EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101412/2020

Held via CVP on 7, 8, 9 and 10 June 2021
Deliberations 5 July 2021

Employment Judge C McManus

21CC Group Limited	**Appellant** **Represented by:** **Mr Andrew McGee** **Counsel**
Thomas Stephen Reeves **HM Inspector of Health and Safety**	**Respondent** **Represented by:** **Mr Hugh J Olsen** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Improvement Notice serial number P 20200219-TSR-1 issued to the Appellant on 19 February 2020 is cancelled.

REASONS

Background

1. The appellant appeals against the Prohibition Notice served on them by HM Inspector of Health and Safety Thomas Stephen Reeves on 19 February 2021. The respondent resists the appeal.

2. The appellant's Grounds of Appeal were set out in their Consolidated Further and Better Particulars of 14 May 2020 (JB45) as follows:-

> "…. *the conditions laid out in s22 of HWSA 1974 for the issue of a prohibition notice were not met in this case in that:*
>
> *(a) there was no risk of serious injury arising from the activities cited in the Notice and/or any inherent risk (if such existed) was*

in any event controlled by appropriate measures or in reasonably practicable way or was negligible.

(b) the activities cited in the Notice were not to be recommenced or carried on; there were and are no reasonable grounds to believe that those activities were or are likely to be carried on.

Further, to the extent that the Tribunal is required to have regard to the Respondent's expertise, that expertise was, in the context of the issuing of this Notice, limited, and the Respondent therefore fell into error.

The Respondent relies on assertions in relation to what is said to be accepted practice (see, for example, [10a] and [34] in the Respondent's document). The Appellant will point to what is and has in fact been industry-standard and safe accepted practice and the HSE's knowledge and acceptance of this.

For the avoidance of doubt, the Appellant does not accept that the activities which were the subject of the Notice involved a contravention of either s2(1) HSWA 1974 or Regulation 26(1)(b) and

(c) ER 2014. "

3. The respondent resists the appeal against the Prohibition Notice. The respondent's skeleton argument set out their resistance on the following grounds: -

"1. *The Prohibition Notice P 20200219-TSR-1 dated 19/02/2020 [JB1] was issued correctly. The Respondent relies upon the reasoning set out in the Respondent's letter of 4 March 2020 [JB3].*

2. As stated in the letter, the Respondent relies upon the HSE Guidance Document "Explosive Regulations 2014 – Guidance on Regulations - Professional firework display operators" [JB288] and in particular: -

(i) paragraphs 44 and 45 [JB299]

"44 When storing or working on fireworks, the primary initiating events that need to be considered are fire or the accidental ignition of the fireworks by other means. The principal hazards that need to be considered are the spread of fire, the propagation of any explosives event, and the potential for persons to be struck by fireworks effects.
45 The safety measures taken should ensure that:

- *the likelihood of an event involving fireworks is minimised.*
- *an event involving fireworks being worked on will not communicate to fireworks in storage.*
- *people present on site will be able to evacuate before the fireworks… become involved in any outbreak of fire…*

(ii) paragraphs 85-91 [JB306-307] and in particular paragraph 89 [JB306].
"85. Storage buildings should be separated from production buildings and other areas where fireworks are worked on or processed…
89. Fireworks should only be removed from their transport packaging in an appropriate place. Normally, this will be in a production building, a picking store, or another place where an event involving the fireworks being handled will not communicate directly with fireworks in storage."

(iii) Further the Respondent relies upon the HSE Guidance Document L150 "Explosive Regulations 2014 Safety Provisions Guidance on Regulations" [JB174] paragraph 107 [JB198]

"107 The precautions are covered in detail in paragraphs 110-173. In summary they include ensuring that any place

of manufacture, processing facility, store, storage area, container or cupboard is:

- *…not used for other activities at the same time that explosives are being manufactured, processed or kept, e.g., a store should only be used to keep explosives and the tools or implements necessary for the safe keeping of those explosives"*

and paragraph 154 - 156 [JB206] and, in particular, paragraph 156

"156 The key measures to limit the extent of the fire and explosion are to:

- *separate storage buildings from production buildings and areas where explosives are packed or processed."*

3. *The ceasing of unpacking and packing fireworks in the ISO containers was reasonably practicable for the Appellant in fulfilment of its duty under section 2(1) of the Health and Safety at Work etc Act 1974. The cessation of unpacking and packing fireworks in the ISO containers and the creation of a picking store were appropriate measures in terms of Regulation 26 of the Explosives Regulations 2014.*

4. *The reasonably practicability of not unpacking and packing fireworks in the ISO containers is demonstrated by the Appellant's ability to create a picking store, and the practice of the fireworks industry as spoken to by HM Principal Inspector of Health and Safety (Explosives) Martyn Sime.*

5. *The appropriateness of this measure is demonstrated by the HSE Guidance documents. These documents were produced after consultation with industry and in particular the firework industry. Martyn Sime was involved in the production of the guidance.*

6. *The Respondent notes that the CBI Explosives Industry Group Risk Assessment for Explosives including Fireworks [JB383] is*

consistent with the HSE Guidance- see [JB418], in the Assessment of Bulk Storage of Fireworks in an ISO Container in the section "Dispensing of materials into and between the ISO containers" identifies the risk of "Ignition caused by dropping box or product from box. Potential for fire spread to other containers" and recommends

"Boxes are not opened within the ISO container; dispensing takes place remotely from the container."

7. *The Respondent's position is that in light of the HSE Guidance that has been produced it is for the Appellant's to prove either (a) the HSE Guidance is wrong, or (b) the Appellant could fulfil its duties under the HSWA 1974 or the Explosives Regulations 2014 by alternative means. The Respondent submits that Dr Tom Smith's opinion should not be accepted.*

8. *Dr Smith's opinions that: -*

(1) *"Picking of fireworks in a store is not an operation that inevitably leads to an unacceptable risk.*

(2) *The measures in place by 21cc and the appearance of their magazines demonstrate that they understand the risks involved and had determined that their procedures represented the lowest form of risk,*

(3) *There was no unacceptable or even high risk to the operator (or others on site) by carrying out this operation*

is not supported by evidence, nor is it supported by adequate reasoning."

4. The Respondent sought that the appeal be refused on these grounds.

Proceedings before the Tribunal

5. A Preliminary Hearing had taken place for the purpose of case management. On agreement, the appeal was before me sitting alone rather than a full Tribunal panel. This appeal hearing took place remotely via the Cloud Video Platform (CVP). Parties produced a joint bundle of documents (JB1 – 434) and an additional joint bundle (AJB 1 – 132). Both were in PDF digital format only. Documents are referred to here by page number in the Joint Bundle ('JB') or Additional Joint Bundle ('AJB').

6. Both parties were ably professionally represented before me. The appellant was represented by Andrew McGee, instructed by Mark Brookes (Clyde & Co Solicitors). The Respondent was represented by Mr Olsen, instructed by Laura McCabe (Anderson Strathern). I am grateful to all representatives for their professional representation in this matter.

7. Prior to hearing the evidence, a video was shown which was relied upon by the respondent. All evidence was taken on oath or affirmation. Witness statements were used. All witnesses adopted their respective statement (or, in the case of Dr Smith, his report). Some supplementary questions were allowed, followed by cross examination and the opportunity for any re-examination. For the respondent, evidence was heard from the individual who had issued the Prohibition Notice (then HSE Inspector Thomas Stephen Reeves) and Martyn Sime (HSE specialist Principal Inspector of Health and Safety, acting Head of the Inspectorate and acting Chief Inspector of Explosives). For the appellant, evidence was heard from John Laidlaw (Appellant's Business Manager), Nick Barrass (Head of Production), George King (Previously Appellant's Display Manager), Geoff Crow (Appellant's Manging Director) and Dr Tom Smith (independent explosives consultant with CarnDu Limited, Secretary of Explosives Industry Group (EIG) and Chairman of British Pyrotechnics Association (BPA)). Dr Smith was called both as an expert witness and a witness to certain facts.

8. On agreement, the appellant's Managing Director (Geoff Crow) and Dr Tom Smith were permitted to be present to hear all of the evidence.

9. It was agreed that written submissions would be made following the conclusion of the evidence. These were submitted to the Tribunal and exchanged, and then written comments on the other party's submissions were submitted to the Tribunal and exchanged, all within agreed time periods.

Findings in Fact

10. The following material facts were admitted or found to be proved:

11. The appellant is an events services business. Their supply services include event design and management, technical production for shows and events, fireworks displays and a range of special effects. The fireworks side of the business can be engaged to put on a range of events, from large-scale shows, including fireworks displays for significant crowds, typically for up to 75,000 on Guy Fawkes night, to work for private individuals and providing fireworks for parties and weddings.

12. The company's main offices, including the fireworks fusing area, are based at Hopetoun Sawmill, Hopetoun Estates, Edinburgh ('Sawmill'). They also operate out of a warehouse with office facility at 2 Grange Road, Livingston. Separately the Company has had a storage area for fireworks, for several years, at Binns Mill, Hopetoun Estate, South Queensferry ("Binns Mill Site"). The Binns Mill site operates under a HSE Explosive Licence. The Sawmill site is a local authority licenced area. The Binns Mill and Sawmill sites are approximately 2 miles apart.

13. Geoff Crowe (Managing Director) is the Policy Holder and is responsible for the overall running of the appellant Company. In February 2020 he was supported by a Managerial Team who at that time included John Laidlaw (Business Manager), Nick Barrass (Head of Production) and George King (Display Manager), Emma McIntyre (Operations Manager) and Julie Ogilvie (Event Producer).

14. A show is designed on a computer using specialist software. This produces a 'picking list' of the fireworks required to build that programmed show. This picking list was provided by the Display Manager to the picking team. Prior to the issue of the Prohibition Notice which is now appealed,

the picking team would go to the ISO containers at Binns Mill and would take out the required products for the planned show from each box within each ISO container, as per the picking list, and put them into another box for transit to the fusing area at the Sawmill site. Different product types were separated for fusing. Plastic bags were used to stop the product from getting wet. The product was transported using the UN standard transport boxes. At the Sawmill site, the fireworks were fused in the correct order for the sequential order of the display and prepared for delivery to the customer. The fireworks displays ranged from 10 fireworks to thousands (for a 30-minute display). Every product (i.e., firework) requires to be picked and labelled in the sequential order that they are required for the display, so that they can be properly fused, and the display appears as per the computer design. One categorisation of fireworks is by hazard type ('HT'), ranging from HT1 – HT5. The hazard type categories fireworks, based on the degree of likely outcome in an accident environment. The hazard type which is likely to cause the most significant damage is HT1. The ISO containers at Binns Mill contained HT3 and HT4 fireworks.

15. The appellant's standard practice is to store the same products together, to assist the picking process. They store the same types of shells in terms of size together, for example 2.5 inch or 5 inch. They also store the same number of shots together; all the 49 shot cakes were stored in the same container. This storage system assists with the picking process as it means all the same type of product are in one container, normally in a range of colours. All the products are stored in the UN cardboard boxes, in which they arrive.

16. When designing the fireworks displays, the appellant seeks to design a display which uses full boxes of fireworks e.g., 25 shot cakes come in boxes of four, so a display design would normally be based on multiples of four so that full boxes were being picked and used and it was a full box that was then being transported. This was not practical for all displays. If a full box of a particular product was not required for a display, the required firework was picked and placed into another box for transportation to the Sawmill site for labelling and fusing to take place.

17. There is a 2 tonne n.e.c. (net explosive content) limit at the Sawmill site, under the Local Authority licencing regime. Some of the displays organised by the business use so many fireworks that that limit would be exceeded. In order not to breach that limit at the Sawmill site, picking is sequenced so that not all fireworks in such a large display are at Sawmill at once. That requires co-ordination between the two sites.

18. There is a supervisor for this picking process, who oversees the activity, and who is responsible for transporting the picked products to Sawmill. During quiet periods, picking would occur periodically. During busier periods, picking could be occurring daily.

19. The Appellant has in place a range of risk assessments and method statements for various activities, and these are reviewed and re-issued on at least an annual basis. This includes method statements for the handling of stock at the Binns Mill site. At the time of the Inspection, the procedures and processes used by the appellant at Bins Mill were as set out in Binns Mill Method Statement (JB125 – 129) and Binns Mill Stock Retrieval Method Statement (Pre-Prohibition Notice), February 2020 (JB56 – 58). These method statements set out a number of steps taken by the appellant to seek to comply with their obligations under the Explosive Regulations 2014. The method statement at JB56 states that it should be read "*in conjunction with the partnering Risk Assessment matrix*" and includes the following in the introduction: -

> "*This document outlines working methods and procedures employed by 21cc Fireworks and its staff in carrying out stock related operations….*
>
> *The procedures are to be followed when managing stock and are designed to:*
>
> - *Prevent an unplanned fire or explosion*
> - *Limit the extent of fires or explosions*
> - *Prevent fires spreading….*
> - *Protect people from the effects of fire or explosion."*

20. Employees who handle stock are trained on the methods used. Nick Barrass undertook the risk assessment review process, and it was then George King's role to put the firework related risk assessments (e.g., the risk assessment entitled "storing and retrieval of firework stock") into practice, as set out in the method statements. A statement of the appellant's approach to risk assessments is at JB 82 – 84.

21. The appellant is a full member of the British Pyrotechnics Association and a member of the Explosives Industry Group, both of which are industry bodies. The appellant has in place a Health and Safety Policy. The version of this at the time of the inspection is at JB 63 – 70, with the related Health and Safety Statement at JB71 and Health and Safety Procedures at JB 72 – 81.

22. Induction training is provided to all new starters, and this includes an explanation of the nature and types of product stocked and the risk assessments and method statements for working with the different items and in different parts of the business. The induction training is a mixture of paper-based learning and also hands on activities, where a new starter observes a more experienced team member undertake a set task, then the new starter repeats those actions under supervision. New starters are commonly placed on a two-week probation period and during this time their work is regularly inspected to ensure it meets the relevant standards and that they were operating safely. Internal inspections are undertaken on a regular basis for all employees to review their work and work areas. Good housekeeping is an important part of these inspections. Housekeeping is considered by the company to be an important area of work. The company seeks to attain consistently high standards of cleanliness in the containers and to ensure that the stacked boxes in the containers are stacked safely so as to not be at risk of collapse. There are weekly team meetings and housekeeping (including cleanliness and order in stock storage) is always one of the areas on the agenda. In these ways the appellant seeks to ensure that its employees are aware of the importance of good housekeeping in relation to stock.

23. George King worked for the appellant from 2008 until 2020. During his employment with the business, George King completed a number of

training courses, including the IOSH Working Safely Course, The British Pyrotechnists Association ('BPA') courses for 'Firers', 'Senior Firers' and 'Trainers'. The BPA Trainers course is that organisation's highest-level course. Having completed those courses, George King is enabled to train others to fire fireworks safely. The BPA was used as a point of reference for queries that the business had in relation to the Explosives Regulations 2014.

24. In his role as Business Manager, John Laidlaw is responsible for business development, developing client relationships, finance and administration, management of the Wedding Co-ordinator and work with retail customers. John Laidlaw has a general understanding about the appellant's products, including fireworks, but does not work with them on a daily basis and is not involved with the storage and transportation arrangements for professional category fireworks. In his administration role, John Laidlaw has been responsible for collating and submitting the required information for all of the Explosives Licence applications that have been made by the business to the HSE.

25. The first application made to the HSE for a new Explosives Licence was in 2014, which was to allow the business to store 25,000kgs n.e.c. ('net explosive content') of explosives at the Binns Mill Site, in eight x 20-foot containers. Prior to 2014, the Binns Mill storage area had been subject to licencing by the Local Authority, due to the amount of explosives being stored there being under 2,000kgs. At that time the business had five containers for storage. In March 2014, John Laidlaw submitted the 2014 application to the HSE, with the relevant supporting information and fee. Arrangements were then made for an HSE Inspector, Kate Howard, to attend site for a visit to review the area in question and to consider the application. George King was present on site at Binns Mill for that HSE Inspector's visit on Friday 11 April 2014, accompanied by both John Laidlaw and Nick Barrass. From their discussions on inspection of the containers, George King formed the impression that that Inspector was very knowledgeable about Fireworks e.g., she was aware of the difference between the different products (shells and cakes) and appeared to understand the appellant's systems of work. These systems of work and

processes were the same as those discussed with the HSE Inspector, Mr Reeves on 19th February 2020. During her visit in April 2014, Kate Howard did not raise any concerns with the systems of work or flag any major issues with the application for the Explosives Licence. She Inspector asked that they amend and re-issue the application, including the maps. This was done. She also advised that the company had to place an advert in the Queensferry Gazette to advertise what they were doing and there was a set period of time that they had to wait to see if there were any objections to the proposal. In addition, the HSE notified various agencies such as the Fire Service and Police, to put them on notice of the application and give them the opportunity to oppose the request. Having undertaken a detailed site visit in April 2014, the HSE issued an Explosives Licence in September 2014

26. In 2015, the company requested a variation to the licence. They requested that they be allowed to place 10 containers on the Binns Mill site, with overall storage to remain at 25000kgs. The Explosive Site Varying Licence, agreeing to 10 containers was granted by HSE on 14 August 2015.

