



EMPLOYMENT TRIBUNALS

Appellant: Ms A Han

Respondent: Ms Tania Bernice Shiffer, an Inspector of the Health and Safety Executive

Heard at: Leeds

On: 11, 12, 13, 14, 15
November 2019

Before: Employment Judge D N Jones
Ms H Brown
Mr D Eales

REPRESENTATION:

Appellant: In person

Respondent: Mr I Wright, counsel

JUDGMENT

1. Prohibition notice PN-TBS-290818-01 is affirmed.
2. Prohibition notice PN-TBS-290818-02 is affirmed and modified by addition of the following underlined wording within the handwritten entry of the notice, immediately after the type written section '*involve a risk of serious personal injury, and that the matters which give rise to the said risks are*':
Part of the external walls to the rear and side of the property have been removed without providing suitable supports to ensure it is not at risk of collapse.
3. The decision is unanimous.

REASONS

Introduction

1. Ms Han, the appellant, is the owner of a dwelling house at 38 Rawdon Road, Horsforth, Leeds, which she purchased in 2016. In March 2018 works commenced

on the construction of an extension at the rear and side of the property to ground and first floor levels.

2. On 29 August 2018 Ms Shiffer, an Inspector of the Health and Safety Executive (HSE) visited the premises. Having viewed the works already undertaken, having spoken to Ms Han and her husband, Mr Zhou and attempted to speak to the builder on site, Yang, she issued two prohibition notices against Ms Han and Mr Zhou. For the latter she used the name Daniel Zu. They prohibited Ms Han and Mr Zhou from carrying out any activities themselves, or under their control, unless the contravention identified in the notices had been remedied.

3. The first contravention was said to be a failure to take steps to prevent danger from the risk of collapse of any part of the building because a load bearing wall had been removed and no adequate means of support had been substituted to ensure the structure was safe. The second contravention was said to have been a failure to ensure the safety of operatives who were working at height by the provision of suitable means of access such as scaffolding with edge protection.

4. By a claim form presented on 18 September 2018, Ms Han appeals against the notices issued in her name. At a preliminary hearing on 1 April 2019, Employment Judge Buckley identified three issues for determination in this appeal in respect of each notice.

5. The issues were redefined slightly at the hearing before us. The Tribunal had the advantage of considering the statutory provisions and the guidance to be derived from the Supreme Court authority of **HM Inspector of Health and Safety v Chevron North Sea Limited [2018] UKSC 7**. The parties agreed with the issues as clarified.

6. The first was whether there was a risk of serious personal injury from the matters described in the prohibition notices. The second was whether the activities to which the relevant statutory provisions applied were carried on by or under the control of the appellant, Ms Han. The third was, if the notices were to be affirmed was any modification of them required.

Evidence

7. Evidence for the appellant was given by Ms Han herself and her husband Mr Zhou. The respondent, Ms Shiffer, gave evidence and called Mr Benjamin Caines and Ms Jayne Towey, both of whom are inspectors at the HSE.

8. Mr Wright called Mr Christopher Moore who is a specialist inspector of health and safety at the HSE. He had prepared a report dated 24 September 2019. He was called as an expert witness to express an opinion on the issues in which he had specialist knowledge.

9. Ms Han submitted that the Tribunal should not attach any weight to his evidence because he was employed by the same employer as Ms Shiffer and so was not impartial. She cited two authorities in support, **Toth v Jarman [2006] EWCH 1028** and **R v Stubbs [2006] EWCA 2313**. The principles set out in those cases are that the principle of a conflict of interest does not automatically disqualify an expert. The key question will be whether the expert is independent. The expert evidence should

be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation. There is an overriding duty on an expert to disclose a conflict of interest.

10. We were satisfied for the following reasons that Mr Moore's expert opinion was independent and that a fair-minded and informed observer would consider that there was no risk that he was not independent or influenced by his employment by the HSE.

10.1. On the face of the report Mr Moore explained his role and employment with the HSE. The alleged conflict was not concealed.

10.2. Mr Moore works from an office in Newcastle upon Tyne and had not met Ms Shiffer, who works in Leeds, until the first day of the hearing.

10.3. Mr Moore prepared his report upon instructions from the solicitors instructed by the HSE. The letter of instruction is attached to his report.

10.4. Employment Judge Buckley had given orders about the use of expert evidence and had given permission for its admission on whether there was a breach of statutory duty and whether there was a risk of serious personal injury from the matters described in the notices. She required any experts to provide a joint statement of agreements and disagreements. These orders reflect the principles underlying CPR Rule 35.

