EMPLOYMENT TRIBUNALS

Appellant: Hellfire Entertainment Limited

Respondent: Martin Hutton (One of Her Majesty's Inspectors of Health and Safety)

Heard at: **Leeds** **On:** **13, 14 and 15 May 2019**
24 June 2019 (Reserved)

Before: **Employment Judge Keevash**
Mr W Roberts
Mr M Taj

Representation
Appellant: Mr I Snowball
Respondent: Mr C Adjei, Counsel

RESERVED JUDGMENT

The appeals against the prohibition and improvement notices served on 17 August 2018 are rejected. The notices are affirmed in their original forms.

REASONS

Background
1 The Appellant appealed against a prohibition notice and an improvement notice which were both served on it by the Respondent on 17 August 2018. The matter was listed for a Hearing. On 23 October 2018 the Tribunal decided that there was insufficient time to determine all of the issues which had been identified. It made Case Management Orders and listed the matter for a final Hearing.

Issues
2 On 23 October 2018 the Tribunal identified the issues which it had to determine. These are set out in the Discussion part of these Reasons.

Hearing

3 At the outset of the Hearing Mr Snowball made an application that the Tribunal determine two preliminary issues:- whether the Respondent operated a business from the premises and whether it engaged any employees. Mr Adjei opposed the application. After the adjournment the Tribunal rejected the application.

4 Martin Andrew Hutton, Inspector of Health and Safety, gave evidence on his own behalf. Adam Edward Snowball, managing director, and Ian Walton Snowball, his father, gave evidence on behalf of the Appellant. The Tribunal considered two bundles of documents.

Facts

5 The Tribunal found the following facts proved on the balance of probabilities:-

5.1 In or about 1837 a building situated in Queensgate, Huddersfield ("the premises" and now known as the Colosseum) was constructed.

5.2 In or about April 1999 the part of the premises which in effect constituted a cinema known as the Tudor was leased to the Appellant. Thereafter the Tudor and a second cinema on the premises were stripped and an office area was constructed.

5.3 On 26 January 2015 Life Environmental Services Ltd issued an Asbestos Survey Report for Star Pubs & Bars Limited in relation to the Sin Nightclub on the premises. This stated:-

"…

Section 1.0 Executive Summary

1.2 Recommended Actions

2.2 Type of survey – Management Survey

…

It is recommended that further intrusive inspection and sampling be carried out where site refurbishment, maintenance, or similar may disturb ACMs that have remained inaccessible during this survey; this should be a Refurbishment/Demolition Survey as described in HSG 264 …

3.0 Methodology & Limitations of Method

[In this section it was noted that the following areas were not included within the scope of survey:- concealed risers or voids, ventilation trunking, floor voids and floor ducts]

Note: If any activities are to be undertaken within areas that have not been accessed as part of this survey then a further survey and assessment should be carried out prior to these works

4.0 Survey Findings – Survey data Sheets

[In this section it was presumed that there was asbestos in a safe, asbestos was detected in the roof, guttering, flue, toilets, corridor of the night club] …".

5.4 On 17 August 2018 the Respondent visited the premises because of a scaffold outside the premises which was thought to be unsafe. He took photographs and used his hard hat to tap against the front doors in order to attract attention. He was greeted by Mr Ian Snowball and made notes of their conversation in his notebook. He wanted to inspect work inside the building and asked whether there was an

asbestos survey for the property. The Health and Safety Executive ("HSE") policy was to ask for confirmation about asbestos before entering premises constructed before 2000 which were undergoing refurbishment. Mr Snowball explained that there was a survey but he was unable to produce a copy because it was on his computer. It was agreed that Mr Snowball would send it by email. The Respondent received the email while waiting outside the premises but he was unable to access the contents. He agreed to review the survey in his office and contact the Appellant if there were any issues. He also asked for details of Mr Adam Snowball as he was the Appellant's Director.