27. In 2017, John Laidlaw applied, on behalf of the business, for a variation to the terms of the Explosives Licence for the Binns Mill site. The amount of explosives remained the same at 25,000kgs n.e.c., but there was to be a change to the way the explosives were stored, to allow greater volume for storage. The variation was to change from ten x 20-foot containers to six x 20 foot and four x 40-foot containers. That application to vary the Explosives Licence was approved without any need for a further HSE visit to site. Neither the Police not the Fire Service had any objections to the application.

28. In July 2019 the business applied to the HSE to vary the terms of the Explosives Licence once again; this time the number of containers were to increase to twenty, split into two separate blocks/compounds of 10 containers. However, the overall storage allowance was to remain unchanged at 25,000kgs n.e.c. (net explosive content). The application for this variation was submitted in July 2019, under reference

XI/4111/2102/4. In August, John Laidlaw contacted the individual at HSE who had been the contact for the previous variation application for an update as to progress. John Laidlaw was ultimately told that the variation application had been assigned to Inspector Thomas Reeves ('the Inspector'). On 25 October 2019, the Inspector sent an email to John Laidlaw. They spoke on the phone later that day and had a conversation about the application. John Laidlaw formed the impression from the Inspector's questions to him that the Inspector was proceeding on the basis that an entirely new application was being made, rather than a variation of an existing licence. John Laidlaw was clear that it was a variation required because the site was already in existence. The Inspector said that there was paperwork missing. He said he would get the full application and make further enquiries and would get back to John Laidlaw. On this call, John Laidlaw got the impression that the Inspector was not on top of matters and had not understood what had been applied for. They spoke about the variation and the Inspector said that he had some thoughts and possible suggestions which would make the processing of the appellant's application easier to agree. The Inspector thought it would make the application process smoother if the company reduced the overall amount of explosives they were allowed to store and the arrangements/layout of the containers. In the call with John Laidlaw, the Inspector made reference to the fact the variation would be easier to secure if the company reduced the amount of explosives from the already agreed 25,000kgs to 20,000kgs. John Laidlaw's position in that phone call was that the company were willing to listen to his ideas. It was agreed that a site visit would be useful to discuss this further. On 3 December 2019, the Inspector sent an email to John Laidlaw informing that he was not able to come to the site before Christmas, but that he would come in the New Year and hoped that he would be able to bring a colleague with him. In a further email from the Inspector to John Laidlaw, on 8 January 2020, the Inspector proposed that he visit the site on 19 February 2020, as he had a visit in the area on 20 February. This was agreed. At that time, it was proposed that the Inspector visit the site with a colleague. During the call on 25 October, the Inspector mentioned some guidance regarding the gaps required between the containers. John

Laidlaw asked if this guidance would be applicable to the company's existing containers. The Inspector replied by saying he was unsure as there were new guidelines introduced subsequent to the appellant's previous licence being granted. The Inspector's position at that time was that he was unsure if the company's application meant retrospective changes and that they would discuss this further on his visit. John Laidlaw understood that the reason for the HSE visit was to review the location and the area at Binns Mills available for the ten additional containers. Distance is important because there are set rules on separation distances, both between stores (e.g., ISO containers) and to other buildings, roads, etc.

29. Thomas Reeves ('the Inspector') worked for the Health and Safety Executive as an HM Inspector of Health and Safety Explosive Specialist with portfolio (Explosion Effect) from August 2017 until April 2021. Prior to that position, he had worked with the Ministry of Defence ('MOD'). In April 2021, he returned to the MOD to run his former team and has taken the position of MOD lead on Insensitive Munitions and Vulnerability. He is Chair of the Energetic Performance and Vulnerability Group (EPVG), a UK representative to the NATO working group AC326 Subgroup B, the Centre of Excellence in Energetic Materials (CoEEM) Technical Panel lead for Vulnerability and, Chair of the (IMAP) Insensitive Munitions Assessment Panel. He has a BSc Hons degree in Aerospace Systems Engineering and a Masters degree in Explosive Ordnance Engineering. Prior to his employment with HSE, he worked for the Ministry of Defence in the role of Graduate Engineer; Explosion Effect and Ballistic Modelling support; and Technical Secretary to the IMAP. In the role of Explosion effect and Ballistic Modelling support he undertook: consequence analysis on explosion events including trials, data analysis and predictive modelling; Quantitative Risk Analysis (QRA) to analyse the risk to service personal and the general public for the storage and handling explosives; developed tools to undertake QRAs; and participated in international groups for the development of consequence assessment tools for explosive events including the Klotz group. In his role as the IMAP Technical Secretary he undertook: the majority of the UK's IMAP assessments, whilst in post to evaluate the energetic response of the systems (ranging from flares, all

the way up to aircraft bombs and Torpedo systems) to fragment impact, bullet impact, shape charge jet, fast heating (fire), slow heating and sympathetic reaction; developed testing methodologies with the NATO community to evaluate the energetic response of weapon systems to the previously stated threats; and he represented the UK at international forums, including NATO, presenting the UK position to various stakeholder groups.

30. On 19 February 2020, the Inspector travelled from his home near Bristol to visit the appellant's sites to discuss and progress the licence variation that had been submitted under reference XI/4111/2102/4. He left home at approximately 4:00am to catch the 7:00am flight to Edinburgh. The Inspector had been due to attend that site visit along with another HSE Inspector, Phil Smith, who has more experience with regard to the fireworks industry. It was then agreed with the Inspector's line manager that he would do the inspection alone. The Inspector arrived at the Sawmill site at around 10:30 and met with John Laidlaw (Business Manager), George King (Display Manager) and Nick Barrass (Head of Production). John Laidlaw initially led the meeting with the Inspector because Geoff Crow was not on site. The Inspector, John Laidlaw, George King and Nick Barrass went to the on-site meeting room to discuss the licence variation. The Inspector told John Laidlaw, George King and Nick Barrass about his qualifications and experience in explosives. John Laidlaw, George King and Nick Barras formed the impression that the Inspector had limited specific knowledge of the fireworks industry. The Inspector spoke about the impact on the visit if he saw an activity that required him to take enforcement action (including how this would change the charging regime for his time on site from the licensing to the 'Fee For Intervention' system). They discussed various matters, including the quality of the mapping provided to date, the extent of separation between the current set of ISO containers on site used for explosive storage, legal entity confirmation and the fact that the other buildings located on site were derelict. Nick Barrass and George King were dealing with the Inspector's questions, and they were also asking him questions about the firework storage and process and what would be required. In response to Nick Barass and George King's questions the Inspector often referred to a booklet that he had with him.

The Inspector referred to this as the 'HSE Licencing Handbook'. which he stated was an HSE guide. He referred to that handbook often and appeared to be looking for answers there to the questions raised. On a number of occasions, the Inspector said that he would look into things that had been raised and would come back to them later with an answer. John Laidlaw, George King and Nick Barrass did not know what the handbook the Inspector was referring to was. They were aware of the LS150 Guidance. The Inspector was surprised that they were unaware of the handbook he was referring to. The Inspector expected the business to have a copy of the guidebook he was referring to. George King tried to find this HSE Guide / handbook on the HSE website but was not able to locate it. The document which the Inspector had with him and was referring to as this handbook was a beta version of a new HSE Guidance document, which had not been published externally and was not available outside the HSE at the time of his visit. That document was being worked on internally within HSE and was principally produced by Martyn Sime. That Guidance is the HSE Explosives Licencing Handbook (AJB 37 – 132).

31. The meeting between the Inspector, John Laidlaw, George King and Nick Barrass lasted around an hour, before it was agreed that they would go to the Binns Mill site. The Inspector travelled to the Binsmill Site with Nick Barrass. They had a general discussion regarding Nick Barass' role and what jobs the company undertakes. On arrival at the Binsmill site, the Inspector, Nick Barass, John Laidlaw and George King all discussed the general layout of the proposed site. The Inspector's position was that he had to check the site and operations as part of the process. The Inspector's position was that if he saw something he did not like then he would have to report it. The Inspector asked to see inside an ISO container. George King gave him a free choice and the Inspector chose to look inside container 1. George King believed all the containers to be in good order and did not seek to limit the Inspector's choice. At the time of the visit there were 10 ISO containers at the Binns Mill site, which together are referred to as 'the storage magazine' on the explosive licence. The containers are licenced for explosive storage on the licence XI/4111/2102/4. The Inspector's primary reason for entering the containers was that he wished to ensure that the container was suitable for the storage of explosives. Water ingress is a common issue for ISO containers. On entering the container, the Inspector recorded his

notes of what he saw in container 1. He recorded these notes in his HSE issued notebook reference 97232 on page 35 (JB 4). He did not record in his notebook that there was any debris in container 1. The Inspector saw some unsealed UN travel boxes in container 1. He asked why these boxes were open. George King told the Inspector that picking was carried in the stores. The Inspector recorded this in his notebook (JB4). The Inspector did not record in his notebook at that time that he had any concerns about this process. The majority of the Inspector's experience was with conventional military explosives, such as those contained with weapon systems. The Inspector was aware at that time that in the military environment it was completely unacceptable to undertake packing and unpacking of explosive items in a storage environment. The Inspector was also aware that, in general, it is a core principle of explosive safety that the minimum of explosives should be in a processing area during a process operation. The Inspector's understanding was that, by extension, processing activities should be separate from storage activities by default. At that time, the Inspector was unsure if there was any dispensation for undertaking processing activities in explosive stores in the fireworks store and he did not take any immediate action. The Inspector did not ask to look in any of the other containers at that point. George King freely admitted to the Inspector that picking was being carried out in the store.

32. The Inspector, George King, Nick Barrass and John Laidlaw then moved over to the area where the new containers were to be located, which at the time was simply a grassy area. They had a conversation about safety distances and how the containers were to be placed. The Inspector asked about derelict buildings that are located in the area, and it was confirmed that they were abandoned, and no one lived or worked there. There was discussion about materials and the possibility of alternative layouts. At this stage neither George King, Nick Barrass nor John Laidlaw understood there to be any warning or indication that the Inspector had a significant concern. They got back in the vehicles and drove back to the Sawmill site. The Inspector, Nick Barass, John Laidlaw and George King returned to the Sawmill site. Nick Barrass left the group as he believed that his involvement in the visit had ended with the inspection of the Binns Mill site. On return to the Sawmill site, the Inspector, George King and John Laidlaw returned to the meeting room. In the

meeting room the Inspector said that he had things to discuss and check with his colleagues re the appellant's processes and he would come back with any further information or queries.

33. Geoff Crowe arrived at the Sawmill site about 11.30am. He went into the meeting room where the Inspector, John Laidlaw and George King were. On his arrival, it appeared to Geoff Crowe that the meeting was coming to an end. Geoff Crowe did not perceive there to be any tension in the meeting. Geoff Crowe asked how they were getting on. John Laidlaw replied that they had reviewed the plans, had been down to the Binns Mill Site and that all was well in terms of the proposed alterations, but that the Inspector thought he needed to look into a query in regard to the processes. Geoff Crowe asked what the query was with their processes. The Inspector responded and said he believed that the company was picking from the stores, but that he wasn't sure if that was an issue or not. Geoff Crowe asked what the issue might be. The Inspector did not give a substantive reply. The Inspector said that he intended to discuss it with his team when he got back. Geoff Crowe perceived that conversation to be relaxed and conversational. Geoff Crowe told the Inspector that the company operated as per their Risk Assessments and Method Statements and that in their view picking was a safe working practice, which had been in place for a number of years and was in line with industry best practice. They discussed the L150 guidance, firework display operator subsector guidance and commercial firework storage guidance. The Inspector did not ask to see the Company's Risk Assessments and Method Statements.

34. There was no attempt by the appellant to avoid the suggestion that picking was being carried out. Geoff Crowe expressly confirmed that picking was being carried out. Geoff Crowe, George King, Nick Barrass and John Laidlaw position to the Inspector was that this activity was safe and met the current guidance. During the discussion after Geoff Crowe had arrived, the Inspector again referred to the HSE handbook / guidance booklet which he had with him. It was not a document that Geoff Crowe recognised. The Inspector referred to that booklet several times during the conversation, he appeared to 'flicking through it'. At times he was pointing

out various clauses or sections in the document. He was unable at that time to point to any particular section of the document in respect of any deficiencies in the appellant's processes. While looking through this booklet, the Inspector said that his experience was in munitions and not fireworks. The Inspector said to Geoff Crowe that he couldn't give an answer today and that he needed to discuss it with one of his colleagues. Geoff Crowe spoke to the Inspector about the company's processes to make sure that he understood their systems and what it was they were doing, as he wondered if the Inspector hadn't quite understood it properly. Geoff Crowe's position was that he believed he was meeting current industry best practice. The Inspector's position was that he would investigate this further and be back in touch. At no point in this discussion did anybody from the group refute that the packing/unpacking activity was being undertaken in the storage magazine. Geoff Crowe said that they could change the system if they needed to, if the HSE were able to tell them what the issue was and how best to rectify it. Geoff Crowe was content that the position was left that the Inspector would check the position with colleagues and come back to the appellant once he had a chance to do so. Geoff Crowe did not understand there to be any urgency. No time frame was placed on resolving the query and there was no suggestion of action being required in the immediate short term. When he was leaving, the Inspector made reference that he was due to attend another business in Fife. There was no suggestion that he would need to return to the premises at any stage. Geoff Crowe understood that the Inspector would be in touch with him in a few days. Geoff Crowe and the Inspector shook hands. George King walked the Inspector to his car, and they discussed where the Inspector could go for lunch. It appeared to George King that the Inspector was quite calm and relaxed at this point.

35. The Inspector went to a local fast-food restaurant for lunch. During his lunch break, the Inspector spoke on his phone to HM Inspector Dave Myrtle. He knew that HM Inspector Dave Myrtle was available and had extensive regulatory experience inspecting explosive storage facilities. The Inspector had a brief discussion with Dave Myrtle about that morning's site visit. The Inspector reviewed the relevant legislation (the Explosives Regulations 2014 ('ER14') reg

26 (JB128 - 161), the associated guidance (L150 The HSE Guidance on Explosives Regulations 2014 Safety Provisions ("L150") (JB174 – 287); and the subsector guidance (HSE Guidance Explosive Regulations 2014, Guidance on Regulations – Professional firework display operators (JB288 – 335) and HSE Guidance Explosive Regulations 2014, Guidance on Regulations – commercial storage of fireworks (JB336 –382)).. It was expected practice in HSE that Inspectors at the stage in their career which the Inspector was at that time (Band 3) would discuss any on site enforcement action with an appropriate Principal Inspector (Band 2 or 1) prior to serving a notice. The Inspector contacted his Line Manager, HM Principal Inspector Dave Adams. After briefly speaking to the Inspector, Dave Adams passed the phone to HM Principal Inspector Martyn Sime, who then had a conversation with the Inspector. Martyn Sime has significant operational experience. He has been working in the field of explosive safety for over 30 years and played a significant role in the development of the Explosives Regulations 2014. The Inspector and Mr Sime discussed various Regulations and Guidance, including bullet points 2 and 3 to paragraph 94 of HSE's guidance document 'L150 Explosives Regulations Safety Provisions Guidance on Regulations, relating to '*the explosives safety statement of success'* of *'Explosives that have significantly different likelihoods of initiation are segregated from one another'* (i.e., packaged and unpackaged fireworks), which identify that segregation should be achieved by:

- *keeping explosives, other than those which are still in the course of being processed, in packaging designed for their transport; and*

- *only removing explosives from their packaging in an appropriate place.*

Mr Sime also discussed with the Inspector paragraph 85 of the HSE published subsector guidance 'Explosives Regulations 2014 Guidance on Regulations – Professional firework display operators'. This guidance also relates to the segregation of explosives that have significantly different likelihoods of initiation and states that:

"Storage buildings should be separated from production buildings and other areas where fireworks are worked on or processed. Separation should be sufficient to ensure that an explosion which takes place in a production or process area (where the risk of an explosion is greatest) does not rapidly propagate to storage buildings (where the greatest amount of explosive substances or articles is kept, and therefore the hazard is greatest)."