10.5. At section 3 of his report Mr Moore made a declaration of truth in which he explained his duty as an expert to the court in compliance with the duties upon expert witnesses under CPR rule 35. At paragraph 1.14 of his report Mr Moore confirmed that he had based his opinion solely on information provided by the solicitors of the HSE, that he had no prior knowledge of the case and he had not discussed the information with any colleagues.

10.6 At paragraph 2 of his report he set out his qualifications and experience. He held an honours degree as a Master of Civil Engineering and was a member of the Institution of Civil Engineers. At paragraph 2.2 he explained his primary role since joining the HSE had been to provide expert technical advice to the HSE, police and local authorities following accidents, dangerous occurrences and similar incidents. Prior to joining the HSE Mr Moore had worked in the construction industry since 1997 as a structural engineering consultant, during which time he had designed many buildings. He had experience in the site supervision and management of construction projects.

10.6 In summary, Mr Moore was detached from the operational aspect of the regulatory inspectorate in Leeds, was experienced in the provision of expert opinion to the HSE and others and understood his duty to provide an independent opinion to the Tribunal.

11. We have included some parts of Mr Moore's evidence in the reasons we have provided below. However, it is worth emphasising that we have no doubt that we would have come to the same conclusions without any such report or expert evidence. The construction works in question and the risks to which they gave rise were not unusual, in the sense of comprising a technicality or sophistication in

construction processes or health and safety risks which were outside our experience and understanding. It is a case about an extension to a domestic dwelling and dangers of falling from height or structural collapse down to lack of support.

Background/facts

12. Ms Han applied for planning permission for a double storey rear and side extension on 17 July 2017. The application to the local planning authority was made in her name. She deleted the section in which the name and address of an agent could be included. She included her own details for the person to be contacted if the authority wished to conduct a site visit. Full planning permission was granted on 9 October 2017.

13. Ms Han instructed Mr James Bourke to act as the building control inspector for the project. He issued an initial notice dated 1 August 2018. He cited Ms Han as the person intending to carry out the work.

14. On 23 August 2018 the Concerns Team of the HSE received a telephone call from a member of the public about unsafe practices in the construction of the extension at Ms Han's property. The 'notifier' reported having seen about five workers who had been working up to roof height of 25 feet without a ladder or scaffold, but with only a plank on a singular breezeblock. She said she would try to take a photograph the next day and send it to the HSE. On 24 August 2018, the notifier sent three photographs which showed the extension work at the rear of the property. External concrete walls were shown, constructed to first floor level and wooden planking was resting diagonally across the top of them. The notifier stated that no one had been working on the roof that day but the workers were '*ripping out with no Ppe or acro props*'. She said she was happy to report the matter but would prefer for her name not to be used.

15. In response to that concern, Ms Shiffer undertook her visit on 29 August 2018. There were four Chinese workers on site including someone who introduced himself as Yang, who she understood to be the foreman. They did not speak English. She noted that the property was strewn with building materials and general building debris. Inside the property, in the front room, mattresses had been laid out side-by-side with sheets and bedding. Yang was preparing to eat something on a children's picnic table there.

16. She asked who was in charge. Yang telephoned Mr Zhou, who informed her his name was Daniel Zu, and he spelt it for her. He told Ms Shiffer that his wife Ms Han was the owner of the property. Yang referred to Mr Zhou as 'boss' or 'Daniel boss'.

17. Ms Shiffer noticed that the rear wall to the kitchen had been removed and had plastic sheeting protecting the interior from the elements. This was tucked under the roof eaves and covered the upper storey as well which was also exposed. She found no scaffolding on site. The only equipment to access height was a narrow tressle unit, 1.6 m in height. Ms Shiffer took 29 photographs of the interior and exterior of the premises on her telephone.

18. Ms Han and Mr Zhou arrived and had a discussion with Ms Shiffer during which Ms Shiffer expressed concerns about the structural safety of the property. Ms Han

told her that she had a building contract which was in her office, about a mile from the property, but could not remember the name of the builder. She provided the name of the architect, Mr Nadir Khan and an email address. She would not provide a telephone number. Ms Han also mentioned a Tony Roberts, but without clarifying his involvement and Mr Bourke, the approved inspector of building control. She provided his telephone number.

19. Ms Shiffer telephoned Mr Bourke whilst she was on site. He informed her that he had not visited since he had inspected the damp proof course. They agreed to meet on site the following day.

