright submitted that the evidence was clear that the Appellant was in breach of regulation 12(2)(a) of the 1992 Regulations on 6 and 18 April 2016, and he set out the matters on which he relied. He said that 'traffic route' covered all areas of the yard if pedestrians walk there, and not only the marked pedestrian walkways.

71 Mr Wright pointed out that there were no documents disclosed concerning the alleged difficulties in ensuring that Thames Water repaired the off-site drainage system to prevent the flooding which occurred, and he again referred to the delays which had taken place in having the repairs effected. The drainage issue was, he said, a red

herring. Mr Wright invited us to conclude that it was only the site visit and the knowledge that an Improvement Notice was to be issued which caused the works to be started.

72 Mr Wright submitted that the Inspector had correctly followed the EMM, while pointing out that he had an overall discretion as to whether to take enforcement action. An Improvement Notice was appropriate. Mr Wright addressed the specific point about the fact that the Notice did not state the location of the alleged defects. He submitted that that matter must be judged against the Appellant's prior knowledge of the defects.

Discussion and conclusion

73 We make one preliminary point, and that relates to terminology. In the Notice the Inspector referred to 'potholes'. That is not a term of art. The 1992 Regulations refer to 'uneven or slippery' surfaces. We do not intend to be drawn into debates about semantics.

74 The service of an Improvement Notice is obviously a very serious matter for the recipient. There are criminal sanctions attached for non-compliance, and the fact of such a Notice having been issued may well have other cost consequences for the business. We have to express considerable surprise the Inspector decided to issue a Notice having undertaken what was by all accounts a limited and perfunctory tour of the site. We do not accept that seeking to minimise the fees the occupier of the site would have to pay for such an inspection is an appropriate reason for not undertaking a fuller investigation and inspection before issuing a Notice. If a Notice is to be justified then sufficient background preparation must be made.

75 In our view there is a major difficulty concerning this Notice. That difficulty is the lack of precision as to what were the alleged defects and that they justified the issuing of the Notice. That general point covers the issues as set out in paragraphs 1.1 and 1.4 of the agreed list of material issues above. The onus is on the Inspector to demonstrate to us that he was reasonably of the opinion that there had been a breach of statutory or regulatory provisions falling within his jurisdiction. In our judgment he has failed to discharge that burden save possibly for areas near the entrance. Insufficient facts were proved in respect of other areas. It is apparent from the Notice itself and the evidence of the Inspector that the Notice was intended to cover other areas.

76 As we have stated, the issuing of such a Notice is a serious matter. Any person on whom the Notice is served must be able to ascertain what it is that needs to be done in order to comply with it. The reasons for the Inspector being of the opinion that there had been a breach referred to defects 'most notably but not exclusively near the entrance' causing a risk to pedestrians. That is very vague. The compliance requirements included an obligation to identify all areas where remedial work was necessary, and then carry out remedial work. In our view the phrase used by the Inspector is simply not precise enough. We could easily see circumstances where the Appellant had carried out certain remedial

works, but yet the Inspector maintained that other areas ought to have had works carried out also. Using the EMM terminology, the standard is Interpretative, rather than Defined or Established. That includes 'standards interpreted by inspectors from first principles.' An inspector may have a different interpretation from a site owner. Further, there may be a different opinion as to what constitutes a 'traffic route'. What, we ask rhetorically, was there to prevent the Inspector (with the permission of the Appellant) marking the areas about which he was concerned by ringing them with spray paint?

77 The Appellant has of course accepted that there were defects in the surface of the yard, and we saw some photographs. The precise position from which each photograph was taken was not identified, but a significant number were taken in the relatively narrow strip between the right hand end of the warehouse / office building and the right hand edge of the site. The Inspector did not visit that area. The photographs provided by the Appellant show that there were cracks or flaws in the surface, but we are unable to conclude from them the extent of the defects, and whether the defects presented a risk to health and safety in a traffic route.

78 We accept Mr Wright's point that 'traffic route' is not limited to a pedestrian walkway, but do not accept that that phrase covers every part of the yard where a person may at some time walk. We adopt the sentence in paragraph 20 of the judgment of Pill LJ in *Button* mentioned in the

> This was a situation in which any reasonably used route from the car park to the building could be said to be a traffic route within the regulation.

79 Other photographs were taken nearer the entrance to the site adjacent to where the Inspector may have parked the car and walked to the reception area. We accept that those areas are likely to be traffic routes. We further find on a balance of probabilities that there were some areas between the car park and the reception area which were traffic routes and in which there was a trip hazard. Indeed, two such areas had been identified by Mr Thorpe in May 2015. We are not able to be satisfied from the evidence before us that any of the other areas which the Inspector may have had in mind, whatever they were, constituted a trip hazard in a traffic route. As far as the areas near the entrance are concerned, we repeat the point that in our view the onus is on the Inspector to be specific about the areas in question. He was not. It was wholly unreasonable for the Inspector to expect the Appellant to second-guess what areas in the yard he might consider as a trip hazard.