Mr Sime also discussed with the Inspector paragraph 91 of the HSE published guidance 'Explosives Regulations 2014 Guidance on Regulations – Wholesale storage of fireworks' https://www.hse.gov.uk/explosives/er2014-fireworks-commerical-storage.pdf. This also relates to segregation and states that:

"Fireworks should only be removed from their transport packaging in an appropriate place. Normally, this will be in a production building or other place where an event involving the fireworks being handled will not communicate directly with the fireworks in the store."

36. They discussed the situation which the Inspector had found on site. The Inspector's position to Mr Sime was that he thought enforcement action should be undertaken and that he wanted to discuss his proposed approach. Based on what the Inspector told Mr Sime about the circumstances he had encountered, Mr Sime's opinion was that it was appropriate for the Inspector to serve a Prohibition Notice. They agreed that the Inspector should return to site and inspect the other ISO containers prior to undertaking deciding on what further action to take. The decision to serve the Prohibition Notice was taken by the Inspector.

37. The Inspector returned to the Sawmills site after lunch. He had been away for just over an hour. He met with John Laidlaw. John Laidlaw noticed a change in the Inspector's demeanour. The Inspector appeared to John Laidlaw to be agitated. The Inspector did not take up John Laidlaw's offer for him to have a seat. The Inspector said that the reason for his return was that he had discussed matters with a colleague and that he wanted to take some form of action. Geoff Crowe returned to the Sawmill site shortly after the Inspector. When Geoff Crowe returned, he saw that the Inspector was talking with

John Laidlaw. Geoff Crowe thought that the Inspector appeared slightly agitated and uncomfortable. The Inspector told Geoff Crowe that he wanted to go back to Binns Mill, as he wanted to have another look at the containers. Geoff Crowe agreed and asked what the issue was. He did not initially receive a substantive reply from the Inspector. The Inspector travelled to the Binns Mill site with Geoff Crowe. While travelling in Geoff Crowe's car, Geoff Crowe again asked the Inspector what the issue was. The Inspector told Geoff Crowe that there may be an issue with the business picking in the store. When questioned further, he said that he may need to issue a Prohibition Notice that day. Geoff Crowe was shocked and upset. He asked the Inspector for the reasoning behind possibly needing to issue a Prohibition Notice. The Inspector said that he had spoken with a colleague and he had been told that he needed to go back and gather evidence. Geoff Crowe responded by saying that the company worked hard to maintain the highest levels of health and safety across the business and that this was an embarrassing situation. Geoff Crowe stated that the company had never knowingly done anything wrong, and that their approach is commonly 'over and above'. The Inspector agreed that they had a professional set up and that they appeared diligent and knowledgeable. Geoff Crowe said that if the HSE required them to make changes, they would be prepared to amend and that they would do whatever was required. The Inspector repeated that he wanted to go back to see the containers to gather information. When asked again, the Inspector at this stage did not say what he believed the issue was or what the dangers were with picking, beyond the issue being related to the activity of picking.

38. When the Inspector and Geoff Crowe arrived at the Binns Mill Site, George King was waiting for them there. Before Geoff Crowe and the Inspector got out of the car, Geoff Crowe asked the Inspector what specifically he was looking for. Geoff Crowe said that the company had been transparent about what they were doing and were happy to tell him what he needs to know if it would help. Geoff Crowe was very upset about the prospect of a Prohibition Notice being served and sought to take whatever steps were necessary to avoid this by changing the processes which were in place, if so directed by the Inspector. The Inspector said that he wanted to look

inside the containers. Once they got out of the car, George King asked Geoff Crowe what the issue was. Geoff Crowe explained to George King that the Inspector had spoken with a colleague and that there may be an issue around the company picking in the stores. George King asked the Inspector some technical questions to determine what the issue was with picking. Specifically, George King asked the Inspector what the risk was and where the risk was coming from. George King said that the Inspector had not seen any activities whilst on site, because the site was not open and no one was working there. George King asked these questions because he was trying to understand what the issue was from the Inspector's point of view. George King and Geoff Crowe felt that the Inspector was not able to articulate what his concerns were. The Inspector then went into each of the containers numbered 2 – 10. When he went into the containers he did not move any boxes, or request they were moved. He recorded what was immediately visible to him by making notes in his notebook (AJB5 -7). He did not take any photographs because the only camera he had with him was his mobile phone and he was unsure whether it was suitable to use that without risk of causing an ignition event. This observation process took about an hour in total. Later that evening, when back at his hotel, the Inspector made further notes in that notebook (AJB 7 - 8). The following day he made further notes on his decision to issue the Prohibition Notice (AJB 10).

39. While the Inspector was inspecting Containers 2 – 10, George King telephoned Dr Tom Smith, who was a point of contact at the British Pyrotechnists Association ('BPA'). Dr Smith has extensive experience in the fireworks industry, as set out in his report at pages 29 - 30. He is Secretary of the Explosives Industry Group (EIG) and Chairman of British Pyrotechnics Association (BPA). George King sought to understand from Tom Smith if they, as a business, had misunderstood a certain aspect of picking and if they were working contrary to the industry practice, as seemed to the be the view of the Inspector. Dr Smith's position to George King was that the picking process they were doing was allowable. He made reference to the 'Duckworth Letter'.

40. George King told the Inspector that he had spoken with Dr Smith from the British Pyrotechnists Association, who had told him that it was not an issue to be picking in the way that the business had been doing. George King told the Inspector that Dr Smith had made reference to the 'Alan Duckworth letter', which was understood to be a letter from the then Chief Executive of HSE (Alan Duckworth) to the BPA agreeing that picking is considered a low-risk activity and could be undertaken within storage. That letter was issued while Mr Duckworth was Chief Executive of HSE, a post he held until 2004. A search has been carried out for that letter and it has not been able to be produced, although it is accepted that a letter was issued by Mr Duckworth re picking processes being carried out in storage units.

41. The Inspector raised a question about the plastic sheets that were stored in containers 9 and 10. He asked what these were for. Geoff Crowe explained that they were for covering deliveries, which are received on pallets, when it is wet. The Inspector then asked why there was tape on the plastic sheets, suggesting they were using the plastic for packing. Geoff Crowe explained that the company don't use plastic sheets for packing, that they use the plastic sheets to cover the arriving stock and that the tape is used to secure the plastic in place over the pallets, so the stock does not get wet. The Inspector appeared to Geoff Crowe to disbelieve the explanation.

42. After inspecting containers 2 – 10, the Inspector asked George King and Geoff Crowe if there was any way they could operate differently, or would a change be impossible, or put the company out of business. Geoff Crow and George King discussed and then responded to the Inspector, saying that there were currently two fusing containers at Sawmill and that they could convert one of these to become a picking store, if necessary, as a short-term solution whilst they worked on a longer-term solution, because both fusing containers were needed for preparing product at peak season. Geoff Crowe and George King's position to the Inspector was that this would be inconvenient and illogical, in terms of introducing risk to the process given the nature of the movements and transport between the storage containers and the picking store, on public roads, but confirmed it was possible if it was necessary and what the HSE wanted. The Inspector

agreed that this was a theoretical solution and that they could add a picking store onto the licence, as part of the variation. Geoff Crowe and George King were willing to amend the application to include a picking store (for packing and unpacking), if necessary. At this point, they thought that would be the solution. There were no shows on in February 2020 and it was expected to be a quiet time for the business, with only a few weddings in the month. There would have been enough stock at the Sawmill to cater for these events. This would therefore have provided sufficient time to convert to a new system of work, without causing too much of an issue.

43. The Inspector asked to be taken back to the Sawmill site so that he could do some work. There was no confirmation at that point about whether he was going to serve an enforcement notice or not. George King drove the Inspector back to the Sawmill site. At the Sawmill site, the Inspector and Geoff Crowe stood at the Sawmill gates with George King and had a further discussion. Geoff Crowe reiterated that the company would make the required changes to their set up and operation if what they had just discussed at Binns Mill was what the HSE needed them to do. Geoff Crowe was aware of the serious consequences which the serving of a Notice would have on the business and was trying to find a solution which would ensure that the business was working safely, without the need for a Prohibition Notice to be served. Geoff Crowe and George King felt that the Inspector was not able to explain what the problem with their processes was. Geoff Crowe asked the Inspector if they had come to a solution, and if he still felt that he needed to issue the company with a notice. The Inspector's position was that he could tell that it was a reputable business but there was a technicality which he could not ignore. Geoff Crowe asked that if he needed to issue a notice, could he issue an Improvement Notice, rather than a Prohibition Notice, given that they were working with him to find solutions. Geoff Crowe did not believe it was necessary for the Inspector to issue any kind of notice but could see that this was becoming likely. The Inspector did not give a reasonable explanation to Geoff Crowe and George King as to why a separate picking store was required, or its benefits, from a risk perspective, when compared

with the picking processes which the company already had in place. Geoff Crowe was concerned that they were not getting answers to their questions and wanted to offer up options. He was willing to set up a picking store as a way of evolving the work processes in the company and to satisfy the Inspector that there was no need to serve a Prohibition Notice. The Inspector responded by stating that he had not decided on what action he was going to take. He said he needed space where he could work in private. Geoff Crowe took him to shed number 2, so he had a quiet area to work. He gave the Inspector their Wi-Fi code and also a phone charger, as he needed to charge his phone. They continued to fully co-operate with the Inspector and offered him tea and coffee. Geoff Crowe asked him one more time if there was anything they could do to avoid him having to issue a Prohibition Notice. Geoff Crowe was seeking to engage in a constructive conversation about possible alternative systems of work, which they could potentially utilise, but the Inspector was not forthcoming or engaging on this. The Inspector said again he did not know what his final decision would be. He asked Geoff Crowe to leave him on his own, so he left him in shed 2. Geoff Crowe returned to the Inspector 15 minutes later. The Inspector was on a phone call to a colleague. Geoff Crowe asked the Inspector how he was getting on. The Inspector then confirmed that he was going to issue a Prohibition Notice. Geoff Crowe then left the Inspector as he felt that there was nothing more he could say or do to prevent the Prohibition Notice being issued.

44. A few moments later, the Inspector came over to Geoff Crowe's office to confirm his email address, so that the Inspector could send through the Prohibition Notice. The Inspector served a Prohibition Notice on 21CC Group Ltd electronically (P20200219-TSR-1) (JB1 - 2**)**, by email sent to Geoff Crowe shortly thereafter. The Inspector then left site, around 15:30.

45. The Prohibition Notice which was issued by the Inspector on 19 February 2020 and which is now appealed before this Tribunal is in the following terms:

> *"I [Thomas Stephen Reeves] hereby give you notice that I am of the opinion that the following activities namely:*

use of ISO containers 1-10, collectively known as the Storage Magazine on the Explosive Licence XI/4111/2102/3, for removing fireworks from boxes or cartons whilst other fireworks are present elsewhere within the Storage Magazine

which are being carried on by you at:
Binsmill, Hopetoun Estate, South Queensferry, EH49 7NB
involve, a risk of serious personal injury, and that the matters which give rise to the said risks are: unpackaging and packing of fireworks and that the said matters involve contravention of the following statutory provisions:

The Health and Safety at Work etc. Act 1974 Section 2(1)
The Explosives Regulation 2014 Regulation 26 (1)(b) and (c)

because you have failed to take appropriate measures to: prevent fire or explosion; to prevent fire and explosion from spreading; and to protect people from the effects from fire and explosion.
and I hereby direct that the said activities shall not be carried on by you or under your control immediately unless the said contraventions and matters have been remedied."

46. After the Inspector left the site, George King suggested that it would be useful to take some photographs of the containers, so that they had a record of what the Inspector had seen that day. Geoff Crowe returned to the Binns Mill site to take photographs of the containers. Those photographs are at JB86 – 88. Those photographs show the containers at the Binns Mill site in the same state as when they were inspected by the Inspector on 19 February 2020. The containers were not tidied prior to these photographs being taken. The only thing that was altered from when inspected by the Inspector was that Geoff Crowe placed some handheld battery LED lamps inside to assist with the lighting levels for the photographs. That type of battery lighting was normally used in the stores at that time as the external lighting source. These photographs are an accurate representation of what the Inspector saw on

19 February 2020 and were taken to record the state of the containers as at the time of the inspection.

47. As set out by Dr Smith in his report (page 13), the photographs show that the stores well maintained; the cardboard UN transport boxes are generally closed, in stable stacks; the stores are not filled; the floor is clean; there is no evidence of extraneous flammable material; the walkway between the boxes on either side is clear and the route to the exit is clear. The photographs at JB86 – 88 are representative of the usual condition of the storage containers at the Binns Mill site. At the time of the inspection on 19 February 2020, containers 9 and 10 were empty in terms of stock, but there was plastic sheeting being stored within those two containers. These plastic sheets are used to cover stock deliveries, which arrive on site when it is raining, to prevent the stock from getting wet.

48. At the time of the inspection and as shown in the photographs, there is a leaf in two containers. The site is surrounded by trees and therefore it is possible for leaves to blow in from time to time, especially during winter months, or be transported into the containers on people's shoes, when they gain access. By highlighting to its employees, the importance of carrying out regular housekeeping tasks, and by regular checks to ensure that these tasks are carried out, the appellant takes reasonably practical steps to keep debris such as leaves out of the containers. The ISO containers are lined with plywood which are fixed by screws. All the containers were swept out and cleaned after the installation of the lining, to remove any sawdust, offcuts of wood and other items. By highlighting to its employees, the importance of carrying out regular housekeeping tasks, the appellant takes reasonably practical steps to ensure there is no source of ignition within the containers.

49. The appellant took steps to prevent limit and protect, as referenced by Dr Smith in his report (pages 13 – 14). The EIDAS database is an HSE held database of explosive incidents. That database does not have a search term 'picking' or 'processing'. There have been no documented historic incidents on the EIDAS database in stores where a simple picking operation has been carried out in the way the appellant was operating.

50. The appellant took steps to limit the likelihood of an explosive accident during picking, as set out in their method statements and as referenced by Dr Smith at page 13 of his report and including minimising the number of open boxes at any one time, ensuring that the picking operation is only carried out in a way that minimises the possibility of communication between magazines (stores) and keeping escape routes clear. The Company had risk assessed the process and developed methods of safe working to ensure the risks are 'as low as reasonably possible' (ALARP) and considered the activity of picking / 'packing and unpacking' at Binns Mill, to be a practical and appropriate solution for the Company's set up and facility.

51. The appellant's position that they were following best industry practice and that a separate picking store was not required was based on their understanding that the activity of 'packing and unpacking' is not a manufacturing process under the Explosives Regulations 2014 because the activity of lifting a firework out of a box does not change the nature of the article and therefore is not a process. 'Picking' is not defined in the Regulations. Activities such as such as cutting a fuse, linking of fireworks or adding an ignitor are processes which pose a risk of ignition, and these processes should not take place within a storage facility. The appellant has a separate dedicated facility for processing articles, including the addition of fuses, which was located at their Sawmill site.

52. Following the issue of the Prohibition Notice, the Inspector wrote to Geoff Crowe setting out the reasons why the Prohibition Notice was issued. This letter begins at JB 5, with what the reasons for issue set out at JB 7 -9. In telephone calls after the issue of the Prohibition Notice, it was made clear to the appellant that the HSE position was that the business had to create a picking / packing and unpacking store. Before the Inspector's visit on 19 February 2020, no one from the HSE had told the appellant that there was a need for a picking / packing and unpacking store. After the visit, the Inspector worked with Geoff Crowe on the licence variation. The licence was completed and sent to George King by the Chief Inspector Explosives on the

11/9/2020. The revised licence included a Picking/Packing area separate from the main store. The maps at JB 112, 113 and 114 show the variation required.

53. The changes which the appellant has made to working practices since the issue of the Prohibition Notice include identifying a picking store. That allows picking of fireworks in a store which is licensed to contain up to 500kg of fireworks. The amount of fireworks previously held in each store where picking was being carried out did not exceed 500kg. The method statement for the picking store allows multiple boxes of fireworks to be present and open (unsealed) during the picking process. The picking shed is appropriately safely distanced to minimise the risk of propagation to the main stores. The changes made require transportation of fireworks between the Binns Mill and Sighthill sites. The new licence is at JB 122. That licenses two activities in the packing / picking store. Activity one is the storage of explosives of up to 500kg HT 3 or 4, provided that the storage activity is not conducted concurrently with the packing and unpacking of fireworks and pyrotechnics activity in the packing store. Activity two is the packing and unpacking of fireworks and pyrotechnics provided that all doors are closed in the North Magazine and South Magazine whilst the packing and unpacking of fireworks and pyrotechnics activity is undertaken in the packing store, and packing and unpacking of fireworks is not conducted concurrently with the storage activity in the packing store, and the packing store is occupied by no more than two persons during this activity. If these two activities were not licenced, then the picking store would require to be emptied when the picking activity was not being undertaken.