5.5 On his return to the office the Respondent read the survey and was concerned about the presence of asbestos within the premises. He telephoned Mr Adam Snowball who explained that ongoing work at the premises included taking down internal walls and ceilings and inspecting under floors. The Respondent explained that he would be serving a Prohibition Notice because there was a risk that the works would disturb asbestos. He also decided to serve an Improvement Notice because Mr Adam Snowball had explained that he had no experience in managing construction work and that he did not know about the different types of asbestos surveys available and because the Appellant had allowed the scaffold to be erected by someone with no formal training.

5.6 On 17 August 2018 the Respondent visited the premises. He met Mr Ian Snowball and made the following notes of their conversation:-
" … Ian Snowball directly employed by Hellfire Entertainment Ltd. 2 years going …".

5.7 By a letter dated 17 August 2018 the Respondent informed the Appellant that he had identified contraventions of health and safety law. It enclosed a notification of contravention with details of the material breaches. This stated:-
"**[1] Control of Asbestos Regulations 2012** - Regulation 5(1)
…
Regulation 5 of the Control of Asbestos 2012 requires that a suitable and sufficient assessment as to the presence, type and condition of asbestos is made prior to refurbishment work. Given the limitations of the management survey I am of the opinion that this is not sufficient to meet the appropriate standard. I have served prohibition notice … to immediately prevent further work at the Colosseum building which is liable to disturb the fabric of the building as this might expose workers to asbestos. You should now obtain an asbestos Refurbishment and Demolition survey prior to works continuing (although the management survey will be a useful basis to begin producing this).
…
[2] Management of Health and Safety at Work Regulations 1999 – Regulation 7(1)

Considering my conversations with Ian Snowball and Adam Snowball, it became clear that the company does not have sufficient knowledge, training or experience in the management of construction projects so as to ensure health and safety so far as is reasonably practicable.

Therefore I am serving Improvement Notice … which requires you to obtain assistance in complying with your legal duties in relation to health and safety (e.g. Construction (Design and Management) Regulations 2012, Control of Asbestos Regulations 2012, Work at Height Regulations 2005). The compliance date for the notice is 7th September 2018.

…
Other Material Breaches
[3] Work at Height Regulations 2005 – Regulation 6(3) and 8(b)
…".

5.8 On the same day the Respondent served the Appellant with a Prohibition Notice and an Improvement Notice ("the Notices").

5.9 By an thirteen page attachment to an email dated 23 August 2018 Mr Adam Snowball informed the Respondent:-
" … I am hoping that having read this response you will determine that, on this occasion, HSE acted in haste and as such erred in their judgment of Hellfire Entertainment Ltd (HEL) and the attendant circumstances surrounding your visit, therein warranting justification for an immediate revocation of the notices …".
He concluded:-
"I trust the contents of this communication meet favourably with HSE and the notices are rendered void in their entirety. If this is not the case could the HSE please escalate this internally for a senior member of the HSE to assess prior to HEL launching a formal appeal and in any circumstance wherein the notices are not rescinded could the HSE please provide a detailed and comprehensive account by way of law and fact as to how and why HEL have contravened H & S legislation …".

5.10 By an email dated 23 August 2019 the Respondent informed the Appellant:-
" …
I am unable to withdraw the Prohibition Notice as this is not a power conferred upon a health and safety inspector … In any event I do not consider that this notice has been improperly served and it would be my intention to resist such an appeal.

Whilst I have the power to withdraw the Improvement Notice, I do not consider this has been improperly served and so make no order for it to be withdrawn ...

In addition, I am now exercising the powers given to me by Section 20(2)(k) of the Health and Safety at Work etc. Act 1974, which allows me to require the production of any other books or documents which it is necessary for me (the Inspector) to see for the purpose of any examination or investigation. I now require you to provide the following documents:

- A copy of the Construction Phase Plan for this project.
- A copy of the F10 notification for this project …".