20. Ms Shiffer informed Ms Han that there was no support to take the load following the removal of a load-bearing wall. Ms Han told Ms Shiffer that there were steel support beams in front of the property which had been delivered and were to be installed. These were packaged with a delivery note with the office address of Ms Han below the words, "Pay/Danny". Ms Shiffer asked Ms Han how the support beams would be installed, because they were too heavy to lift manually. On her tablet Ms Han searched online for jacks or handling aids.

21. Ms Shiffer asked Ms Han about how workers could safely operate at height. Ms Han said that scaffolding would have to be erected on the neighbouring property, that the neighbour was new and she had been unable to speak to him to obtain permission. There was inconsistency in the account provided to the tribunal by Ms Han about discussions she had had with the neighbour, Mr Chatterley. On the one hand, Ms Han maintained the position that she had not spoken to her neighbour before the visit of Ms Shiffer. On the other, she said that there had been a discussion with her neighbour who had discussed the extension and not allowed scaffolding to be erected on his property.

22. Having seen the disclosure in this case, which included a witness statement from Mr Chatterley, Ms Han believes that both his statement and that of Ms Young, the notifier, is false and motivated by Mr Chatterley's anger that the extension was larger than he had expected and contrary to that granted by the planning authority. There has been subsequent enforcement action in this regard which is presently subject to appeal.

23. Ms Han told Ms Shiffer that she would obtain some tower scaffolding. She looked online for suitable providers. Ms Shiffer informed her that this would have to be erected by a competent contractor. Ms Han said in her evidence that she had asked Ms Shiffer to view tower scaffolding that was on site, but Ms Shiffer had refused to enter the property on the ground it was unsafe. Ms Han said, in evidence, that she had only searched for tower scaffolding on a tablet to demonstrate the equipment that had been used because Ms Shiffer was not prepared to look at the tower scaffolding on site. Ms Shiffer denied, in cross-examination, that she had been asked to look at any tower scaffolding on site.

24. We do not accept the appellant's evidence on this issue. In her witness statement, at paragraph 28, Ms Han stated that she had tried to tell Ms Shiffer that there was a trade-use aluminium tower scaffolding for internal and external use on site from the beginning. She also stated she did not see where the scaffolding was at the time. Ms Han made no reference in her witness statement to having asked Ms

Shiffer to enter the property to view it, let alone to go upstairs to the first floor to see it in situ, the account put to Ms Shiffer in cross examination. That would not have been consistent with that part of her statement in which she had stated that she did not know where the tower scaffolding was at the time.

25. Having spoken to a colleague by telephone who concurred with her opinion that the site was unsafe and that there was a risk of serious personal injury, Ms Shiffer informed Ms Han and Mr Zhou that she would issue prohibition notices which would take some time to draft.

26. Ms Han had to leave the site because her children had been waiting in the car. Mr Zhou and the workers also left the site. Finding herself alone in the property, Ms Shiffer telephoned Ms Han who informed her she was to give birth the next day and that Mr Zhou would therefore return to the site. Ms Shiffer telephoned Mr Zhou who was stuck in heavy traffic and arranged to meet Ms Shiffer at an agreed venue. After waiting an hour, Ms Shiffer abandoned the proposed meeting, having been informed on the telephone that Mr Zhou was still stuck in traffic. She sent the prohibition notices to the office address which had been provided by Ms Han.

27. The following day, Ms Shiffer received a text message from Mr Zhou, which informed her that Ms Han had given birth and he did not have time to deal with other matters. He stated that the architect had attended the site, that everything needed to be updated and 'it has been done'.

28. Ms Shiffer returned to the site on 30 August 2019 with Ben Caines, another regulatory inspector of health and safety. Upon arrival they found two workers operating power tools within the first floor at the rear of the house. These workers ceased what they were doing and left. Mr Caines took a series of photographs of the rear and side of the property.

29. Yang approached Mr Caines and Ms Shiffer and they walked to the rear of the property. Yang wrote his name, Yang Gao Gin, in Ms Shiffer's notebook. Because an attempt to discuss matters was not possible due to language difficulties, Mr Caines telephoned an interpreter service used by the HSE. With its assistance it was ascertained that Yang lived in Heckmondwike, but no specific address or landlord was given. Yang produced a bus pass in his name. Ms Han suggested to Mr Caines in cross examination that a meaningful conversation had not been possible because a Cantonese rather than Mandarin interpreter had been used. Mr Caines was doubtful about that, because he thought the interpreter would have explained the problem at the time but nothing turns upon that.