54. The Explosives Licence which has now been granted is on the proviso that there is a picking store located at Binns Mill, which in fact is another 20-foot shipping container, identical in structure and construction to the storage containers. The revised Licence also permits up to 500kgs of explosives to be in the picking store at any one time, which in essence is the same, if not more, than the amount of explosives that are were commonly housed in the ISO storage containers at the Binns Mill site at the time of the inspection.

55. Following the service of the Prohibition Notice and thereafter, the appellant has used one of the fusing stores at their Sawmill site as a short-term picking store, while alternative arrangements were made at Binns Mills. This was the solution the appellant had offered to the Inspector as an alternative to the Prohibition Notice being served. The method in this short-term picking store contains the 'core component' of the picking of fireworks in a container whilst other fireworks are present in that container. The net explosive content of fireworks in the ISO containers at the Binns Mills site at the time of the inspection was not in excess of the net explosive content allowed in that short term picking store.

56. Mr Sime is employed by the Health and Safety Executive (HSE) as a specialist Principal Inspector of Health and Safety in the HSE's Explosives Inspectorate, part of HSE's Chemicals Explosives and Microbiological Hazards Division. As at the time of this Tribunal he was acting Head of the Inspectorate and acting Chief Inspector of Explosives. He was part of the drafting committee for the drafting of the L150 guidance and had the role as lead author of that guidance. Dr Tom Smith was also part of that drafting committee: as one of the industry representatives. The LS150 Guidance (JB 182 – 289) is overarching guidance which covers the breadth of the explosives sector. Ammunitions and fireworks are both subsectors of the explosive sector. There is subsector guidance which is more specific and with a more targeted framework. Martyn Sime is the lead author of the HSE Explosives Licencing Handbook (AJB 37 – 132). The intended end user / customer of that Handbook is stated in the edition dated 7 November 2019 as being '*HSE staff involved in the granting of licences under ER2014 regulation 13.'* In February 2020 that Handbook was not available externally to HSE.

57. The introduction to LS 150 (JB 182 – 186) states (at para 6) 'Following the guidance will enable you to comply with the safety provisions of ER 2014.' At para 7 is stated '*This document also provides guidance on the application and scope of the regulations and on some wider areas which are relevant to our industry. These wider areas are included as they help support compliance with the safety provisions.*' And '*throughout the*

guidance you will see statements in boxes. The statements identify successful outcomes of the application of appropriate safety measures to explosives operations. Duty holders can use the statements to challenge themselves on the effectiveness of the safety precautions that they have implemented.' This suggests that the steps set out in the guidance are not mandatory.

58. Paragraphs 37 to 39 of the L6 150 guidance (JB 187 – 188) are under the heading of '*General principles of safety in explosives operations*. They set out the general principles of safety. A general principle is that the minimum amount of explosives should be worked on to undertake the task at hand. Paragraphs 89 to 92 of the LS 150 guidance (JB196 – 197) set out the guidance with regard to stock management. There are no provisions there with regard to stock being stored separately from a picking area. Paragraphs 98 to 94 (JB197 – 198) are under the heading '*segregating explosives presenting different likelihoods of initiation'.* There are no provisions there with regard to stock being stored separately from a picking area.

59. Paragraph 89 (JB329 - 331) defines a picking store as '*a store where part-boxes of particular products commonly used in displays are kept. Picking stores are generally stores holding smaller quantities of different types of fireworks, and limit the hazards associated with picking items that may not be required in units of a complete transit carton.'*

60. Paragraphs 95 and 96 of the L150 guidance (JB 198 – 199) have the heading '*Segregating explosives operations from other activities'.* In the boxed area there is stated '*Explosive operations are segregated from activities that do not include explosives.*' Those paragraphs state: -

> *'95. Segregating explores of operations from activities that do not include explosives can ensure that:*
>
> - *materials involved in other activities do not aggravate the effects of an explosive event;*
> - *people on site who are not engaged in the explosive activities are appropriately protected should a fire or explosion occur;*

- *the likelihood of the non-explosive activity acting as a source of initiation is reduced.*

96. Segregation of explosive operations from other activities should be achieved by:

- *not storing explosives with other hazardous goods (e.g. flammable liquids and solids, reactive substances);*
- *storing explosives in a separate area from other groups (e.g. food stuffs, combustible materials);*
- *so far as reasonably practicable preparing non-explosive components for explosive articles separately from explosive operations;*
- *preparing packaging for use with explosives separately from explosives operations.'*

61. Paragraph 104 - 105 of LS 150 (JB200) is under the heading '*Preventing fires and explosions Regulation 26(1)(a)'.* In the boxed area is stated '*Safety measures are in place to prevent the accidental initiation of explosives.'* These paragraphs state:-

'*104. Keep sources of ignition away from explosives or other flammable materials on site. The presence of explosives (including explosive vapours and dusts) should be controlled, especially in areas of activity, for example, places where work is done or where people or other traffic move around regularly.*

105. The following sections give guidance on how the main sources of ignition can be controlled and the general principles that can be followed to prevent fire and explosion. They are structured around the general circumstances of the storage and manufacture of explosives, the most common sources of ignition, and general precautions to prevent fire and explosion.'

62. If an explosive product is damaged in transport, there is the potential for a leak, if the seal is damaged. It is recognised in the relevant standards that there may be leakage during transport, therefore fireworks are subject to

a vibration test. The vibration test permit leakage of up to 3% of the total mass or a maximum of 1g per item. Items are stored in the UN standard transport boxes because when they are within the transport carton that minimises the likelihood of initiation of the firework in an initiating event.

63. The appellant did and does have safety measures in place to prevent the accidental initiation of explosives. These are set out in their risk assessments and method statements. (21CC Binns Mill Stock Retrieval Method Statement (pre-Prohibition notice, February 2020 @ JB54 – 56; 21CC Binns Mill Stock Retrieval Method Statement (post-Prohibition notice, 20 February 2020 @ JB57-60; 21CC Health and Safety Policy, May 2019 JB63 – 70; 21CC Health and Safety Policy Statement, August 2019 JB71; 21CC Health and Safety Statements and Procedures May 2019 JB72 – 81; 21CC, Our Approach to Risk Assessments, May 2019 JB 82 – 84; 21CC Good Housekeeping Toolbox Talk JB85)

64. Paragraphs 106 to 109 (JB 200 – 201) of LS150 are under the heading of '*General precautions.'*. In the boxed area is stated '*explosives operations only occur in an appropriate place, using appropriate tools and equipment and following an appropriate process.'* These paragraphs state:-

> *'106. Explosive operations should only be undertaken in a suitable place and within the scope of any licence or other permission the suitability of the location will depend on the quantity and type of explosives and all the planned activity.*
>
> *107. The precautions are covered in detail in paragraphs 110 – 173, in summary they include ensuring that any place of manufacture, processing facility, store, storage area, container or cupboard is:*
>
> - *suitably weatherproof;*
> - *designed to ensure that explosives do not come into contact with substances with which they are incompatible;*
> - *protected by a lightning conductor, where appropriate;*
> - *not used for other activities at the same time that explosives are being manufactured, processed or kept, e.g. a store*

should only be used to keep explosives and the tools or implements necessary for the safekeeping of those explosives; and

- *kept clean, with steps taken to prevent grit entering unpackaged explosives.*

65. Paragraphs 110 -153 of LS 150 is under the heading '*Protecting explosives from sources of ignition'* (with various subheadings following). In the boxed area there is stated '*Explosives are protected from those sources of ignition that could cause them to initiate and are kept in a suitable closed container or in a suitable packaging whenever it would be reasonably practicable to do so."* At para 111 the most common sources of ignition are stated as being:-

- *naked lights and flames;*
- *heat and temperature;*
- *electricity (including static electricity and electromagnetic energy);*
- *sparks from a mechanical or frictional contact between metal surfaces;*
- *impact and friction;*
- *pressure; and*
- *chemical incompatibility between certain substances.'*

66. Paragraph 154 -157 of LS 150 (JB 208 – 211) are under the heading '*Measures to limit the extent of a fire or explosion Regulation 26(1)(b)'.* In the boxed area there is stated '*appropriate steps are taken to;*

- *limit the size of an explosion or fire that may occur;*
- *stop fires spreading, and*
- *limit the size of an explosive event and the area that the event affects.'*

and sets out '*key measures'* at 156, including to:-

"*separate storage buildings from production buildings and areas where explosives are packed or processed."*

67. There is more protection against the initiation of an initiating event where the firework is stored within the transport carton than out. For that reason the appellant stores fireworks in the UN standard transport boxes.

Relevant Law

68. The Prohibition Notice was issued in respect of purported breach of the Health and Safety at Work etc. Act 1974 ('HSWA') Section 2(1) and the Explosives Regulation 2014 Regulation ('ER') 26 (1)(b) and (c)

69. Regulation 26 of the Explosive Regulations 2014 provides as follows:-

"(1) Any person who manufactures or stores explosives must take appropriate measures –

(a) to prevent fire or explosion;

(b) to limit the extent of fire or explosion including measures to prevent the spreading of fires and the communication of explosions from one location to another, and

(c) to protect persons from the effects of fire or explosion.

(2) For the purposes of paragraph (1), the reference to the manufacture or storage of explosives includes a reference to any handling, on-site transport and testing of explosives which is associated with that manufacture or storage.

(3) In this regulation, 'fire or explosion' means unplanned fire or explosion at the site of manufacture or storage."

70. Section 2(1) Health and Safety at Work etc Act 1974 provides as follows:

"*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.*

71. Section 3(1) Health and Safety at Work etc Act 1974 provides that:

"*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.*"

72. Section 22 Health and Safety at Work etc Act 1974 provides that:

(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.

(4) A direction contained in a prohibition notice in pursuance of subsection (3)(d) above shall take effect –

(a) at the end of the period specified in the notice; or

(b) if the notice so declares immediately.

73. Supplementary provisions to subsections 21 and 22 are as set out in subsection 23 of the 1974 Act. These include the following:-

"…..

(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.

…."

74. The right to appeal against the notice is contained in section 24 of the 1974 Act:

"*In this section "a notice" means an improvement notice or a prohibition notice.*

(1) 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."

75. The burden of proof is on the respondent to the appeal (Readmans v Leeds City Council [1992] COD 419). That case is also authority that the standard of proof is the same as in criminal proceedings (that position is now superseded, as set out below).

76. The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Rule 105 sets out provisions relevant only to such appeals.

77. The leading authority is HM Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) 132. At the stage of the Supreme Court in Chevron, the test to be applied was set out by Lady Black (paragraph 18) :-

> "W*hen the inspector serves the notice, section 22 makes clear that what matters is that the activities in question involve a risk of serious personal injury. If he is of that opinion, the notice comes into existence. However, as it seems to me, when it comes to an appeal, the focus shifts. The appeal is not against the inspector's opinion but against the notice itself, as the heading of section 24 indicates. Everyone agrees that it involves the tribunal looking at the facts on which the notice was based. Here, as the inspector spelt out in the notice, the risk that he perceived arose by virtue of corrosion of stairways and gratings given giving access to the helideck, and the focus was therefore on the state of that metalwork at the time when the notice was served. The tribunal had to decide whether, at that time, it was so weakened by corrosion as to give rise to the risk of serious personal injury. The inspector's opinion about the risk, and the reasons why he formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but I can see no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. It must, in my view, be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was. If, as in this case, the evidence shows that there was no risk at the material time, then, notwithstanding that the inspector was fully justified in serving the notice, it will be modified or cancelled as the situation requires.*"

78. In Chevron, the Supreme Court rejected an argument for a purposive construction. The test to be applied by the Tribunal on appeal, decided on the balance of probabilities, is a wholly objective one as to whether or

not there was a risk of serious personal injury at the time the Notice was issued. Following Chevron then, the standard of proof to be applied in considering this appeal is the balance of probabilities and not beyond reasonable doubt. The expertise of the Inspector who issued the Notice maybe taken into account. At the Court of Appeal stage of in Chevron, this was stated as " *All of these circumstances justified the findings that there was no risk of serious personal injury and that service of the notice was both unnecessary and unreasonable."* In reaching its decision, the Supreme Court did not follow the previous line of authority (Rotary Yorkshire v Hague [2015] EWCA Civ 696; MWH UK Ltd v Wise [2014] EHWC 427 (Admin). Following Chevron, the Tribunal must look at all the relevant facts and take its own view on those facts as to whether the activities involve a risk of serious personal injury. The test the Tribunal applies to an appeal against a prohibition notice is not confined to reviewing the inspector's opinion on public law grounds, for instance reasonableness. Instead, the Tribunal is to decide whether, at the time the notice was served, the breach existed. Whether or not there was a risk of serious injury is an objective test for the Tribunal, being essentially a matter of opinion, albeit based on the facts as established by evidence.

79. The requirement in the case of a prohibition notice is a risk of serious injury, not likelihood of serious injury (R v Board of Trustees of the Science Museum [1993] ICR 876). Both aspects require proof (1) that there is risk and (2) the consequence of serious injury. The level of risk need not be high, but does need to be more than trivial or fanciful (R v Chargot [2008] UKHL 73). In West Bromwich Building Society v Townsend [1983] ICR 257, the Divisional Court held that it was appropriate to concentrate on the offence in question under section 2 of the Act, which was not absolute, and weigh the degree of risk with how onerous the measures required to avert the risk were said to be. In Canterbury City Council v Howlett and Port Lympne Estates Limited [1997] ICR 925, Turner LJ held that "*The [1974] Act is not seeking to legislate as to what work could or could not be performed, but is properly concerned with the manner of its doing."*

80. There are three potential outcomes to the appeal of a prohibition notice:-

i. if the notice is considered to have been properly issued it is confirmed as it stands, or

ii. it may be confirmed with modifications, or

iii. if it is not considered to have been properly or reasonably issued, it is cancelled

Issues for Tribunal

81. The questions for the Tribunal were:-

i. Was the appellant at the date of the notice carrying on or controlling activities or likely to carry on activities to which any of the relevant statutory provisions apply (in the sense of being breached)?

ii. Did the activities or would the activities if carried on involve a risk of serious personal injury (with regard to the principles in R v Chargot [2008] UKHL 73, West Bromwich Building Society v Townsend [1983] ICR 257 and Canterbury City Council v Howlett and Port Lympne Estates Limited [1997] ICR 925).

iii. If so, ought the Notice to be affirmed, if necessary with modifications?

iv. If not, the Notice is to be cancelled.

82. There was no competency or jurisdictional issue before me.

Submissions

83. Both parties relied upon substantive written submissions, and written responses to the other party's submissions. I will not seek to reproduce or condense their submissions here. In the Decision and Discussion section I refer to where parties' submissions are accepted or otherwise.

84. The Appellant relied upon their written submissions (to be read in conjunction with the Appellant's skeleton dated 30 May 2021; their Consolidated Further and Better Particulars of 14 May 2021 and their

Response Submissions. The Appellant relied upon the following authorities:-

R v Chargot Ltd [2008] UKHL 73
R v EGS Ltd [2009] EWCA Crim 1942

Tangerine Confectionary Ltd, Veolia ES (UK) Ltd v The Queen [2011] EWCA Crim 2015

R v Board of Trustees of the Science Museum [1993] ICR 876

HM Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) 132

Railtrack plc v Smallwood [2001] ICR

Sagnata Investments v Norwich Corpn [1971] 2 QB 614

Loveday v Renton [1990] 1 Med LR 117

Kennedy v Cordia (Services) Ltd [2016] UKSC 59

85. The Respondent's position was set out in their written submissions and further submissions in response to the appellant's closing submissions. The Respondent relied upon the following authorities:

Inspector of Health and Safety v Chevron North Sea Limited 2018 S.C. (UKSC) 132

Kennedy v Cordia (Services) LLP 2016 S.C. (UKSC) 59

R v Board of Trustees of the Science Museum [1993] ICR 876

R v Chargot Ltd [2009] ICR 263

Railtrack v Smallwood [2001] ICR 714
Sagnata Investments Ltd v Norwick Corporation [1971] 2 QB 614

Comments on the Evidence

86. My assessment of the credibility and reliability of witnesses was particularly important given the dispute in evidence between the Inspector and George King re a matter which was significant in the Inspector's decision to issue the Prohibition Notice i.e. whether or not the appellant

had sought to hide or deny the fact that they were carrying out the activity of picking in the stores at Binns Mill. I therefore carefully considered factors relevant to the credibility and reliability of witnesses, including consistency.