5.11 By an email dated 24 August 2018 the Appellant sent to the Respondent a construction phase plan for "the only currently planned works at the building, that being the installation of two CCTV cameras".

5.12 By an email dated 28 August 2018 Mr Ian Snowball informed the Respondent that he was preparing the Appellant's appeal and asked for confirmation that he was correct in making certain assumptions about the HSE's approach.

5.13 By an email dated 10 September 2018 the Respondent informed Mr Ian Snowball:-
"…

1. 'Construction work' is defined within the Construction (Design and Management) Regulations 2015 …
   Given the works ongoing at the Colosseum (including exterior painting works, installation of CCTV cameras, re-fitting doors and windows), I consider that construction work has already begun.

   The notes in my notebook made at the time of the visit record Ian Snowball's status as an employee and would be tendered in evidence in any Employment Tribunal hearing. In any event, if you are not in fact an employee of Hellfire Entertainment Ltd then you may be deemed as a 'contractor' – another term strictly defined within the Construction (Design and Management) Regulations.

2. As above in (1), following a conversation on site with Ian Snowball I have recorded the fact he is an employee of the company Hellfire Entertainment Ltd.
3. …
4. The Prohibition Notice … prevents further work liable to disturb the fabric of the Colosseum building. This is a sub-section of 'construction work' as defined by the regulations, but includes all work liable to disturb asbestos such as lifting floorboard, demolishing walls etc …

   Given the sporadic use of some asbestos-containing materials within buildings, the benchmark standards in preventing exposure of people to asbestos in refurbishment projects are a refurbishment and demolition survey and asbestos awareness training for operatives undertaking the refurbishment works…".

5.14 On 6 September 2018 the Appellant presented the appeals to the Tribunal.

Law

6 Section 1 of the Health and Safety at Work etc Act 1974 ("the 1974 Act") provides:-

"(1) The provisions of this Part shall have effect with a view to –
(a) securing the health, safety and welfare of persons at work;
(b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;
(c) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances ...".

Section 2(1) of the 1974 Act provides:-

"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."

Section 21 of the 1974 Act provides:-

"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 repealed,

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."

Section 22 of the 1974 Act provides:-
"(1) This section applies to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply.
(2) If as regards any activities to which this section applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Part referred to as "a prohibition notice").
(3) A prohibition notice shall –
(a) state that the inspector is of the said opinion;
(b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;
(c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of the relevant statutory provisions, state that he is of that opinion, specify the provision or provisions as to which he is of that opinion; and
(d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied ...".

Section 24 of the 1974 Act provides:-
"(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…"

Regulation 4 of The Control of Asbestos Regulations 2012 ("the 2012 Regulations") provides:-
"(1) In this regulation "the dutyholder" means-
(a) every person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to the maintenance or repair of non-domestic premises or any means of access or egress to or from those premises; or
…
(3) In order to manage the risk from asbestos in non-domestic premises, the dutyholder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present on the premises …".

Regulation 5 of the 2012 Regulations provides:-
"An employer must not undertake work in demolition, maintenance or any other work which exposes or is liable to expose employees of that employer to asbestos in respect of any premises unless either –

(a) that employer has carried a suitable and sufficient assessment as to whether asbestos, what type of asbestos, contained in what material and in what condition is present or is liable to be present in those premises, or
(b) if there is doubt as to whether asbestos is present in those premises, that employer –
    (i) assumes that asbestos is present, and that it is not chrysotile alone, and
    (ii) observes the applicable provisions of these Regulations."

Regulation 7 of the Management of Health and Safety at Work Regulations 1999 provides:-
"(1) Every employer shall … appoint one or more competent persons to assist him in undertaking the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions …".

Regulation 6(3) of The Work at Height Regulations 2005 ("the 2005 Regulations") provides:-
"Where work is carried out at height, every employer shall take suitable and sufficient measure to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury."