30. Work had been undertaken on the property overnight. Three or four acrow props had been installed in the kitchen to support the ceiling along the edge of the sidewall. Similar props had been installed in the bedroom above the kitchen, to support the ceiling and roof structure. The open edge of the bedroom, at the rear, had wooden rails fitted.

31. Yang contacted Mr Zhou by telephone. Mr Zhou reiterated the content of his text message, saying that the architect had visited with him. Ms Shiffer advised that he should appoint a competent manager in building work and that she was considering serving an improvement notice. He said he would ask the architect to put in writing

the safety measures which had been undertaken to confirm the structural safety of the property. Ms Shiffer asked for a copy of the contract. Mr Zhou said he would send it shortly, after he had retrieved it from the office.

32. On 3 September 2018 Ms Han sent a text to Ms Shiffer to inform her that she had retrieved the prohibition notices from the office and that she intended to appeal and lodge a formal complaint with her manager. She then telephoned Ms Shiffer and informed her that she did not intend to instruct someone to manage the project and that the work at height was not high-risk. Ms Shiffer asked for the contact details of the architect and the copy of the contract with the builder.

33. Later that day Mr Bourke telephoned Ms Shiffer. He informed her that he had attended the site that day and that, even with the acrow props in place the building could collapse. He called later and said he had advised Mr Zhou to obtain a report from a structural engineer.

34. On 7 September 2018 Ms Hirst, principal inspector of HSE, met with Ms Han and Mr Zhou at the HSE office. Ms Towey was in attendance. She was to take over conduct of the case from Ms Shiffer. Ms Hirst said they needed reassurance that the risk of structural collapse and fall from height were mitigated. She asked Ms Han to provide details of the principal contractor or builder. Ms Han said work on the building had stopped although she was still paying the builder. Ms Towey advised Ms Han and Mr Zhou to employ a competent site manager with relevant construction experience to manage the site and associated health and safety risks.

35. Ms Shiffer collated materials in response to Ms Han's complaint and appeal. This included taking witness statements from Mr Bourke, Mr Chatterley and Ms Young. Although she had a telephone call from Yang in which he promised to furnish his address, he did not contact Ms Shiffer again.

36. On 27 November 2018, Ms Towey visited the property and met the new builder who had taken over the works from Yang. She was satisfied that the risks which had led to the serving of the notices had been satisfactorily addressed.

The Law

37. Section 22 of the Health and Safety at Work Act 1974 (HSWA) 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 give particulars of the reasons why 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.

38. By section 24(2) of the HSWA, a person on whom a notice is served may 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. By section 82 (2) of HSWA, modifications include additions, omissions and amendments.

39. Section 2 of the HSWA provides for a general duty on employers to ensure, so far as is reasonably practicable, the health and safety and welfare at work for his employees and a similar duty applies, under section 3, to an employer and persons who are not in his employment.

40. The Work at Height Regulations 2005 imposes on an employer the duty to ensure that work is not carried out at height when it is reasonably practicable to carry out the work safely otherwise. When work is carried out at height there is a duty on the employer to take suitable and sufficient measures, so far as is reasonably practicable, to prevent any person from falling a distance liable to cause personal injury.

41. The Construction (Design and Management) Regulations 2015 imposes duties on contractors and domestic clients to ensure the stability of structures and to prevent danger when dismantling any structure or reduce the danger when that is not reasonably practicable.

Discussion and analysis

Was there a risk of serious personal injury from the matters described in Prohibition Notice PN-TBS-290818-01

42. The photographs taken by Ms Shiffer on 29 August 2019 and by Mr Caines on 30 August 2019 depict substantial openings in the rear wall of the property at ground floor and first floor level. It is not disputed that the dormer window extension and porch beneath had been dismantled by Yang who supervised the other workers. A blue tarpaulin sheet hung from the guttering in the roof to the first floor, covering the opening at that level.

43. The removal of the dormer window involved working at a height of above 8 feet. There is no first-hand evidence of how that occurred. The respondent relies upon a

witness statement taken from Ms Kelly Young, a decorator who had been working in the property next door and who raised the concern about the safety of the operation on 29 August 2019 with the HSE. According to the statement of Ms Young, two or three Chinese men had been standing on two by two pieces of kiln-dried wood which were placed on top of breezeblocks. Both breeze blocks were straddled over open areas to all floors at a height of 2.5m. She said that the men used a long-armed lump hammer whilst balancing on the wood and breeze blocks, in order to knock out the rear dormer.