87. I did not accept the position set out by the Inspector in his witness statement that in his initial meeting with John Laidlaw, George King and Nick Barrass, he discussed the guidance available to duty holders, including the: subsector guidance for the wholesale storage of fireworks; the subsector guidance for Professional firework display operators; and L150 Explosive Regulations 2014 Guidance document and that the operator was not aware of these documents. That position was inconsistent with the Inspector's acceptance that the appellant had a professional set up and that they appeared diligent and knowledgeable. I accepted the position of Geoff Crowe, George King, Nick Barass and John Laidlaw in their statements and under cross examination that they were familiar with L150 and other published relevant guidance, but that what they were unaware of at the time of the inspection was the Guidelines the Inspector was referring to in his discussions with them as the 'Handbook'. I accepted the appellant's witnesses' position with regard to that aspect of the evidence because their position was consistent and credible, taking into account their undisputed experience in the fireworks industry, because that position was plausible with regard to the Inspector's relative lack of inexperience in the fireworks industry and that that document was being worked on as an internal HSE document at the time (and so the Inspector would have been aware of it). I also took into account that the Inspector's position changed under cross examination with regard to that aspect of the evidence. When it was put to the Inspector that he was asked by John Laidlaw where they could get a copy of the Licensing Handbook because they had never seen it, his reply was '*I do remember that*'. When it was put to the Inspector that there was no suggestion that the appellant's witnesses were not aware of the Guidance (LS150 etc.), but that it was the then internal Licensing Handbook which they were unaware of, the Inspector's position was *'I had a discussion with John Laidlaw re LS150 and the Explosives Licensing Handbook'* and '*My understanding was that [the Explosives Licensing Handbook] was available to the public on the HSE Explosives Community website. I was informed that it was on there.*' It was then put to the Inspector that they were not saying that they didn't understand the guidance, rather

that they could not find that handbook guidance online. The Inspector's reply to that was '*No*.' It was then put to him that both John Laidlaw and George King asked him where to get hold of the guidance he was referring to, the Inspector's answer was then '*I can't recall'.* That was contrary to his earlier position, when he had said that he had remembered being asked that. On being pressed, the Inspector's position was '*There were several documents which they didn't appear to be aware of. I can't recall the discussion you refer to'.* When questioned on his evidence that the appellant's witnesses were not aware of the guidance other than the unpublished handbook guidance, his reply was '*They were not aware of them. In our discussions they stated that they were not aware. We discussed various guidance and my recollection is that they were not aware of all of them.'* For these reasons, I considered the Inspector's evidence to be inconsistent on that aspect of his evidence and I accepted the evidence of the appellant's witnesses in that regard.

88. It was not in dispute that the Inspector had considerable experience in dealing with explosives but that was mainly not in the context of the fireworks industry. I took into account the Inspector's undisputed considerable experience in dealing with explosives in the context of defence munitions. He clearly came from a background of working in the context of the military, for example, his evidence on why he had relied on natural light when inspecting the containers was that he did not take any electronic items with him because they were '*identified as contraband in the military."*

89. Under cross examination, the Inspector did concede that there was initial confusion about whether the application was for a new licence or for a variation. He described his approach in considering the application as being '*to start from the beginning and satisfy myself as I would be responsible for the licence.'*

90. I accepted the appellant's witnesses' position that the Inspector had been unable to answer some of their questions and had often referred to the unpublished Guidance Handbook. The Inspector made a concession to that extent. His evidence was '*Some I did answer and others required more thought.*' When it was put to him that there were some questions which he couldn't answer at the time he said '*Yes. I believe there were. That's correct.'*

91. Under cross, the Inspector accepted that he was asked to '*take his pick'* of containers to inspect. I considered that to be important evidence pointing to the fact that the appellants did not seek to hide any activities which were being done within the containers at Binns Mill. There was a direct dispute in evidence re George King's position to the Inspector on his return to the site. In his statement (para 30), the Inspector's position was '*GK (*George King*) stated that packing and unpacking was not undertaken in the storage magazine, contradicting what was said during the opening of container 1 earlier in the day and in the wash up meeting at the end of the initial visit. GC (*Geoff Crowe*) was involved in the conversation but did not take the opportunity to correct GK.*' The Inspector accepted under cross that it had been expressly confirmed to him that picking was going on. His position then was that this was '*at the wash up meeting'.* That is inconsistent with the note in the claimant's notebook (AJB 4) which records George King saying when the inspector was inspecting container one that picking was being carried out there. It is also inconsistent with his position in his statement. The appellant's witnesses denied that George King had stated that. This dispute in evidence was important because it was the Inspector's position that Greg King's denial that that activity was being carried out caused him to lack confidence in the appellant and caused him to believe that the activity would not stop. This was important because it was the appellant's witnesses' position that they had offered a solution of changing one of the stores at the Sawmill site to be a picking store and that it was then not necessary for enforcement action to be taken. It was the appellant's position that the change which was later put in place, following the issue of the Prohibition Notice, was discussed and would have been put in place without that Notice having been issued, and so there was no necessity to issue the Prohibition Notice. The Inspector's position was that he had not accepted that the appellant would put in place that change without a Prohibition Notice being served. His reasons for that were that it was clear to him that that change would cause inconvenience to the business, that at one stage George King had denied that picking was taking place, and that Geoff Crowe had not corrected George King's position. It was undisputed that the change required would cause inconvenience to the business but it was Geoff Crowe's position that they

had sought to convince the Inspector that whatever steps he considered were necessary for them t take would be put in place.

92. I accepted the evidence of George King and Geoff Crowe that George King had not denied that packing was being carried out, but had pointed out that the Inspector had not witnessed the packing being carried out (and so the method being used). That appeared to me to be plausible and consistent with their later and earlier position to the Inspector that day. It was plausible and credible that Geoff Crowe would not then have corrected that statement as it was true: the Inspector hadn't seen that activity being carried out. The Inspector offered no explanation as to why on one occasion on the same day George King would have denied that the activity was being carried out, when he had confirmed that it was being carried out on two other occasions (or, on the Inspector's position in cross on at least one other occasion) on that day. My decision on this is important, given the Inspector's evidence on the reasons why he had considered that it was necessary to issue the Prohibition Notice rather than accept the solution discussed (which was the solution later effected by the variation). Following consideration, I accepted the evidence of the appellant's witnesses on this matter as consistent, plausible and credible.

93. In making my decision, I considered the general credibility of the Inspector's evidence. In his evidence, the Inspector made reference to notes taken by him during the inspection (AJB 3 - 8). I attached significant weight to these notes, being contemporaneous notes taken by the Inspector while he was carrying out the inspection. Under cross, the Inspector's position was that in these contemporaneous notes he '*as much as possible'* took a note of anything significant that he saw, did, and what was said, including reasoning, advice, comments or warnings. When asked if these notes were a good guide as to what happened, his reply was *'I hope so*.' He confirmed that he had the opportunity to pause during the inspection and write a note. I accepted Mr McGee's suggestion that if anything of importance had occurred to the Inspector during the inspection, it is likely that he would have recorded that in his notebook. The Inspector accepted that he had not recorded in his notebook that he had discussed the fee for intervention. His position was that he had discussed that, and

that he could not recall why he had not mentioned it in his notebook. I accepted Mr McGee's observations on the Inspector's notes in this notebook. These notes do not indicate that the Inspector initially considered there to be any issue requiring a Prohibition Notice to be issued. I considered it to be significant that the Inspector did not record in his Notebook when inspecting container 1 that he had any concerns about a picking process being done there. It was not in dispute that at that time George King told the Inspector that picking was done in the containers. The Inspector recorded that in his notebook (AJB 4) '*George stated that they are picking in the containers.*'. When it was put to the Inspector that he had raised no issue at the time, his evidence was '*I believe I mentioned to George that I had concerns re that.*' When pressed, his position was *'I believe/ recall saying I had concerns at that point.'* The Inspector accepted that he did not record any such concerns in his notebook at that time, although he had recorded his observations on the good physical condition of the container. There was no explanation why at that time he had not recorded in his notebook any concerns he had about picking and packing being carried out in the container, nor that he had had discussions re those concerns. The Inspector's position in his statement (para 14) was '*I questioned the activity opening of boxes / containers in the storage magazine, related to the picking activity whilst in the magazine and stated I had concerns and that I wanted to consider it further.*' The Inspector accepted under cross that there is no record in his notebook re his observations of container 1 that '… *there was debris located on the floor (including mud and several screws) various empty containers and packing* materials', as is stated at para 14 of his statement. That was not recorded in his notebook and is not shown in the photograph of Container 1 (JB 88). I considered these inconsistencies, and others inconsistencies between the Inspector's written statement and his notes taken at the time, to be significant with regard to credibility.

94. The inspector admitted under cross that Geoff Crowe had expressly said to him that if there was a problem with the picking activity the business would stop it and change how/ where it was done. The Inspector's later position was '*I remember them saying they would do what HSE requested, not that they would do the picking at Sawmills. I don't believe that was*

discussed. I have no recollection of that being said to me at that point." The Inspector was inconsistent in his position with regard to that. When it was put to him under cross that the appellants had repeatedly said that they would stop or change any process, the Inspector's evidence was '*they stated that at the wash up meeting*." He then said '*in the car with Geoff Crowe he was saying he would do whatever he needed to do.".* The Inspector accepted that on the drive to the Binns Mill site after lunchtime, Geoff Crowe had been open, saying the company would be willing to do whatever he was looking for or needed. I considered that to be significant. It was put to the inspector in cross that when at the Binns Mill site George King had asked what is the risk and where the risk was coming from. The Inspector's evidence was that he remembered being asked that question. His evidence was' *"I believe I told them there was an increased likelihood of an event /ignition. They kept asking*." He denied being unable to tell the business of what the ignition risk was. The inspector accepted that he had not recorded that in his notebook. It was the inspector's evidence that it was at that point that George King stated that they didn't do packing. The Inspector accepted that that denial would be significant, given that George King had previously said that packing was being done in the containers. The inspector also accepted that he did not record that denial in his notebook. It was then unclear from the Inspector's evidence why he had concentrated on what he believed to have been a denial from George King on one occasion during the day, when his evidence was that there were a number of occasions when it was confirmed to him that picking was being carried out, and that the company would do whatever was considered to be necessary by HSE. I considered this aspect of the evidence to be very significant, particularly because it was Mr Sime's position under cross that if on inspection he had come across a company operating without a picking store, he would tell them to stop that process but would not issue a Prohibition Notice '*When confident that they were not going to undertake the activity*'. This aspect of the evidence was then very important with regard to whether the issue of the Prohibition Notice was necessary. I accepted the position of the appellant's witnesses that it was not necessary for the Prohibition Notice to be issued and that they would on a voluntary basis have carried out any changes required by HSE.

I considered it to be significant that the Inspector accepted under cross that Geoff Crowe's position to the Inspector was that if he had a problem with that activity they would stop it and change how and where that was done. It was put to the Inspector under cross that that had been expressly said to him and the Inspector's answer to that was *'yes'*. I considered that to be very significant with regard to whether it was necessary for the Prohibition Notice to be served. Given that the appellant offered to voluntarily put into practice the changes made, it was not necessary for the Prohibition Notice to be issued. The Inspector's position was that he did not believe that they would do the required change voluntarily. For reasons set out here in respect of credibility and reliability, I preferred the evidence of the appellant's witnesses in that regard. I did take into account that it was put to the Inspector under cross that he had not taken into account what had been said in respect of voluntary cessation. The Inspector's reply to this was '*I did. They stressed the significant impact on the business of cessation. There was a significant effort made in respect of highlighting the financial implications*.'. In all the circumstances, I did not accept that that ought to have led to the conclusion that voluntary cessation would not occur.

95. I took into consideration Mr Sime's acceptance under cross that what was said to the Inspector and the likelihood of the activity ceasing or being reformed '*has to be a consideration*" when deciding whether it is necessary to issue a Prohibition Notice. Having found that the appellants did not seek to hide that picking activities were being carried out in the store, and having found that the duty holder had expressed that any steps required by HSE would be carried out, I concluded that it was not necessary for the Prohibition Notice to be issued.

96. The Inspector's notes in his notebook are not clear as to what is meant by '*open containers*'. It was unclear from the Inspector's evidence whether he was referring to the UN transport boxes being 'open' in the sense that the box had the seal opened and then had been closed by folding the 4 flaps together. There was reference by him to boxes being '*open*', '*open but with the flaps folded ove*r', or '*open to the elements*'. In his notebook

(AJB 6) the words '*to elements'* are written. In the supplementary questions in examination in chief, the Inspector's initial position was that '*open to the elements'* meant '*open wide to the air'*. His later position was that '*open'* in his notebook meant '*unsealed'* and '*open to the elements is open'*. He then described the photograph of container 6 (at JB 29) as '*Open. Not to elements'*. His position was inconsistent. The Inspector's position was also not consistent with Mr Sime's evidence on what is meant by '*unsealed'* and '*open'* in this context. Mr Sime's evidence was that he would consider '*unsealed*' to be '*a carton where there is no mechanism to ensure the flaps are closed, either by tape or interleaving flaps, so that they do not open in storage.'* His evidence was that an '*open*' box is one where '*the flaps weren't flat and pushed together, therefore the route into the carton was not obstructed by the carton.'* He did not give a separate category of '*open to the elements'*. In his Notebook there is reference to boxes being '*open*'(e.g. AJB4 re Container 1; AJB5 re container 2 & 3, AJB7 re container 8); '*open to elements'* (e.g. AJB5 re container 4) and '*open not to elements'* (e.g. AJB6 re container 6, AJB7 re container 7). With regard to the position in his witness statement, in the supplementary questions in examination in chief, the Inspector's position was that '*open/ unsealed box'* meant '*open with the cardboard flap up';* '*unsealed'* meant '*flaps down but not interleaven',* with no tape and '*folded cardboard boxes'* meant '*flat packed*'. There were some inconsistences in the Inspector's position in his witness statement, to his position under cross examination, and to the contemporaneous notes recorded by the Inspector in his Notebook. I took that into account when considering the Inspector's general credibility. I did not find the Inspector to be entirely consistent or credible in his evidence.

97. Mr Sime gave three ways in which a transport box could be effectively '*closed*': '*reseal with a Sellotape dispenser; effectively close by interleaving the flaps; use a piece of wood over the top, which stops the flaps from lifting up during storage.'* I considered this difference between Mr Sime and the Inspector to be significant with regard to the Inspector's experience re the fireworks industry.

98. The Inspector accepted without explanation that in his notebook he did not record that container 4 has '*screw and debris on the floor'*, as stated in his statement (para 27). In the supplementary questions in examination in chief, the Inspector's position in respect of his notes stating '*screw and debris on floor*' was that there were a few leaves and some screws. The reference to debris on the floor is important with reference to the Inspector's position at para 35 of his witness statement re additional factors increasing the likelihood of an explosive event. I accepted Dr Smith's position in his report that this 'debris' would not cause an ignition event.

99. No account appeared to have been taken by the Inspector that mobile light sources were used at the time of the Inspection (now replaced by a fixed light unit).

100. When it was put to the Inspector under cross that the large UN certified boxes which can be seen in the photographs of the containers (JB 88 – 90) contained fireworks within boxes, rather than loose fireworks, his reply was '*I honestly don't recall*.' The other witnesses were clear that fireworks would not be stored loose in UN transport boxes.

101. It was the Inspector's position that the photographs at JB 88 – 90 did not show the containers in the state they were when he inspected them. He was not specific about the differences. His evidence under cross was *'I believe they have been tidied up. Boxes were stacked quite high to the back. It generally appears to have been tidied up*.' When asked what was different in the photographs from what he saw his evidence was '*I saw unsealed boxes in container 3*'. And '*I don't remember the containers being arranged in such an orderly fashion'.* He accepted that he had not recorded at the time that the boxes had been arranged in a disorderly or higgedly piggedly way. The appellant's witnesses were clear, consistent and plausible in their evidence that the photographs had been taken in order to have a record of the state of the containers as inspected, and had not been tidied up before the photographs were taken. I accepted their position.