Regulation 8 of the 2005 Regulations provides:-
"Every employer shall ensure that, in the case of –
(a) …
(b) a working platform –
    (i) Part 1 of Schedule 3 is complied with; and
    (ii) where scaffolding is provided, Part 2 of Schedule 3 is also complied with …".

Regulation 2(1) of The Construction (Design and Management) Regulations 2015 ("the 2015 Regulations") provides:-
"In these Regulations –
…
"client" means any person for whom a project is carried out;
"construction phase" means the period of time beginning when construction work in a project starts and ending when construction in that project is completed;
"construction phase plan" means a plan drawn up under regulations 12 or 15;
…
"construction work" means the carrying out of any building, civil engineering or engineering construction work and includes –
(a) the construction, alteration, conversion, fitting out, commissioning, renovation, repair, upkeep, redecoration or other maintenance (including cleaning which involves the use of water or an abrasive or toxic substances), de-commissioning, demolition or dismantling of a structure;
(b) the preparation for an intended structure, including site clearance, exploration, investigation (but not site survey) and excavation (but not pre-construction archaeological investigations, and the clearance or preparation or preparation of the site or structure or use or occupation at its conclusion …".
"contractor" means any person (including a non-domestic client) who, in the course or furtherance of a business, carries out, manages or controls construction work …".

Regulation 4(5) of the 2015 Regulations provides:-
"A client must ensure that –
(a) before the construction phase begins, a construction phase plan is drawn up by the contractor if there is only one contractor, or by the principal contractor …".

The Tribunal was also referred to the following publications:- **Asbestos: The survey guide** 2012 HSE; **Managing and working with asbestos Approved Code of Practice and guidance** 2013 HSE; **Technical Guidance TG20:13 Operational Guide Technical guidance on the use of BS EN 12811-1A comprehensive guide to good practice for tube and fitting scaffolding** 2015 National Access & Scaffolding Confederation; **Technical Guidance TG20:13 Design Guide A comprehensive guide to good practice for tube and fitting scaffolding** 2015 National Access & Scaffolding Confederation; **Construction Phase Plan (CDM 2015)** HSE; **Managing asbestos in buildings; A brief guide** 2012 HSE

Submissions
7 Mr Ian Snowball referred to a skeleton argument. He also made oral submissions.

8 Mr Adjei referred on a skeleton argument. He also made oral submissions. He referred to **Chrysler United Kingdom Ltd v McCarthy** [1977] ICR 939 QBD; **Readmans Limited and Another v Leeds City Council** [1992] C.O.D 419; **R v Board of Trustees of the Science Museum** [1993] 3 All ER 853 CA; **Railtrack plc v Smallwood** [2001] ICR 714 QBD; **Chilcott v Thermal Transfer Limited** [2009] EWHC 2086 (Admin); **MWH UK Limited v Victoria Susan Wise (H.M. Inspector of Health and Safety)** [2014] EWHC 427 (Admin) QBD; **Sarah Jane Hague (One of Her Majesty's Inspectors of Health and Safety)** [2015] EWCA Civ 696 CA; H**M Inspector of Health and Safety v Chevron North Sea Ltd** [2018] UKSC 7 SC.

9 After hearing submissions the Tribunal reserved its decision. By an email dated 16 May 2019 the Appellant sent additional submissions. By an email dated 24 May 2019 the Respondent confirmed that it had no objection to the Tribunal considering those submissions provided that the Tribunal also considered its comments on them. In those circumstances the Tribunal also considered the additional submissions and comments.