44. Ms Han disputed this account and said it was fake. She gave an account of the demolition of this part of the property which she had obtained from Yang on 29 August 2019. At paragraph 24 of her witness statement she stated that the workers undertook brickwork from foundation to ground floor level and it was not necessary to have scaffolding at that height. She stated that the first-floor dormer window had been removed easily from the inside as there was no brick wall or installation in the dormer window but only plasterboard, so there was no work at height.

45. Even on the account put forward by Ms Han, we are satisfied there was a serious risk of injury in conducting the work in this manner. Any worker who had been breaking down the exterior wall, whether it was plasterboard or brick, would have been at a height in excess of 8 feet from the ground. There was no guardrail or other means of protection at this level to prevent a fall.

46. Ms Han said in her evidence that Yang had used a tower scaffold from the interior, inside the bedroom. She said this was sufficient to eliminate any risk of falling when demolishing the dormer window. We did not accept that a tower scaffold was or would have been used. Ms Han first made reference to its use for this purpose in cross examination of Ms Shiffer. She made no reference to it when describing how the dormer was demolished, at paragraph 24 of her witness statement. A tower scaffolding as a means of protection from falling would have been unsuitable if the dormer window had been demolished from the inside because it was not a handrail.

47. We accepted the evidence of Ms Shiffer in respect of the conversation about scaffolding. We think it highly unlikely that scaffolding of any form was present on site at the time of Ms Shiffer's visit. If it had been there and Ms Shiffer had refused to enter the premises to view it, we would have expected Ms Han to have taken a photograph of it with her phone or tablet, as she did with the later photographs of the work on her neighbour's property.

48. We did not accept the hearsay account put forward by Ms Han about the dormer window having been demolished from the inside. Although adopting a preference between two hearsay accounts is less than desirable, namely that of Yang or Ms Young, we think it more likely that the description provided of the demolition of the dormer window from the exterior, with workers balancing upon planks is correct.

49. Ms Han disputed the validity of the contents of Ms Young's statement. Firstly she stated the wrong postcode was contained in her statement. Given this was not Ms Young's address we do not think such a small error is of any significance. Secondly, she stated that Ms Young was in 'the same team' as her neighbour and he had an agenda to create trouble because of the extent of the proposed building

works. This argument is undermined by the inconsistencies in Ms Han's account about whether she had spoken to Mr Chatterley before the inspection, considered at paragraph 21 above. It is based upon a hypothesis which is unsupported by any evidence. Ms Young's report to the HSE was on 23 August 2019, a matter of days after Mr Chatterley had taken occupation of the neighbouring property. The proposition that Mr Chatterley had arranged for his decorator to submit false reports, and in such a short timeframe, is unlikely. Thirdly, Ms Han stated that it would not have been possible for Ms Young to have seen the workers operating at height. As is apparent from the photographs Ms Young submitted the following day, she would have had a clear view of these workers from the neighbouring property and could have seen that no acrow props had been erected in that wall which faced the property of Mr Chatterley. Fourthly, Ms Han considers it incredible that the other decorators who were working with Ms Young would have said they would "*place bets on what point of the roof would collapse first*", as Ms Young described. Ms Han's criticism takes the remarks literally. Construed in its more likely ironic colloquial context, it adds plausibility to Ms Young's statement rather than undermines it. Fifthly, Ms Han submitted that the qualifications described by Ms Young were false. She said she was overqualified for the decorating trade. In cross examination Ms Shiffer explained that Ms Young had set up a business of interior decorating, having previously trained and worked in construction. There was no reason to doubt this.

50. The rejection by Ms Han of the account of Ms Young about how the dormer window was demolished is based solely on the alternative explanation provided to her by Yang. Ms Han did not call him to give evidence, nor produce a witness statement from him. He had been in contact with her during these proceedings and at the preliminary hearing it had been anticipated he would be called. In contrast the account of Ms Young was in a written statement taken by Ms Shiffer, signed by Ms Young and supported by a declaration of truth which stated she would be liable to prosecution if she stated anything in it she knew not to be true.

51. Taking the trouble of reporting this to the appropriate authority would suggest a motivation based on concerns of safety. Ms Young was a qualified construction site manager with site management safety training scheme and NVQ level 6 in construction site management and engineering. This knowledge and experience would make her more alive to the level of risk. The photographs taken by Ms Young of wooden planks resting on newly built concrete walls is consistent with the working platform which she had described. The account of the working practices by Ms Young were not undermined, but supported, by the subsequent inspection of Ms Shiffer who found no suitable scaffolding equipment. It was unlikely that any scaffolding had been removed because there remained further work to be done at height.