102. The Inspector accepted that there was no suggestion when he left before lunchtime that he would be back to the appellant's site that day. In relation to the allegation that after lunchtime he was '*very agitated'*, the Inspector's evidence was '*I don't believe that was the case'*. He agreed that he had said words to the effect of *"I've discussed with colleagues and I want to take some sort of action."* The Inspector did not dispute that his demeanour had changed after lunch. In response to the allegation that the Inspector was '*flustered'*, his evidence was "*I remember being asked lots of questions in quick succession. I was trying to field as many as possible*." I took this as being consistent with the appellant's witnesses' position that the Inspector had been flustered and unable to answer their questions. Both John Laidlaw, Geoff Crowe and George King were clear and consistent in their evidence that the Inspector had been unable to answer some of their questions. John Laidlaw and Geoff Crowe were also consistent in their evidence that the Inspector's demeanour had changed when he returned in the afternoon. I considered it to be significant that no explanation was given by the Inspector as to why they may have formed the impression that his demeanour changed in the afternoon.

103. I considered the Inspector's evidence in respect of risk assessments to be significant. I noted the Inspector's acceptance under cross that he did not ask to see the appellant's risk assessments and method statements, and his explanations that he didn't think it was required and that "..*they had explained the activities and that they believed they were following good practice."* The Inspector was then asked why he did not ask to see the risk assessments and method statements, his reply was '*I didn't believe I required it.'* His later position was "*I don't think a physical risk assessment can reduce the likelihood of consequence."* In re-examination, his position was that he recollected being provided with the appellant's risk assessments but could *'not recollect going into any significant detail*.' And that '*I don't believe my position is to accept or reject a risk assessment or method statement.'* It was undisputed that the Inspector did not take into account the appellant's risk assessments and method statements when deciding to issue the Prohibition Notice. I considered that to be significant. The implementation of appropriate risk assessments and method

statements are part of the steps taken by the appellant to ensure safe methods of working.

104. I found Mr Crow to be entirely consistent, plausible and reliable in his evidence. My clear impression from him was that he cared about the sites and sought to take all necessary steps to ensure that safe working practices were carried out in the appellant business.

105. The evidence of Geoff Crowe, George King and John Laidlaw was much more detailed than the Inspector's evidence in relation to the discussions which they had with the Inspector prior to him communicating to them that he was going to serve a Prohibition Notice. Their evidence was plausible, credible, internally consistent, and consistent with each other's position. For these reasons, where there was inconsistency between the appellant's witnesses' position and the Inspector's position, I accepted the position of the appellant's witnesses. I accepted the evidence of the appellant's witnesses that the Inspector had referred to 'The Guidelines', that they had sought to find what he was referring to and that at that time the Guidelines were an internal document and so could not be located by them.

106. It was put to the Inspector under cross that he had taken a steer from a colleague who hadn't seen the site and was not aware of the methods being used. The Inspector did not deny that. He replied '*I was an experienced Inspector. Not a significant amount with regards to fireworks as a specific item.'.* Taking into account that reply, the Inspector's lack of explanation as to why the appellant's witnesses found his demeanour to be changed after lunchtime to being 'flustered', that he had given no indication when leaving for lunch that he would be back that day and that and his acceptance that he was unable to answer some of their questions in the morning, I accepted that the Inspector's position changed after speaking to his colleagues at lunchtime. I heard evidence only from Mr Sime and not from the other colleagues who the Inspector had spoken to that day. I considered Mr Sime to be an entirely credible and reliable witness. He was consistent and plausible throughout his evidence and made concessions where appropriate. Mr Sime's evidence on what he

had discussed with the Inspector in the phone call on the day of the inspection is set out in paragraphs 12 – 14 of his witness statement.

107. I considered it to be very significant that Mr Sime conceded that the Inspector had not informed him of the duty holder's position with regard to taking voluntary action to avoid the need for enforcement action to be taken. That was plausible given that at the time of that phone call the Inspector had given no indication to the appellant that enforcement action would be taken, and Geoff Crowe had not yet expressed to the Inspector his position that the company would put in place whatever steps were considered by HSE to be necessary to avoid enforcement action being taken. Given that it was Mr Sime's position under cross that if on inspection he had come across a company operating without a picking store, he would tell them to stop that process but would not issue a Prohibition Notice '*When confident that they were not going to undertake the activity*', I concluded from Mr Sime's evidence that the core fact of picking being carried out in the presence of stored fireworks would not necessarily lead to the issue of a Prohibition Notice. It is clear from Mr Sime's evidence that he took into account other factors, including the impression which he obtained from the Inspector as to the state of the containers. I considered this to be significant, given the inconsistency issue between the Inspector's notes, his position in his statement, his position under cross and the photographs. I did take into account Mr Sime's comments on the photographs (JB88), which he had seen only as part of the Joint Bundle. I noted his comments with regard to the height of stacking of the boxes, stack stability, the escape routes and the state of the boxes. His evidence was '*I would be telling them to reduce height, to reduce manual handling injury and reduce risk of dropping as working from above head height.'* Mr Sime's evidence with regard to escape routes was that '*travel distances in the picking store should be smaller than 12 / 13m from the back of the container and the workspace arranged so that at least for part of the activity the picker would not have explosives in the route to exit."* There was no evidence before me to suggest on the balance of probabilities that there was not a clear exit route from the ISO containers. The Inspector had not raised any issue at the time of the inspection with regard to escape routes.

108. Mr Sime gave a considerable amount of evidence in examination in chief, which was not contained in his witness statement. This was noted on, but not objected to by Mr McGee. Part of that evidence was in relation to the layout of the place where picking should take place, and the consequences of that e.g. working in shadow, ease of the escape route. That included evidence on use of benches as a workstation and use of cubby holes to store boxes. There was no evidence that either of these factors were discussed with the duty holder or considered by the Inspector when issuing the Prohibition Notice. I accepted that picking from a balanced stack of transport boxes would be less stable than use of a workstation for that activity. Mr Sime's evidence was that '*The likelihood depends on the working environment. If open, well lit environment, with benches at an appropriate height, a person is much less likely to make a mistake or error than if they are in the back of a container, in the dark, working in their own shadow. They are much more likely to identify damage if there was a drop, which could be an initiative event.'* There was no evidence that these matters were in the mind of the Inspector when issuing the Improvement Notice, or of them being discussed with the duty holder as being necessary or appropriate. I took that evidence into account. I noted the reference to lidded wooden boxes and cubby holes in para 107 of the Explosive Regulations 2014 – Guidance on Regulations - Professional firework display operators" [JB288] , as commented on by Dr Smith in his report at page 9. His position that those measures were not set out in equivalent paragraphs in other relevant Guidance was undisputed. I took into account and accepted Dr Smith's position on those measures.

109. I found both Dr Smith and Mr Sime to be entirely credible and reliable. Each made concessions where they considered it to be appropriate and accepted the other's expertise in their field. Much of the dispute in their evidence was in respect of their interpretation of the Regulation and Guidance, what was required, and what was industry practice.

110. Dr Smith's report is in two parts: his expert opinion (Part 1) and where he is reporting as a past employee of a UK fireworks manufacturing and display company and as an explosives consultant (Part 2). The terms of

his instructions are set out at page 3 and reflect these two aspects. I noted the terms of instructions, which were as follows:-

"*Part 1*

- *the risks associated with the activity of removing fireworks from their packaging within a storage container;*
- *the level of appropriate measures/ reasonably practicable control measures that you believe should be in place to mitigate those risks;*
- *whether you believe that the companies arrangements for mitigating those risks, as evidenced by the photographs of the standards of housekeeping in the storage containers (and by witness statements in due course), were suitable and sufficient and whether there was a risk of serious personal injury (either on 19 February 2020, or if that activity had been carried on);*
- *as part of the above, specifically consider and address the following paragraphs from the HSE's amended response (Tribunal Material, document 9) – paras 10a, 10b, 10c, 23, 24, 25, 26, 29-30,31, 32, 33, 34, 36 – 38.*

Part 2

- *the industry standard approach to this activity and HSE knowledge / or acceptance of that practice*."

111. I accepted Dr Smith's expert opinion on the issues asked of him in the letter of instruction. In doing so, I took into account the terms of his instructions, his qualifications, the considerable extent of his experience in the particular field of the fireworks industry, and his considerable experience in advising on legal compliance for firework display companies and events, all as set out at pages 29 – 30 in his report; his statement of truth at page 27 of his report, including his understanding of his duty to the court; and his oral evidence. I noted that Dr Smith had then had professional contact with a wide range of operators in the firework industry and considered that to be very significant. I also took into account the qualifications, experience and evidence of Mr Sime. I considered it to be significant that there was mutual respect between Dr Smith and Mr Sime

with regard to their knowledge and expertise in this field, agreement between each other in some aspects, and some concessions made by both. I took into account that Mr Sime's evidence was not presented as an expert report. His comments on Dr Smith's report as an expert in the field came via extensive additional questions allowed in examination in chief, rather than being set out in an expert report or included in his witness statement. Dr Smith had been allowed to be present throughout the evidence and so in his evidence he was able to comment on Mr Sime's position. Mr Sime had had the opportunity to consider Dr Smith's report prior to giving his evidence. I noted Mr McGee's submissions in respect of being content to accept that Mr Sime is an expert witness (despite not serving a report with the usual declarations and relying on his impromptu evidence). I accepted Mr McGee's submission that the Inspector is not an expert in the fireworks industry (and he was not presented as such).

112. The respondent relied upon videos by H & S Laboratory, an agency of HSE. Dr Smith commented on the videos in his report, which contains still shots from the videos shown. Dr Smith's summary of his position is set out in a table at p20 – p24 of his report. Mr Sime commented on this in the extensive examination in chief additional questions. I accepted Dr Smith's expert opinion that the 'CHAF trials' '… *Only demonstrate the potential hazard on fireworks and in any case are not representative of the quantities and conditions of the fireworks stored by 21cc'.* These videos showed tests on the reliance of ISO containers to ignition sources and spread following ignition. The trials videoed were on 1 – 8 tonnes of explosives. The videos showed the fireworks start to function after varying periods of time, resulting in a large explosion. I accepted Dr Smith's position that it was important to consider (page 18 of his report) that '*the trials were designed to examine the explosive effects of single types of fireworks which is not representative of how fireworks are actually stored and certainly not at 21CC'* and "*They were initiated by an igniter within the store so the effect was rapid but not instantaneous."* Eg 12 minutes (Dr Smith's report page 19). Some of the containers shown in the videos were stacked to capacity with fireworks in UN transport standard cardboard boxes. The fireworks in the ISO Containers used by the appellant were also stored in UN transport cardboard boxes, but were not

filled to capacity. I accepted Dr Smith's expert opinion on the Consideration of Risks, as set out at page 14 – 17 of his report). Importantly, I accepted the basis of his position being *"Explosives are undoubtedly hazardous - if the law only related to hazard and not risk then no work could feasibly or economically be done with explosive substances or articles*." Mr Sime's evidence was that the videos, where the containers were full with fireworks to the point where there was no more space were used, showed a '*potential top event'*. Mr Sime accepted that the trials showed on the videos said little about the likelihood of an ignition event. Mr Sime's opinion was that picking does involve a risk of serious personal injury, which is the applicable test. I accepted Dr Smith's expert opinion that:-

> *"In dealing with all dangerous goods incidents the most important aspect of overall risk control is to minimise the event happening, and in an explosive situation this generally relates to minimising the risk of an initiating event (such as fire). Of course then minimising the consequences of that ignition is important both in terms of the size of the event (which generally will relate to Hazard Type and quantity of explosives involved) and the protection of people. These are the basic tenets of ER 2014 regulation 26.*
>
> *This is important in this case because, in my view, the operations being carried out by 21CC where appropriate in minimising risks, and indeed that other alternatives could have significantly increased the risk."*

113. I accepted both Dr Smith's evidence that methods of picking similar to that which had been place at the appellant company was not uncommon, and Mr Sime's evidence that he was not aware of such a method being common. I did not consider their evidence on that to be mutually exclusive, given Mr Sime's evidence on the number of inspections carried out by him (approx. 50 in total) and the extensive range of Dr Smith's contacts within the industry, as set out in his report. I took into account Mr Sime's evidence that this was not raised as an issue during consultation with the industry about the HSE guidance which was referred to by the Inspector at the inspection. I took into account that although Dr Smith has been

personally involved in consultation with HSE on a number of matters, he was not personally involved in the drafting of that guidance. I accepted Dr Smith's position that that guidance is not specific about the use of picking stores, nor is it mandatory.

114. Given Dr Smith's considerable range of contact with companies in the fireworks industry, I could not discount his opinion (set out at page 4 of his report) that "…*HSE's position that any packing or unpacking of fireworks should be carried out at a 'Picking Shed' located away from the stores and that this is covered in ER2014 Schedule 5 which explicitly refers to 'Processing' but not to 'Picking*'…"*is not the case or the intention of the law and is contrary both to existing 'Custom and Practice' within the explosives industry and to the general principles of Health and Safety law – in so much that it provides a low risk means of carrying out a universally common activity that is actually of lower risk that the alternatives.*" I accepted Dr Smith's evidence that not all operators in the fireworks industry use separate picking sheds. I accepted his evidence that "*Almost every site I've visited in pyrotechnics carries out some form of picking – there may be shelves and lidded boxes but there will be picking in the presence of other fireworks.*" I accepted the evidence of Dr Smith that the fireworks which were being picked were unfused finished products ('*not exposed composition"*) and that "t*he firework article containing pyrotechnic substance would not expose the pyrotechnic substance to the air to be subject to a spark, friction, sensitivity, etc*." and that therefore the risk of ignition on dropping was *'vanishingly small".* I accepted Dr Smith's evidence that '*I'm not aware of any incident of where a single firework drop led to ignition – with whatever consequence."* I considered it to be significant that Dr Smith's candidly volunteered that the EIDAS database was 'not particularly current' I accepted Dr Smith's conclusion that the appellant's procedures demonstrated the lowest practical risk.

115. In coming to my conclusion, I accepted Dr Smith's position on the HSE Guidance (Explosive Regulations 2014 – Guidance on Regulations - Professional firework display operators" [JB288]), particularly re paragraphs 68 and 89, as set out in his report (pages 8 -9). I accepted and considered to be significant Dr Smith's position that

"*The guide requires the operator devises procedures to cover those operations, and, presumably, has carried out a suitable and sufficient assessment of the risks associated with those operations*."

I noted his acceptance (with regard to para 89) that "*The guide does introduce the term 'Picking store' which is not in the Regulations).* I accepted Dr Smith's evidence that *"It is not a term used in the Guidance* (LS150) *or universally across the industry*". I considered to be significant the undisputed evidence that the amount of explosives kept in the ISO Containers as Binns Mill at the time of the inspection was not in excess of the amount kept in the picking store which was required to be established at Sawmills. I accepted Dr Smith's evidence that "*If there is another way of achieving something, eg with new developments, there are other ways of achieving a broadly acceptable level of risk"* and his evidence that that position that that was in line with the preamble to the Guidance and the fact that the Guidance is not mandatory.

116. I considered it to be very significant that it was the undisputed position in Dr Smith's report (page 10) that '*Fireworks are not inherently unstable, and a firework article is essentially a sealed device with only, perhaps, a fuse exposed.'* Mr Sime accepted that one could walk into a fireworks' store with a lighted match without causing an explosion (although his position was that he wouldn't do it). Dr Smith's evidence on the likely chain of events if ignition occurred from dropping a firework (as set out at page 10 of his report) was undisputed. It was undisputed that '*The important thing is that in step 2 the operator will be able to react to the ignition and has several seconds to move out of the container to the door and retreat to a safe place before escalation of the event occurs."* I considered that to be very significant with regard to whether there was a risk of serios personal injury. I also accepted Dr Smith's opinion in his report as to the likelihood of such an event. That included "*Based on there being no evidence that the operation of taking one* (firework) *out of a box and into another leads to ignition. No evidence that that ever was the case. If the likelihood is very small, it's an assessment of risk balanced with consequence. I stick by my conclusion that* (picking) *is not an operation which leads to*

unacceptable risk." I considered his evidence to be significant with regard to the necessity (or otherwise) of the service of the Prohibition Notice. His evidence that he was concerned about the service of a Prohibition Notice *"where there was an alternative route to achieve an acceptable level and in the absence of looking at the risk assessments."* I accepted his observation that wording in the Guidance such as 'normally', 'generally' and 'smaller' are *'open to interpretation'* and do not set out mandatory steps. I accepted Dr Smith's evidence that the sector Guidance, including LS150 is '*good guidance but not mandatory*', and that it is "*not mandatory. Not explicit – what is in the guidance is not compulsory and there may be other methods of achieving low risk. That could be a magazine. There is nothing to me inherently special about a picking store over a store to keep boxes."* I accepted Dr Smith's position that *"If the term* ('picking')*is so important then it should be defined in the 2014 Regulations."*

117. Dr Smith commented on the photographs of inside the appellant's ISO containers on the day of the inspection (pages 10 – 14 of his report). I accepted his expert opinion that the important features of all of the pictures of the stores he looked at are :-

- "They look well maintained
- the boxes are generally closed
- the boxes are in stable stacks (presumably of different firework types)
- the stores are not filled
- the floor is clean
- there is no evidence of extraneous flammable material
- the walkway between the boxes on either side is clear
- the route to the exit is clear."