10 Shortly after it began its deliberations on 24 June 2019, the Tribunal was informed by its clerk that the Appellant had that morning sent an email with an attachment containing a CCTV file. The Employment Judge read the email (but not the attachment) and fully discussed it with the Members. The Tribunal decided in accordance with the overriding objective (set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) not to take into account the email and not to open the attachment. In reaching its decision the Tribunal considered the following matters:- the submissions had closed; it was clear to a reasonable person that all relevant evidence and submissions must be produced before or (at the very latest) at the Hearing so that the other party had an opportunity to rebut them; the Appellant had not explained why this file had not been produced during the disclosure process; the Appellant's previous additional submissions had been considered but only because the Respondent had agreed subject to its being

granted the opportunity to comment; there was no opportunity to obtain the Respondent's comments; taking into account the email and the attachment would cause injustice.

Discussion

11 There were three grounds of appeal:- namely that the Respondent failed to uphold the Civil Service Code; failed to work within the Regulators Code and failed to work within the Human Rights Act. At the Preliminary Hearing it was agreed that in order to determine the appeals, it was necessary to address the issues which are set out in this Discussion section. These issues embraced and elaborated on the grounds of appeal.

1 Did the Respondent have power to enforce because in his notification letters there was an error concerning the numbering of the Notices?

12 In Mr Snowball's original skeleton argument (produced at the Preliminary Hearing), he noted that the Appellant had not been served with any notice with the serial number IN/180718/MH1 but had in fact been served with two different Notices both with the same number: 170818/MH1. However, during the Hearing he confirmed that the Appellant no longer relied on this as a ground for appeal.

2 Did the conduct of the Respondent as a representative of the Queen warrant the grant of the appeal?

13 In its grounds of appeal, the Appellant contended that the Respondent acted in breach of the Civil Service Code ("the Code"). which provided:-
"As a civil servant, you are appointed … to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality."

14 The Tribunal accepted the Respondent's evidence. It found and decided that he did act in accordance with his responsibilities under the Code. None of the allegations that he "broke all 4 of the 4 core values" were made out. Similarly, the Tribunal rejected the allegation that the Respondent failed to work within the Health and Safety Executive Code. Finally, it found and decided that there was no basis for the allegation that the Respondent failed to act in a way which was incompatible with the Human Rights Act 1998.

3 Were there any employees or contractors engaged on site?

15 The Respondent gave evidence that he made contemporaneous notes of his conversation with Mr Snowball in his notebook. These notes record:-
" … Ian Snowball directly employed by Hellfire Entertainment Ltd. 2 years going …".

16 Mr Ian Snowball denied that he told the Respondent that he was an employee. He gave evidence that, when asked by the Respondent whether he was a Director of the Respondent, he replied in the negative. He suggested that the Respondent then jumped to his conclusion that he was an employee. During cross examination he admitted that he was a worker for the purposes of health and safety. He resided in the premises and worked for no one other than the Respondent. He worked an eighteen hour day seven days a week. He denied that there was any agreement between him and the Respondent. Some of his gold bullion was stored at the premises by the Respondent. Mr Adam Snowball also stated that there was no agreement between the Respondent and his father; his father had provided the premises with kitchen and musical equipment; if the Respondent made a profit, it would provide him with a pension; he lived rent free

on the premises. He denied that the Respondent made any payment to his father either directly or indirectly.

17 The Tribunal found and decided that Mr Ian Snowball was an employee of the Respondent. There was a conflict between the parties as to the accuracy of the Respondent's notes The Tribunal accepted the Respondent's evidence and found Mr Snowball to be somewhat evasive on this issue. For instance, he was very reluctant to explain fully his role in running the Respondent' business. The Tribunal was concerned with the quality of the Respondent's notes although it recognised the difficulty with making full notes while conducting a conversation. His notes were not verbatim but they were a contemporaneous record, made before he left the premises. He formed the opinion that Mr Snowball was an employee based on what he was told by Mr Snowball. In any event when the Tribunal reviewed its findings of fact and applied the common law tests as to the existence of a contract of employment, it found and decided that Mr Snowball was an employee of the Respondent. Among other matters there was mutuality of obligation, extensive control, personal performance and the arrangement as a whole was consistent with its being a contract of employment.