52. In conclusion therefore, we find there had been a risk, or real possibility, of serious personal injury from working at height in the circumstances found by Ms Shiffer and there remained a future such risk. The workers had been standing on planks resting upon concrete walls whilst manipulating a long-armed lump hammer to demolish an upper story exterior wall. The potential for them to slip and overbalance and to fall a distance of more than 8 feet to the ground was significant.

53. Falls from height are the leading cause of workplace fatalities in the UK. Ms Han submitted that the severity of any injury rises proportionately with the distance fallen.

That is undoubtedly true, but falls from heights of less than 2 m (6 feet) have been known to result in fatal injuries. We find that there was a risk of injury which could and would have been serious on 29 August 2018.

54. At the commencement of the hearing, the issues included whether Ms Han had, herself, been in breach of one of the duties to which the relevant statutory provisions applied. In refining the issues, it was accepted that was not necessary, for reasons we explain in our considerations about control. However, for the purpose of our scrutiny of the notice which Ms Shiffer issued, on 29 August 2018 there was ample material from which she could conclude there had had been or was likely to be a breach of a statutory duty under section 3(1) and (2) of the HSWA and regulation 6 of the Work at Height Regulations 2005. An employer or self-employed contractor had failed to conduct the undertaking in such a way as to ensure, so far as had been reasonably practicable, persons had not been exposed to risks to their health and safety. An employer had failed to take suitable and sufficient measures to prevent, so far as had been reasonably practicable, any person falling distances liable to cause personal injury.

55. Ms Han drew our attention to the guidance issued by the HSE in the document entitled *Enforcement Policy Statement* and *When a health and safety inspector calls*. She said that Ms Shiffer had failed to comply with the guidance because a proportionate response was required and one of the actions which it is stated that an inspector might take would be to give advice. Ms Han said there were acrow props on site and Ms Shiffer could have given advice to install them immediately. She also suggested that a prohibition notice was excessive and Ms Shiffer should have made further enquiries of who was responsible before issuing the notice.

56. We did not accept these criticisms of Ms Shiffer. She was not a structural engineer or a builder and did not have the expertise to advise on how to rectify the dangers in the most suitable way. She recommended, appropriately, the appointment of a suitable contractor to manage the property and put it into a safe condition. Ms Shiffer made appropriate enquiries but the information she received left many unanswered questions and the danger required immediate safety action. Ms Han's response to the identification of the risks was unsatisfactory and did not reassure Ms Shiffer that the matter was being taken seriously. In those circumstances it was reasonable of her to conclude that a lesser order, such as by way of an improvement notice or notice of contravention, would have been inadequate to safeguard people from danger.

57. At paragraph 73 of her witness statement, Ms Han invited the Tribunal to find racial discrimination or unfair treatment by Ms Shiffer in the performance of her official duties, although Ms Han did not put the allegation of race discrimination in cross examination. She relied upon the comparative treatment of her neighbour, Mr Chatterley, whose builder was photographed working on two planks resting upon a small metal framework, at first floor level. The Appellant reported this to the HSE. In her evidence Ms Towey said that she had visited the property in response to the complaint and spoken to the builder. She served a notice of contravention on the principal contractor for working unsafely at height.

58. This comparison did not establish the complaint of unfair treatment or discrimination against Ms Shiffer. The difficulties which she was confronted with

were not the same as those Ms Towey addressed. Ms Han denied there had been work at height when spoken to by Ms Shiffer, providing an account from her builder that the demolition of the first floor outer wall had been undertaken from inside the property. This contradicted the account given by the notifier, both as to the manner of the deconstruction and the time when it was done. There were grounds for Ms Shiffer to believe the extent of the risks were not being accepted or understood by Ms Han. In these circumstances the strongest form of corrective action, by way of service of a prohibition notice, was entirely appropriate. There was no evidence to suggest Ms Towey faced a similar reaction or denial of unsafe working practices from Mr Chatterley or the principal contractor when she visited. The lesser form of action in the form of a notification of contravention was suitable to that situation.