In accepting Dr Smith's opinion on the state of the stores, I took into account the inconsistencies in the Inspector's evidence, in particular the inconsistencies between the Inspector's contemporaneous notes and his statement. I then accepted Dr Smith's expert opinion that "*Overall these are signs of well managed and well thought out stores and are at the upper end of what I would expect from stores managed by a fireworks display*

company." I took into account Mr Sime's agreement that a screw was unlikely to cause initiation of an event, and his position that it could cause leakage. I took into account that the agreed screw was partially jammed. I then accepted Dr Smith's expert opinion that …" *The assessment of risks carried out prior to the PN being issued and the operating procedures derived from it, recognise and deal with the major risks and it was wrong for HSE to dismiss this assessment before issuing a Prohibition Notice*." I accepted that position on the basis of it not being in dispute that the risk assessments were not considered by the Inspector prior to the issue of the Prohibition Notice (rather than having been considered and *'dismissed').*

118. I accepted Dr Smith's expert opinion (pages 13 – 14 of his report) with regard to the principles of 'Prevent, Limit, Protect'. I accepted his position that in doing so, he applied the test of '*risk of serious personal injury'* and that this report has a typographical error in one reference to '*serious risk of personal injury*." I accepted his expert opinion that by taking the steps as set out there, the appellant showed they were aware of the risks and had:-

- *"Minimised the likelihood of an ignition occurring*
- *Minimised the effect of the ignition by managing the store well*
- *Maximised the realistic protection of people by managing the store and adjacent stores to allow easy escape and retreat in the time period between ignition and escalation of the event."*

On that basis, I then accepted Dr Smith's expert opinion that "*in this way they were complying with their duties under regulation 26 of ER 2014."* In reaching this conclusion, I considered it to be very significant that Mr Sime accepted under cross examination that the test is not with regard to compliance with the Guidance. Mr Sime's evidence was '*I would see that as a starting point for assessing activities and whether they meet the test."* I noted and took into consideration Mr Sime's position in cross that

when considering if there is a risk of serious personal injury '*you look at the hazard, the degree and likely consequences of the event'.*

119. I accepted Dr Smith's conclusion (page 2) that "*'Picking' of fireworks in a store is **not** an operation that inevitably leads to unacceptable risk*." I considered that if that were the case then the Explosive Regulations and LS150 would have set out clear provisions in respect of picking operations, and they do not. I took into account that at the picking stage the fireworks are not fused. I accepted Dr Smith's expert opinion, as set out in his report, on the likelihood of an event occurring. I took into account that measures can be taken to both avoid an ignition event while picking and to ensure that persons can escape from, or will not be in the immediate vicinity of, an explosion, should an ignition event occur. I accepted Dr Smith's expert opinion on the likelihood of ignition even if there was a drop (of a single firework or of several stored in a UN standard transport box). I took into consideration the undisputed evidence in respect of the time for an ignition event to lead to an explosion and the importance of a clear escape route. I took into consideration the example risk assessment of Bulk Storage of Fireworks in an ISO Container (JB419 – JB422) and the assessment of risk and likelihood of events therein. I accepted Dr Smith's expert opinion that "*the measures in place by 21cc and the appearance of their magazines demonstrate that they understand the risks involved and had determined that their procedures represented the lowest practical risk".* In making this conclusion, I took into account the evidence of Mr Sime in evidence in chief supplementary questions, with regard to use of stable workbenches. I took into account that that had not been suggested to the appellant at the time of the inspection or at the time of setting up the picking store at the Sawmills site. I accepted that picking from a stable workbench, with use of cubby holes where the boxes being picked from are kept, with wooden lids on top of the boxes, and screens to determine escape routes, could be further safety measures. There was no evidence that these additional measures were required by the appellant when setting up the picking store in Sawmills (which was the alternative agreed on after the Prohibition Notice was issued). I also took into account the undisputed evidence in respect of the time it would take for an ignition event to lead to

an explosion, and that it was not disputed that there was a clear escape route in the appellant's ISO Containers. I took into consideration Mr Sime's evidence with regard to the (inappropriate) possibility of transport boxes being placed in the gangway while product was removed was not put to the appellant's witnesses. I accepted Dr Smith's evidence that "t*hat's not how they operated'* and (re use of cubby holes) that 'T*he gross likelihood of an incident on handling a shell is essentially the same.*"

120. I accepted Dr Smith's conclusions that '*There was no unacceptable or even high risk to the operator (or others on site) by carrying out this operation."* In doing so, I accepted his reliance on his conclusion that '*HSE have no evidence from their own EIDAS database or from Prohibition or Improvement Notices that there is an inherent high risk in a 'picking' operation".* There was no such evidence before me and Mr Sime did not dispute Dr Smith's findings on his search of the EIDAS database (as set out at page 17 of Dr Smith's report). It was not Mr Sime's evidence that he had never encountered an operator working without a picking shed. Mr Sime's evidence was that where on inspection he had encountered a similar method as used by the appellants, the arrangements had been altered on agreement and without necessitating service of a Prohibition Notice or Improvement Notice.

121. I considered Dr Smith's evidence of his experience of operations which have a picking shed to be significant. His evidence was 'I *have direct experience of true picking sheds...they might pack 50 (rockets) at once: they put a green rocket into 50 boxes. At that point you have 50 boxes open with rockets in them."* I accepted Dr Smith's reliance in his conclusions on the appellant's operating procedures and risk assessments. I accepted his evidence that *"it is important to assess if an alternative is equally as safe as the Guidance: risk assessments are critical."*

122. Both Mr Sime and Dr Smith also gave evidence on their involvement on the day of the inspection. The Inspector's evidence was that his conversation with Mr Sime at lunchtime on that day had lasted '*a couple of minutes'* and was *'not hugely extensive'.* Mr Sime considered that the conversation was around 10 - 15 minutes. On either account, this was not

an lengthy conversation. Mr Sime could only give guidance based on what he was told by the Inspector. The Inspector accepted that in this conversation he did not tell Mr Sime that Geoff Crowe's position was that the company would cease and desist and do whatever HSE wanted them to do with regard to this activity. I considered that to be very significant with regard to the Inspector's decision that it was necessary to issue a Prohibition Notice.

123. I accepted and took into account Mr Sime's evidence with regard to the general principles of safety set out in LS 150 paragraphs 37 to 39 (JB 187 – 188), Mr Sime's evidence was that '*essentially work should be done on the minimum amount of explosives to undertake the task at hand.'* I considered it to be significant in that regard that the limit on the amount of fireworks held in the picking store under the new licence was not lower than the n.e.c. of explosives held in each ISO storage container at Binns Mill. He accepted that the requirement was to do what was 'reasonably practicable'. His evidence was that the '*objective is to minimise the likelihood of an event in store as much as you can.'* With regard to the risk of the possibility of leakage during transport, Mr Sime's evidence was he wouldn't expect to see that as a matter of routine, but would expect operators to be aware of the possibility of leakage, particularly where the carton show signs of damage. General principles of safety are set out in LS 150 at 38.

124. Both Mr Sime and Dr Smith gave evidence on the historic 'Duckworth letter'. I accepted Mr Sime's evidence that a search had been carried out within HSE and that a copy of that letter could not be found. I took their evidence into account as historical context of there at least having been a time when HSE had been satisfied that picking from a store could be acceptable (on the basis that it was not an act of manufacture), and that, at best there was a lack of clarity in HSE's current guidance on the necessity for a picking store. Mr Sime's evidence was that while '*picking in a magazine is not generally appropriate, you can have a designated picking store / picking magazine. You can have closed shelves and that significantly reduces the potential for an event to rapidly proceed*." And

'*picking and packing is not an act of manufacture but it is not generally appropriate to undertake within a store*.'

125. Mr Sime's evidence was that picking and packing in a store was not a common practice in the industry. He carries out 5 – 10 inspections a year in his role with the HSE. Mr Sime's evidence was that he had seen different methods of working safely and that the duty holder should '*take reasonably practicable steps where undertaking an activity with explosives*.' I considered it to be significant that Mr Sime's evidence was that the action he took when he saw on an inspection that that activity was taking place was *'I made it clear to the duty holder that that was not an acceptable approach and they agreed the activity would stop*.' That then was voluntary cessation rather than the issue of any Notice.

126. Although I took his expertise into account, I did not consider either Mr Sime to be an independent expert. With regard to Mr Olson's reliance on the approval in Kennedy of Mr Justice Cresswell's summary from the Ikarian Reefer (No 1), I did not find that the expert evidence of Mr Sime was '*the independent product of the expert uninfluenced as to form or content by the exigencies of litigation*'. Mr Sime holds a senior position with HSE, which is a party in this litigation.

127. I took into account the comments of LJ Smith in Loveday v Renton [1990] 1 Med LR 117, as relied upon by Mr Olson. I considered that both Mr Sime and Dr Smith gave clear reasons for their positions, supported by evidence. Their positions were both internally consistent and logical. They both presented with care. I took into account the extent to which each faced up to and accepted the logic of a proposition put in cross examination. I took into account the extent to which either was prepared to concede points seen to be correct. I took into account the extent to which each modified or changed their opinion.

128. I took into account that 'picking' is not defined in the Regulations and the appellant's witnesses' position that the activity of lifting a firework out of a box does not change the nature of the article and therefore is not a process. I noted that the appellant does consider activities such as cutting a fuse, linking of fireworks or adding an ignitor to be 'processes', on the basis that

these pose the greatest risk, and their acceptance that 'processing' activities should not take place within a storage facility. I noted that the appellant does have a separate dedicated facility for processing articles, including the addition of fuses, which was located at Hopetoun Sawmill, and that they put in place arrangements for a picking store to also be put into place at Sawmill, on a temporary basis. I took into account the position of the appellant's witnesses that if 'packing and unpacking' is not a process, then it is an activity, and as a consequence, if the risk of an activity can be assessed and determined to be low, it can be an acceptable practice. Their position is that assessing and managing risk is within the spirit of the Regulations and this is what the Company had undertaken in the risk assessment process. I accepted that position. I accepted the reasons for the appellant's witnesses' concern that including a method of working which involves additional road transportation (between their sites) was a factor which added an additional risk. It was the position of Mr Sime that there is a risk of ignition on the occasion of a firework falling to the floor. Dr Smith's position was that in the context of what was being done by the appellants in the picking store, that risk was '*vanishingly small'.* I accepted Dr Smith's position that the requirement for transportation by public roads is a factor to be taken into account when assessing the most appropriate picking method.

129. I did not accept Mr Olsen's submission that there was no evidence before the Tribunal about the contents of any risk assessments or assessment of risk carried out by the appellant, therefore the Tribunal must disregard any opinions stated by Dr Smith that are based on the contents of any risk assessment as being unsupported by factual evidence. I accepted Mr McGee's position that the evidence on that had been uncontested. I accepted Mr McGee's submissions that Dr Smith gave clear evidence that he had seen and considered the risk assessments and that he had explicitly answered that question in cross examination. I noted that a risk assessment is listed as being document 10 in the Joint Bundle but was inadvertently not before me. I accepted Mr McGee's evidence that the respondent was aware from the appellant's witnesses' statements that the appellant relied on the risk assessments and that the respondent did not question or challenge any of the appellant's civilian witnesses with regard

to the risk assessments. I accepted that it was not disputed that the appellant had risk assessments in place which set out their assessment of the risk involved, and the method statements setting out the way in which the work should be done, which took into account the factors in the risk assessment. Having accepted that the risk assessments and method statements were in place, I accepted Mr McGee's submission, (based on Dr Smith's opinion) that the risk assessments and method statements must sensibly be a factor in considering the objective test, on the balance of probabilities, as to whether or not there was a risk of serious personal injury at the time the Notice was issued (Chevron).

130. I accepted Mr McGee's reliance on the content of the risk assessments as referred to by Dr Smith, as set out in his report. In his report: -

> *"In my opinion the assessment of risks carried out prior to the PN being issued, and the operating procedures derived from it, recognise and deal with the major risks and it was wrong for HSE to dismiss this assessment before issuing a Prohibition Notice"*

I accepted Mr McGee's position that Dr Smith's position on the risk assessments was unchallenged. I accepted that Dr Smith came to his conclusions based on the content of the risk assessments, the method statements and the photographs. From these, Dr Smith formed the view that the assessment of risk was appropriate, that the method statements took steps to address the issues highlighted in the risk assessment and that the photographs showed that the method statements were adhered to (Dr Smith referred to the 'important features of all of the pictures of the store (he) looked at). It is these features, the method statements and the uncontested evidence that these method statements were adhered to which show that measures were put in place by the appellant to appropriately manage the risk. That was the evidence on which I decided that the appellant had not been in breach of their statutory obligations. The processes, risk assessments and method statements were considered by Dr Smith in his report, and it is his opinion, as set out at page 14 of his report that

'*21cc were aware of the risks that they were creating by 'picking' fireworks in the store and had: -*

- *Minimised the likelihood of an ignition occurring*
- *Minimised the effect of the ignition by managing the store well*
- *Maximised the realistic protection of people by managing the store (and adjacent stores) to allow easy escape and retreat in the time period between ignition and escalation of the event."*

It was Dr Smith's conclusion that "In this way they were complying with their duties under Regulation 26 of ER2014". I accepted that conclusion based on the evidence before me, even in absence of the sight of the risk assessment itself. I placed weight on the method statements, which set out the practices put in place following the risk assessments. I noted that Dr Smith compared the method used by the appellant with other methods (set out as methods 1 – 3 in his expert report at page 16). I accepted Dr Smith's evidence (page 15 of his report) that "*Exactly the same concerns and practices are widespread throughout the explosives industry – the operators, whether it be fireworks, other pyrotechnics or explosives manufactures, have assessed the risks, taken the HSE's agreed stance, and concluded in most cases that the risk of removing an item from one box within a store and placing it in another box is lower overall than transporting a large number of boxes across a site, or even to another site."* That evidence was uncontested. Mr Sime could only speak to the sites that he had visited in inspections and that the issue had not been raised in consultation with the industry.

131. I accepted Dr Smith's position that the appellant company had risk assessed the process and developed a method of safe working on the basis of the risks being 'as low as reasonably possible' (ALARP). I took into account that in so doing, it was considered that it was sensible to create a method of safe working to pick / 'pack and unpack' stock in situ and not introduce more layers of risk to people and property by lifting and moving (and potentially damaging) stock multiple times, especially given the facility the stock is being moved to would be the same, i.e. it would be another shipping container. I considered it to be significant that those risk assessments and method statements were not taken into account when

the decision was made to issue the Prohibition Notice. I considered it to be significant that it was not disputed that the process which was put in place by the variation licence is the same as the process which was suggested by the appellant as an alternative to the issue of the Prohibition Notice. I considered it to be significant that it was not disputed that the amount of explosives stored in the new picking store is similar to the amounts of explosives stored in the containers where picking was being carried out.

132. It was notable that the experts agreed on much, with the significant area of dispute in their opinion being with regard to picking being carried out in a store facility. Dr Smith's position was that it was common in the industry for picking to be carried out in a store facility. Mr Sime's evidence was that it was not, and where found on inspection such processes would be stopped (in his experience, voluntarily). Mr Sime's evidence was that the Guidance had been consulted on and it had not been raised that it was impractical to have a separate picking store. It was not disputed that there are no records of any incidences of ignition episodes occurring while picking fireworks in a store. I accepted the appellant's position that their processes were common in the industry, and that their approach is supported by the industry, including the British Pyrotechnists Association and the Explosives Industry Group, with the Company being an active member of both organisations the British Pyrotechnists Association often being the point of reference for queries that the business had in relation to the Explosives Regulations 2014. That position was supported by Dr Tom Smith in his oral evidence and in his report. Dr Smith's report included a table setting out three different method statements (Route 1 – 3) for picking (page 16). Mr Sime commented on these routes in his substantial further questions in examination in chief. It was a matter of agreement that in essence the appellant's method was that in Route 1.