4 No requirement to do an asbestos report

18 Mr Ian Snowball gave evidence that at the material time there was no requirement for the Respondent to do an asbestos report. In the Appellant's supplementary submissions it relied on **Managing asbestos in buildings** HSE in support of its contention that, as the premises was refurbished after 2000, asbestos was unlikely to be found. Asbestos containing materials may be present only where a building was constructed or refurbished before 2000.

19 The Tribunal noted that the approved HSE Code of Practice and guidance entitled **Managing and working with asbestos** provided the following guidance on the specific duty to manage asbestos on the owners and/or those responsible for maintenance in non-domestic premises:-

"…

What the dutyholders must do comply with the law

112 Dutyholders are required to ensure that:

- reasonable steps are taken to find materials in premises likely to contain asbestos and to check their condition

…

Find out if asbestos is present

113 Everything that can reasonably be done must be done to decide whether there is (or may be) asbestos in the premises, and if there is asbestos (or could be), to find out where it is likely to be. All documentary information that can be obtained about the premises must be systematically checked and as thorough an inspection, as is reasonably accessible, of the premises both inside and outside must be carried out.

114 The thorough inspection of the premises will usually take the form of a survey. The survey should be comprehensive and systematic and the survey type should ensure that the dutyholder meets their current occupational requirements: a management survey should be carried out to identify the asbestos for normal day-to-day occupation and maintenance of the building, and a refurbishment and demolition survey should refurbishment or demolition work be planned.

…

118 Consider the age of the premises when assessing if asbestos is present. Any premises whose construction was completed before 2000 should always be presumed to contain asbestos, unless there is strong evidence to suggest they do not. Any premises constructed after 2000 can be presumed to be asbestos free. However, exercise caution in circumstances where new premises are built on existing basements or linked to adjoining structures …".

20 The Tribunal understood that the Code gave practical advice on how to comply with the law. If employers followed its advice, they would be doing enough to comply with the law in respect of those specific matters on which it gave advice. The Tribunal found and decided that the Appellant was a dutyholder for the purposes of the 2012 Regulations. It found that the 2015 management survey indicated that asbestos was present in the premises and set out several areas which had not been inspected. During these proceedings the Appellant provided no cogent evidence to show that the areas to be refurbished were free from asbestos. There was no evidence that Mr Ian Snowball had the necessary competence to conduct a "walking about" survey and in any event such a survey was not sufficient. At the time of the Respondent's visit and before the Notice was served, the Appellant did not inform him or present any evidence to show that a refurbishment had taken place after 2000. Its skeleton argument, letter dated 24 August 2018 and Mr Ian Snowball's witness statement were imprecise and somewhat inconsistent as to the date when the work was done. Indeed the Tribunal was a loss to understand why the Appellant did not produce documentary evidence showing the schedule of works and the date of completion. It accepted Mr Adjei's submission that the fact that a refurbishment project had been carried out at the premises around 1999 did not mean that asbestos was absent from the premises. There was no evidence to show that during any works after 2000 asbestos was identified and removed. In the absence of such evidence and given the age of the premises, paragraph 118 of the HSE Code of Practice and the HSE publication (on which the Appellant relied) guidelines suggested that the presence of asbestos should be presumed. That presumption was supported by the fact that the management survey recorded the presence of asbestos. The drawings showing the outline of the premises were insufficient to rebut the evidence that asbestos was present at the time the Notices were served. It followed that the Appellant could not rely on any presumption that the premises were asbestos free.

5 Mr I Snowball is highly knowledgeable regarding health and safety, building works and the law

21 Mr Ian Snowball gave evidence. The Appellant submitted that he was a competent person for the purposes of the 1999 Regulations. Mr Adam Snowball accepted that he did not have the necessary expertise. The Respondent gave evidence that for various reasons he did not consider Mr Ian Snowball to be highly knowledgeable in relation to construction health and safety or the law in this regard.