Was there a risk of serious personal injury from the matters described in Prohibition Notice PN-TBS-290818-02

59. The photographs taken by Ms Shiffer on 29 August 2019 demonstrate clearly that the upper wall of brick on the side wall, where it met the corner of the rear wall, was unsupported from beneath. Bricks and mortar immediately beneath had been removed. Photographs taken by Mr Caines on 30 August 2019 demonstrate that, in addition, part of the upper section of the side wall which connected to the roof joists had been removed. In Mr Moore's opinion, this was very unstable with a risk that not only that section of the rear wall could collapse, being entirely unsupported beneath, but that it could bring part of the roof down with it.

60. Ms Han disputed this. She pointed to a frame attached to the inside of the bricks on the upper wall which rested upon a wooden beam. The beam ran across the top of the ceiling to the rear wall of the bedroom. We did not accept this provided any satisfactory support to the upper external side wall. The wooden framework was narrow timber attached to no more than plasterboard or plasterwork. The brickwork was extensive and of considerable weight. It was not being adequately supported by the fragile plasterwork and timber which could easily have yielded to the substantial gravitational pressure from the upper wall at any stage.

61. We therefore agree with the assessment of Ms Shiffer, expressed in the prohibition notice, that there was no suitable support to ensure the risk of collapse of part of the building.

62. One area of dispute concerns the extent to which Yang had removed supporting walls at the rear. In evidence, by use of a photograph of the property in 2016, Ms Han established that the principal deconstruction at the rear of the property by Yang had been of the dormer window and the porch beneath, none of which comprised a supporting wall. The photographs were of the exposed rear section of the original property and the changes to the supporting wall had been undertaken when the original dormer extension had been constructed. To her mind, therefore, Ms Shiffer was mistaken in believing that Yang had deconstructed a supporting wall at the rear, as expressed in the notice, because the gaps she saw at the rear were no more than the internal doorway which led into the porch, at ground level. We recognise this potential for confusion. On 29 August 2018 Ms Shiffer did not have the benefit of the photographs of the property from 2016 and knowledge of the earlier works to add the dormer window and porch beneath.

63. Notwithstanding this, the overwhelming evidence is that there was structural instability due to the removal of a significant part of the sidewall which met the corner of the rear wall. Removal of these sections at the corner, left a suspended row of brickwork somewhere between 12 and 15 feet above ground level. Supporting acrow props were placed beneath on the evening of 29 August 2019, after Ms Shiffer's visit, when the architect Mr Josh Loynes attended with Mr Zhou. The addition of these supports was compelling evidence that this part of the building had been unsafe.

64. There was a risk, or real possibility, of injury because of the structural instability created by the removal of the corner of the rear and side wall up to first floor level. There could have been a collapse in this area. Anyone standing in the vicinity, in such circumstances would have been likely to be injured by the falling building material. Any such injury would have been serious. A single brick typically weighs 3 kg (6 ½ pounds). A large section of masonry, multiple roof timbers or timbers from the unsupported roof and first floor could have led to fatal injury. At the time Ms Shiffer issued the notice she had good reason to suppose that the property was being occupied by the workers, because of the bedding she had seen in the living room. The risks were significant.

65. The poor state of workmanship generally was highlighted by Ms Han's building inspector, Mr Bourke. In a witness statement taken by Ms Shiffer, dated 17 September 2018, he stated he had visited the property on 3 September 2018 and found evidence of numerous contraventions of building regulations, probably the worst he had seen in 20 years. He expressed the opinion that the people in charge were not competent to manage the construction work and those doing the building work were not competent to do that. Ms Han invited the tribunal to treat this evidence sceptically. She said Mr Bourke had told her that it was the first time in 40 years he had had to provide a voluntary statement to the HSE and he had received five calls in one morning from Ms Shiffer. He had said he had to maintain a good working relationship with HSE and had to cooperate with them. The inference we were invited to draw from this reported discussion was that his witness statement was not true. That was not what Mr Bourke had said to Ms Han. Not had she called him to give evidence. He had signed the same declaration of truth on his statement as Ms Young, with reference to the risk of prosecution if he included details he knew to be false. The content of Mr Bourke's statement fell into a consistent theme which emerged from the evidence that there had been poor planning and execution of work on this extension.

Were the activities to which the relevant statutory provisions applied carried on by or under the control of the appellant?

66. Ms Han focused upon the concept of a 'duty holder', in submitting that she was not the responsible person within the meaning of section 22 of HSWA. That term is not used in the HSWA, nor in the Work at Height Regulations 2005 or the Construction (Design and Management) Regulations 2015. It is used by the Concerns Team of the HSE as can be seen from the email in response to Ms Young.