80 We have noted the evidence of Dr Ford as to a standard of 15mm in connection with repairs to pavements. We are not suggesting that there is any similar standard within the legislation and regulations relevant to these proceedings. However, the evidence does to us appear to be relevant in emphasising the importance of some precision about the identification of defects.

81 We accept that we have the power to modify the Notice, which includes the power to make it more precise. We are simply not in a position to exercise that power. We were not able to inspect the site on 6 April 2016 ourselves. There is no plan specifically identifying the areas near the entrance. Therefore we are unable to identify precisely what areas may have been a trip hazard in a traffic route.

82 The next issue we considered was the extent of the knowledge of the Inspector as to the proposed remedial works at the time when the Notice was served. That was in the afternoon of 18 April 2016, although the Notice and the Notification of Contravention letter were both dated 15 April 2016. The Inspector had been made aware on his site visit that repair works were planned. We have recorded the correspondence above. In particular, we note the email of 18 April 2016 from Mr Griffiths sent at 13:54 hrs. There was clear confirmation that the works were to commence the next day, with reasons having been given for the delay. That was the information known to the Inspector at the time that the Notice was served. There was no reason given to disbelieve Mr Griffiths of which the Inspector was aware at the time. Further, if the Inspector had made further enquiries of the Appellant he could have been supplied with a copy of the quotation of 21 March and the Purchase Order of 7 April 2016 which confirmed the information supplied by Mr Griffiths that the Appellant had contracted for the works to be undertaken.

83 The Inspector did not know at the time of the service of the Notice that unfortunately the contractors were to postpone the commencement of the works by a further week. Further he did not know the past history concerning the proposed works as later disclosed during these proceedings. The Inspector's evidence to this hearing that there had been a 'track record' of the works not having been done therefore has to be irrelevant as the Inspector had not made any enquiries. However, we must consider what we would have done, standing in the Inspector's shoes, if further enquiries had been made. We are in no doubt at all that we would not have served the Notice, but instead would have made arrangements to re-inspect the site after, say, three or four weeks to ascertain whether the areas which had been of concern had been sufficiently repaired.

84 In our judgement the service of a Notice was heavy handed and disproportionate, even if it had been precise about the areas to be repaired. Mr Griffiths had set out a clear explanation of the drainage problems, and clearly stated that the works were due to start on the following day. That was the information which the Inspector had. He could also have had the quotation and purchase order if he had wanted more information.

85 Submissions were made concerning the EMM process including the flowcharts within it, and the completion of the form EMM1. The fact that an EMM assessment had been carried out and that the form EMM1 existed was not mentioned by the Inspector until during the hearing. We entirely fail to understand why that was. We do not place great weight on

any effect that any changes in the manner in which the EMM process would have had on the outcome because it is only intended to be a guide. It is not a document to be analysed in the manner of detailed legislation. It is arguable that following the analysis of the Risk Gap the outcome should only have been a letter, on the basis that the alleged defect depended on an 'Interpretative Standard'. On the other hand, as Mr Adjei pointed out, it could also be argued that the outcome should have been prosecution.

86 There are some comments which we make on matters which do surprise us, but would not by themselves cause us to decide that we would not have issued the Notice. The first point is that the Inspector ticked the box to indicate as follows:

> The dutyholder is deliberately avoiding minimum legal requirements for commercial gain. (For example failing to price for or provide scaffolding for high roof work).

87 We consider that marking to be inappropriate and highly presumptuous. There was no evidence to support that statement before the Inspector. The explanation given by the Inspector was that he had ticked the relevant box, as the remedial works cost money. Of course they did as all remedial works must, and the Appellant had been seeking to have them done for some time. If the Inspector had made enquiries he would have found that that point was not justified.

88 The second point which surprised us was that the Inspector had ticked the box to indicate that vulnerable groups were to be protected. The EMM gives 'children, members of the public and patients' as examples of vulnerable groups. This site is not one which is visited by such groups. That marking was not justified.

89 The final point links to points already made. The Inspector noted that he had little or no confidence that the Appellant would comply with is obligations. Mr Griffiths had informed the Inspector of the proposed commencement of remedial works. The Inspector also accepted that if he had checked he would have found that there was no history of the Appellant not complying with its obligations.

90 For the reasons set out above we conclude that we would not have issued the Notice, and the Notice is therefore cancelled.

Employment Judge Baron
Dated 26 September 2017