133. This is not a case where the company was taking little or no regard of health and safety matters. From the evidence of Dr Smith and the appellant's other witnesses, I am satisfied that the appellant conducted risk assessments and put in place method statements (or operating

procedures) and systems of work so that the risk was as low as reasonably practicable. I considered evidence of the following to be important in this regard: -

- The limitation on the amount of fireworks in each ISO container store
- Storage of fireworks according to hazard type, and to maximum of Type 3.
- The regular maintenance including cleaning and good housekeeping of the ISO container stores.
- Storage of fireworks in their unfused state, within the UN standard transport boxes, which were generally kept closed
- The UN standard transport boxes being in stable stacks in the ISO Containers
- The floor being regularly swept clean
- There is a clear walkway between the boxes
- The route to the exit is clear
- The number of boxes containing unfused fireworks which were open in the ISO Container stores at any one time was minimised.
- Individual items were picked in the store, being picked up from one UN standard transport box and put into another UN standard transport box.
- Closing the UN standard transport box after taking out the item
- Clear route to exit from ISO container
- Once exited from ISO container store, route to safety perpendicular to store axis
- Single person working in store at any one time
- Requirement for other stores (magazines) to be shut while picking was being carried out in another ISO store container.
- Training and Induction of employees

134. I noted that it was Mr Sime's evidence that it was preferrable for two persons to be working at one time – with one supervising. This was not the reason for the Prohibition Notice being issued. I considered the extent

of the appellant's operation, their number of employees and what was reasonably practicable.

135. Mr Sime accepted Dr Smith's position that there is no record on the HSE database (EIDAS) of an ignition event following a dropped firework. Mr Sime's comments on that were that '*One of the challenges of the database is that there is quite a high proportion of events which are at least partially unexplained: generally, the witnesses don't survive. There can then be quite a high degree of uncertainty about how incidents came about.'* Mr Sime did however accept that the likelihood of an ignition event occurring during picking and packing was low or very low. His evidence was that '*I have no reason to doubt (Dr Smith's) conclusion that an ignition event during picking is low. Whether that necessarily confirms that the likelihood of an event is as low as reasonably practical is a significant step to take. The likelihood is low or very low, but the consequences are significant.'*

136. The Inspector's position in his evidence was that '*activities where the explosives are being interacted with is a separate process and there should be a separate area for that activity."* He confirmed under cross that the '*core component*' of his concern was the activity of picking going on in the presence of other stored fireworks. In cross, the Inspector was asked if it was '*simply the fact of picking in the presence of other stored fireworks'* that was his concern. His answer was '*correct'*. He was asked the same question twice later in cross and on both occasions again confirmed the position.

137. It was put to the Inspector later under cross that exactly the same activity which the Prohibition Notice was intended to stop is being allowed to be carried out in the picking store. He did not dispute that the 'core component' of what is now being carried out in the picking store is the picking of fireworks in a container whilst other fireworks are present in that container. In re-examination, the Inspector gave further evidence in respect of the new licence issued after the Prohibition Notice was served (JB123). He was asked about the provision in that licence that the container could be used either for storage or packing but not at the same

time. The Inspector's evidence was '*Correct. But at night. If they didn't have a licence for storage then the container would have to be emptied at night therefore there's a licence for storage as well, or it could be used for storage. If there was only a licence for picking and packing the container would have to be empty when that activity was not being undertaken*'. It was not his position that when the picking activity was being carried out the fireworks stored in the container had to be removed. I considered it to be very significant that neither the Inspector nor Mr Sime's were of the view that picking could never be carried out in a container in the presence of other fireworks. Indeed that would be practically impossible by the nature of the activity. I accepted that the net explosive content of the fireworks and the type of fireworks in the container where picking is being carried out are relevant factors. I considered it to be extremely significant that it was undisputed that the net explosive content of fireworks in the ISO containers at the Binns Mills site at the time of the inspection was not in excess of the net explosive content allowed in the picking store which was required to be set up at the Sawmills site.

Discussion and Decision

138. The appellant appeals to this Tribunal against the Improvement Notice. For the reasons set out in this decision, I find that the Inspector's opinion that the appellant was in breach of section 2(1) of the Health and Safety at Work Act 1974 and regulation 26(1)(b) and (c) of the Explosives Regulations 2014 was made without proper consideration of the methods used by the appellant, their assessment of the risk of the activity of picking and their position that voluntary action would be taken as was considered to be necessary by the Inspector. The appellant took appropriate measures in terms of Regulation 26, as set out in their Binns Mill Method Statement (JB125 – 129) and Binns Mill Stock Retrieval Method Statement (Pre-Prohibition Notice), February 2020 (JB56 – 58), and in doing so complied with their duty under section 2(1) of the Health and Safety at work etc. Act 1974

139. I find that at the time the Notice was served on the appellant, the appellant was not in breach of their obligations under section 2(1) of the Health and

Safety at Work Act 1974 and regulation 26(1)(b) or (c) of the Explosives Regulations 2014.

140. In reaching my decision, I took into account the L150 HSE Explosive Regulations Guidance (JB 176 – 289); the subsector guidance, being HSE Explosive Regulations 2014 Guidance on Regulations - Professional firework display operators (JB290 – 337) ; HSE Explosive Regulations 2014 Guidance on Regulations - Wholesale storage of fireworks (JB 338 – 385); the HSE Explosives Licencing Handbook Part 1 dated 7 November 2019 (AJB 11 – 19 and Beta 2 version full version AJB 36-132). I also took into account the CBI Explosive Industry Group Risk Assessment for Explosives including Fireworks (JB385 – 428)

141. Following HM Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) 132), my task was to make findings in fact on the evidence before me, taking into account any issues of credibility and reliability and then to take my own view on the relevant facts as to whether at the relevant time the appellant was contravening the relevant statutory provisions. The key question (determined on the balance of probabilities) was whether or not there was a risk of serious personal injury in the activities set out in the Prohibition Notice, being the use of ISO containers 1 – 10, collectively known as the Storage Magazine on the Explosive Licence XI/4111/2101/3, for removing fireworks from boxes or cartons whilst other fireworks are present elsewhere within the Storage Magazine.

142. With regard to the numbered propositions set out in Mr Olson's closing written submissions, I accept his first four propositions, which he stated with reference to Inspector of Health and Safety v Chevron North Sea Ltd 2018 SC (UKSC) 132. I did not accept Mr Olson's propositions 5 – 9, set out by him to be drawn from Railtrack plc v Smallwood [2001] ICR and Sagnata Investments v Norwich Corpn [1971] 2 QB 614, on the basis that the approach in those authorities no longer stands in light of Chevron. I accepted Mr Olson's eleventh proposition with regard to reliance on the guidance given in Cordia re expert witnesses. I did not accept Mr Olson's submission that Dr Smith did not give adequate reasoning for his opinions. I instead accepted Mr McGee's submission and accepted that Dr Smith clearly set out his reasoning in his report, which was based on facts as to

how the appellant operated, being as set out in the method statements which had been put in place after proper risk assessment, and evidenced by the photographs as having been put into practice.

143. I accepted Mr Olson's reliance on the evidence from Mr Reeves, Mr Sime and Dr Smith about the consequences of ignition of fireworks. I accepted that any accident involving fireworks could result in serious personal injury. In considering the risk of serious personal injury I took into account that the requirement in the case of a Prohibition Notice is a risk of serious injury, not likelihood of serious injury (R v Board of Trustees of the Science Museum [1993] ICR 876).

144. Mr Olson relied on R v Board of Trustees of the Science Museum [1993] ICR 876 and the dictionary definition of 'risk'. I accepted Mr McGee's submission that that case was concerned centrally with the meaning of 'exposure to risk', in the sense that exposure only occurred when a danger ceased to be potential and became actual. I accepted that the use of the dictionary definition of risk in that case should be considered in that context. I accepted that R v Board of Trustees of the Science Museum [1993] ICR 876 is authority for the proposition that exposure to potential danger is sufficient under the Act. I further accepted Mr McGee's submission that the risk must be a material one. I accepted Mr McGee's reliance on Ld Hope's comments in Chargot (at para 27E-F) that the purpose of the Act is not to create a risk free environment but to create a safe working environment'. I considered that to be very significant. In Chargot Ld Hope's said:-

> *"The first point to be made is that when the legislation refers to risks it is not contemplating risks that are fanciful or trivial. It is not its purpose to impose burdens on employers that are wholly unreasonable…..The law does not aim to create an environment that is entirely risk free. It concerns itself with risks that re material. That, in effect, is what the word 'risk' which the statute uses means. It is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against."*

145. I accepted Mr McGee's reliance on those comments, and on their approval by the Court of Appeal in R v EGS Ltd [2009] EWCA Crim 1942 as per Ld Dyson at paragraph 23:-

> "*As Lord Hope makes clear at [27] of his speech in Chargot, the risks must be material risks to health and safety….In our judgement, Lord Hope was referring back to the earlier part of [27] when he said that the legislation is only concerned with risks that are not trivial or fanciful. A risk that is trivial or fanciful is not material."*

146. I further accepted Mr McGee's reliance on the line of Dyson LJ's reasoning, as affirmed by the Court of Appeal in R v Tangerine Confectionary Ltd; R v Veolia Ltd [2011] EWCA Crim 2015. I then accepted Mr McGee's reliance on Dr Smith's evidence of the remoteness of the likelihood of an ignition event during picking being relevant with regard to consideration of whether there was a material risk. I accepted Mr McGee's submission that the risk under consideration in this case is one arising from the packing and unpacking of fireworks in the presence of other fireworks. I accepted Mr McGee's submission that that risk centres on the likelihood of an event leading to the accidental ignition of a firework or explosive material in the course of that activity. I accepted Mr McGee's submission that the risk of propagation is secondary. I accepted Mr McGee's submission that the core issue in this case is the risk of an originating accidental ignition of a firework. I accepted Dr Smith's evidence that the risk of that was very low. I accepted Mr McGee's reliance on the opinion of Dr Smith that such an initiating accidental ignition was extremely low being largely accepted by Mr Sime. In considering whether there was a material risk of serious personal injury, I took into account the time for escape should an ignition event occur.

147. I accepted Mr McGee's submission that the Tribunal should pay due regard to the Inspector's expertise, but form its own view on the facts. I accepted Mr McGee's submission that I must come to my own determination and may find that the Inspector was wrong to issue the Improvement Notice. I accepted Mr McGee's submission that if on the

evidence I reach a different conclusion from the Inspector, I am entitled to cancel the Prohibition Notice. I accepted Mr McGee's criticism of Mr Olson's submission that to reach my own decision is not a '*trap*' but is rather expressly what the Tribunal should do in an appeal of this kind. I accepted Mr McGee's submission that I do not require to find that the Prohibition Notice was issued 'unreasonably' and that this appeal is not a review of the reasonableness of the Inspector's decision (Railtrack v Smallwood and Hague v Rotary Yorkshire Ltd).

148. Following Chevron, the Tribunal must look at all the relevant facts and take its own view on those facts as to whether the activities involve a risk of serious personal injury. The test the Tribunal applies to an appeal against a prohibition notice is not confined to reviewing the inspector's opinion on public law grounds, for instance reasonableness. Instead, the Tribunal is to decide whether, at the time the notice was served, the breach existed. Whether or not there was a risk of serious injury is an objective test for the Tribunal, being essentially a matter of opinion, albeit based on the facts as established by evidence.

149. I considered it to be very significant that the wording in Regulation 26 of the Explosive Regulations 2014 is :-

"(1) Any person who manufactures or stores explosives must take appropriate measures –

The decision on whether 'appropriate' measures have been taken will depend on the facts and circumstances of the case. I accepted Dr Smith's expert opinion that the measures taken by the appellant were 'appropriate measures' and therefore there was no breach of ER14 Regulation 26. I attached significant weight to the method statements, which set out the measures taken by the appellant to seek to comply with their obligations under the Explosive Regulations 2014. I accepted Dr Smith's opinion that by taking the steps as set out in those method statements the appellant was at the time of issue of the Prohibition Notice in compliance with the Explosive Regulations 2014. In doing so I took into account that the Guidance relative to those Regulations is not mandatory and that the

measures taken by the appellant were in line with the LS150 Guidance, which does not make reference to any necessity for a separate picking store. I accepted the appellant's position that they had a system of working in place to ensure that firework explosives were picked and packed safely. I accepted that they were not in contravention of the statutory provisions set out in the Prohibition Notice. I considered the facts and made the findings set out above. The appellant has a system in place for assessing risk. Method statements have been developed and work is carried out in accordance with those method statements.

150. When reaching my decision in this case, I took into account the guidance in Chevron. I noted paragraphs 30 – 31 of the Supreme Court's decision:-

> *".. once again the Tribunal were entitled to reach their own view based on the evidence which they had heard. They took into account a number of features, including: the temporary measures which had been put in place to prevent the use of stairways and staging; the remedial steps which were underway; the undertakings given by the installation manager; the fact that the stairways and staging would not be used until the remedial works were completed; and the presence of the appellant until 25 April. All of these circumstances justified the findings that there was no risk of serious personal injury and that service of the notice was both unnecessary and unreasonable.*
>
> *31. The criticisms of the Tribunal's approach are essentially directed towards the weight attached by the Tribunal to particular facts and circumstances. As such there is no true error of law identified, in the absence of an unreasonable conclusion. In a particular case, a Tribunal or an inspector may, depending on the evidence, decide that any temporary measures taken, or undertakings given, or progress of remedial works noticed, do not persuade them or him that the risk is effectively eliminated. It will also depend on the particular facts and circumstances. However, a Tribunal or inspector is not bound to discount these factors when assessing whether the particular operation (in this case evacuation) will involve the relevant risk. In some cases, a Tribunal or inspector*

may decide that a risk remains or will revive. That may be the situation where a serious accident has occurred and the relevant activities will be resumed at some point (eg Railtrack v Smallwood (supra) at paras 97-98). There is no absolute proposition that temporary means, undertakings and remedial steps can, or should, be ignored when carrying out the risk equation. Equally, the presence of an inspector on site is a factor, albeit not a decisive one, in assessing the risk. The Tribunal or inspector may regard that as of little or significant weight according to the particular circumstances."

151. Although accepting that there are further safety measures, such as the use of cubby holes and stable workbenches, which were not in place at the time that the Prohibition Notice was issued, I did not accept that the risk in the method used by the appellant at the time of the Inspection was significant. In reaching that conclusion, I considered it to be significant that the HSE records do not show any incidence of ignition following dropping of a unfused firework. It was Mr Sime's evidence that it was the potential for dropping a firework which was the potential ignition route. I accepted that a firework could ignite on being dropped but in the circumstances, including the type of fireworks and that they were in an unfused state, I accepted Dr smith's professional opinion that the methods used by the appellant '*effectively eliminated'* the risk of serious personal injury.

152. Having made my findings in fact, I carried out an objective test, on the balance of probabilities, as to whether or not there was a risk of serious personal injury at the time the Notice was issued (Chevron). In all the circumstances, my conclusion was that at the time the Prohibition Notice was served, there was not a risk of serious personal injury in the method of picking used by the appellant. Additionally, I was satisfied that the duty holder would have taken all steps required by the HSE without the need for statutory enforcement.

153. In coming to my decision, I considered it to be very significant that I accepted the appellant's evidence that they would have ceased the activity on a voluntary basis. I made that finding in fact on assessment of the

consistency, credibility and reliability of the Inspector, George King and Geoff Crowe, as set out above. I considered it to be very significant that I found that the appellant did not seek to deny that picking was being carried out in the stores, and on a number of occasions openly admitted that his methods was being carried out. I considered it to be very significant that on a number of occasions offers were made to cease the activity and work differently as a solution and alternative to a Prohibition Notice (or other enforcement action) being issued. In these circumstances it was not necessary for the Prohibition Notice to be issued. I accepted Mr McGee's submission that I should consider the Inspector's decision-making process, including in relation to voluntary cessation. The Inspector's belief that the appellant would not voluntarily cease the activity (which I found to be an unreasonable belief) was a significant factor in his decision to issue the Prohibition Notice. My conclusion that this belief was unreasonable is a factor in my decision to cancel the Prohibition Notice, on the basis that it was not necessary.

154. In all the circumstances, my conclusion is then that there was no breach of the statutory provisions set out in the Prohibition Notice and that that the duty holder would have taken all steps required by the HSE without the need for statutory enforcement. In these circumstances, I have concluded that the Improvement Notice should be cancelled. The appeal succeeds.

Employment Judge: Claire McManus
Date of Judgment: 23 September 2021
Entered in register: 27 September 2021
and copied to parties