67. The legislation uses a number of different terms to describe to whom the relevant statutory duties apply. For example, under the Construction (Design and Management) Regulations 2015 definitions of client, contractor, designer, domestic

client, principal contractor and principal designer are to be found regulation 2 and each would fall within a general characterisation of duty holders for particular purposes.

68. By section 22 of the HSWA a relevant statutory provision must apply to the activities carried on. In this case that would be one of the duties under sections 2 and 3 of the HSWA, the Work at Height Regulations 2005 or the Construction (Design and Management) Regulations 2015. Those duties applied to the work being carried out to this property and Ms Shiffer reasonably concluded a number of the provisions had been contravened.

69. That being the case, were those activities carried on by or under the control of the persons upon whom the notice was served? These are alternatives. The contractor by whom the works are undertaken is likely to have contravened the relevant statutory provisions. That may have been Yang, although identification of his details by way of his address and his particular involvement overall in the project were not clear.

70. In contrast, the person *under whose control* the activities are undertaken may not be the person liable for a breach of the duties under the relevant statutory provisions. He may not be the employer or self-employed contractor who owes the duty. We consider the language of section 22 was intentionally expressed in this broad and general way, because the inspector who is faced with a dangerous site must act without undue delay. Detailed factual and legal analysis to determine the precise status of contractors and workers may not be possible. It can be difficult to decide these issues without a multi factorial assessment.

71. Initially the respondent argued that the works had been carried out by Ms Han or in the alternative had been carried out under her control. In closing submissions Mr Wright pursued only the latter.

72. It does not necessarily follow that because Ms Han owned the property that the activities were carried out under her control. A freehold owner of premises might divest himself of control of his premises or a particular project. This was not such a case. Ms Han and Mr Zhou each played a significant role in the extension of the property. Ms Han applied for planning permission in her own name, specifically struck out the option of appointing an agent in the application and took responsibility for any site visit, instructed Mr Bourke, the building control inspector, appointed a builder who abandoned the project at cost to Ms Han, to be replaced by Yang who she also appointed. Ms Han instructed an architect, Mr Josh Loynes, met Mr Bourke to enable him to inspect the drain foundations and damp-proof course. Mr Zhou arranged for the delivery of steel beams, using the office address of Ms Han and arranged payment. Ms Han paid Yang £2,500 in cash every week.

73. On the day the inspector called, Ms Han did not provide the name of anyone else who had responsibility for the works. She did not provide a written contract, which she said was in her offices, a document which has not been produced to this day. Although Yang could be seen to be responsible for other workers on site the extent of his involvement in the project was not entirely clear. No address was given for Yang on the day.

74. We find Ms Han took a leading role in coordinating and orchestrating the building project. This is not typical in a construction exercise of this type. Albeit a domestic extension, it required a level of regulatory and technical expertise which is often undertaken by a building contractor or structural engineer who would manage the project. In the absence of such a person, the only reasonable conclusion was that the activities were under Ms Han's control. That was a conclusion Ms Shiffer drew, on 29 August 2019 and which we draw from the greater information now available. Ms Han was the obvious person upon whom to serve the notice. She had the control over the premises to refuse access to the builders and to authorise what could and could not be done on her property. By serving the notice in the name of Ms Han and Mr Zhou, Ms Shiffer safeguarded those at risk by the most immediate and practical means at her disposal. That was appropriate.

75. We have not focused on the involvement of Mr Zhou because he has not appealed the notice. In his evidence, he said this was because the prohibition notice was not in his name. Mr Wright invited us to modify the notice if we affirm it, to substitute Yudong Zhou for Daniel Zu.

76. We did not consider that necessary. On the evidence of Ms Han and Mr Zhou Daniel Zu is a name used by Yudong Zhou. He spelt it for Ms Shiffer. Mr Zhou cannot avoid legal responsibility for compliance with the notice because of the name Ms Shiffer had written upon the notice, in these circumstances. It is the identity of the person which is relevant and that is not in doubt.

Conclusion

77. We affirm both notices.

78. For the reasons set out in paragraphs 62 and 63, we are satisfied that the structural instability arose from the removal of the brickwork where the side wall met the corner of the rear wall to first floor level. We have had the advantage of forming this view with the benefit of photographs of the property which were not available to Ms Shiffer. Our duty is to modify the notice if the evidence warrants that. We are satisfied it does and we have included the two small additions to notice PN-TBS-290818-02 which are set out above in the judgment.

Employment Judge D N Jones

Date: 2 December 2019