22 The Tribunal accepted the Respondent's evidence and Mr Adjei's submission that Mr Ian Snowball lacked sufficient competence. In its judgment his evidence amounted to no more than a bare assertion that he possessed the required skill and experience to fulfil the responsibilities of a competent person. Although he referred in outline to various roles he had undertaken during his working life, there was insufficient detail to enable the Tribunal to accept his submission.

6 Building does not lawfully require a demolition and refurbishment report as the last refurbishment was around the date of the "1999 Act" coming into force

23 The Tribunal decided that in effect this issue was the same as issue number 4 (see above).

7 There are short-term exemptions for working with asbestos during refurbishment

24 The Appellant contended that it was entitled to an exemption from the 2012 Regulations. The Tribunal accepted Mr Adjei's submission that the Appellant had failed to point to any exemption from which it could draw benefit.

8 Whether any destruction work had taken place at the hands of the Appellant

25 The Tribunal found that the Respondent was told by Mr Ian Snowball and then by Mr Adam Snowball that "destruction work" was being carried out. This work involved pulling down ceilings, internal walls and taking up floors. This evidence was credible. That work was being undertaken at the time the notices were served. The Tribunal decided that this constituted construction work for the purposes of the 2015 Regulations.

9 The conduct of the HSE in not providing the officer's notes

26 Mr Ian Snowball gave evidence that the Respondent failed to provide him with his notes. The Appellant submitted that this failure was serious and on its own was sufficient to invalidate the Notices.

27 The Tribunal found that copies of the Respondent's notebook were given to the Appellant at the Preliminary Hearing on 23 October 2018. In the circumstances the Appellant suffered no disadvantage or injustice when preparing its case for these appeals.

10 Refurbishment took place since 2000 and, if there was any asbestos, it was taken away then

28 The Tribunal decided that in effect this issue was the same as issue number 4 (see above).

11 Whether any reasonable investigation took place

29 The Tribunal accepted the Respondent's evidence. It found that he asked for an asbestos report. He read it when he received and he became concerned about the presence of asbestos on the premises. He spoke to Mr Adam Snowball because he was a Director of the Respondent. He was told that further works were to be carried out.

30 In the Tribunal's judgment the Respondent carried out a reasonable investigation. He had reasonable grounds to reach the conclusion that there were material breaches of the legislation and that serving the Notices was a necessary and proportionate method of addressing his concerns. It was reasonable for him to speak to Mr Adam Snowball because Mr Ian Snowball was only the Respondent's employee. He had the appropriate contact details and it would have been remiss of him not to speak to the Respondent's Director.

31 The Tribunal accepted Mr Adjei's submission that there was no credible evidence that, if further enquiries had been made, the Respondent would have

reached a different opinion. The evidence suggested that, had he done so, he would have discovered further health and safety contraventions.

Other matters

32 During his oral submissions Mr Ian Snowball raise several other matters which had not previously been identified as freestanding issues. Nonetheless the Tribunal considered it appropriate to address them (insofar as they had not been discussed above). Firstly, the Respondent was not required to follow the Police and Criminal Evidence Act process (administering a caution, recording interviews etc) because at the material time he did not suspect that the Appellant had committed any offence and he was not contemplating any decision as to whether to prosecute. Secondly, there was no evidence of any breach of natural justice. Thirdly, there was no need for the Appellant to be asked to nominate someone to attend an interview under caution because no caution had been given. Fourthly, there was no basis on which the Tribunal could assume that asbestos had been removed from the premises. Fifthly, there was no need to reach any decision about the scaffolding because no notice had been served in relation to that matter. Sixthly, there was no need for a Construction Phase Plan.

Conclusion

33 The Tribunal decided that the Respondent was entitled to issue and serve the Notices on the Respondent. Accordingly, it rejected the appeals and confirmed the Notices in their original form.

Employment Judge **Keevash**

Date 10 July 2019