Neutral Citation Number: [2022] EWHC 3167 (KB)

Case No: F90BM313

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil and Family Justice Centre
33 Bull St
Birmingham
B4 6DS

Date: 20/12/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

ANDREW CARR (A PROTECTED PARTY, BY HIS LITIGATION FRIEND MICHELLE PARSONS)	**Claimant**
- and -	
BRANDS TRANSPORT LIMITED	**Defendant/ Claimant in additional claim**
-and-	
TRAX (COVENTRY) LIMITED	**Third Party**

- -
- -

Stephen Killalea KC (instructed by **Irwin Michell LLP**) for the **Claimant**
Lord Faulks KC (instructed by **DAC Beachcroft Claims Limited**) for the **Defendant**
Christopher Kennedy KC (instructed by **Keoghs LLP) for the Third Party**

Hearing dates: 14-16 February 2022

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Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Julian Knowles:

Introduction

1. This is a tragic case. Nothing in this judgment is intended to minimise the loss and suffering of the Claimant, his family and his friends.

2. This is also not a straightforward case. Resolving it has not been easy and has taken some time.

3. The case raises a number of substantial legal issues including: (a) whether the Claimant was an employee of the First Defendant, Brands Transport Ltd (Brands), as well as being its sole director and majority shareholder; (b) assuming he was an employee, whether Brands is liable for alleged faults on the part of its external transport manager (an independent contractor), who was responsible for regulatory compliance, and whose fault (it is said) caused or contributed to the accident in which the Claimant was seriously injured, because Brands owed the Claimant a non-delegable duty of care as its employee: see *Woodland v Swimming Teachers Association* [2014] AC 5; (c) whether the Claimant can sue Brands, even though he was its sole director, or whether, it being said by Brands that the accident was the Claimant's own fault, his claim is defeated by the principles set out in *Brumder v Motornet Service and Repairs Ltd* [2013] 1 WLR 2783; (d) whether Brands' external transport manager was in a position analogous to that of an employee, so that Brands is liable for his fault as if he were in law an employee: see *Various Claimants* v *Barclays Bank Plc* [2020] AC 973; and (e) whether the Claimant was contributorily negligent and, if so, to what extent.

4. As well as my detailed trial notes, I have full transcripts of the hearing which I have consulted whilst writing this judgment. I also was supplied with various written submissions by the parties, before and after the trial, for which I am grateful.

Factual background in brief

5. On 18 December 2017 the Claimant, then aged 32, was in the process of loading cars on to the top deck of a large double-decker car transporter at premises in the Midlands. The vehicle consisted of two distinct sections: a tractor unit (or cab), and a trailer with triple axles. Both the cab and trailer unit had ramps (decks) which could be raised and lowered and/or angled to allow for the loading of cars. Also, sitting directly above the tractor unit, was a fixed overhead platform. This, and other sections of the unit, had safety rails. These consisted of cables looped through steel guard rails which were welded to the unit, with the ends of the cables anchored to the unit. The rails were intended to stop people from falling from the decks.

6. As the Claimant was loading and securing a Skoda car on the deck above the tractor unit, the front near side safety guard rail gave way when the Claimant leant back on it or put pressure on it. That is the inference I draw from the evidence: no-one saw the actual accident. The Claimant fell some 14 feet or so on to concrete. He suffered a severely fractured skull and catastrophic brain injuries which he is unlikely ever to recover from. It is not necessary for the purposes of this judgment (which is only concerned with liability) to set out further details of his injuries. He is not able to give evidence and is a protected party.

7. It is common ground that the safety rail failed because of corrosion in the front near side guard pillar. An area of the pillar just above where it had been welded to the unit had almost entirely corroded away. That pillar then snapped when force was applied to it, causing the cables to give way and the Claimant to fall from the top deck.

8. The transporter was owned by Brands**.** The Claimant was Brands' sole director and an 80% shareholder. His partner Michelle Parsons owned the other 20%. The Claimant was paid a salary. Ms Parsons did some administrative work for the company and also received a salary.

9. Brands was established by the Claimant in February 2016. It was going to undertake car transport work using the transporter, which was purchased second-hand towards the end of 2016. There had been some 'dry-runs' in the months prior to the accident, but the day of the accident was Brands' first paying job.

10. At least initially, there was an issue whether the Claimant was an employee of Brands. For reasons I will explain later, I am satisfied that he was indeed an employee, as well as being its sole director and majority shareholder. The law is clear that a company's sole director can also be an employee.

11. The Claimant sues Brands for negligence for personal injury.

12. The Third Party, Trax (Coventry) Limited (Trax) is a company whose business included carrying out safety checks on large vehicles (it has since ceased trading). The regulatory regime in force for such vehicles requires them to be inspected for roadworthiness regularly, in the case of the transporter, every six weeks, as well as having an annual MOT. Drivers also need to do daily walk around inspections before they set off. Trax inspected the car transporter in October 2017 and November 2017 and passed it as roadworthy. There had been two inspections earlier in 2017 not done by Trax. The vehicle passed its MOT in August 2017.

13. Because it was used for working at height, the transporter needed additional inspections under health and safety regulations, as I will describe in a moment.

14. The Claimant originally issued proceedings against both Brands and Trax as Defendants. Following pleading amendments, the Claimant's case against Trax was discontinued. Brands then brought a claim against Trax under CPR Part 20 for an indemnity/contribution, in the event that I find Brands to be liable. It is common ground that if I find for Brands as against the Claimant, then its claim for a contribution from Trax will fall away.

Health and safety legislation

15. As I have said, because the transporter involved working at height, it was subject to the Lifting Operations and Lifting Equipment Regulations 2008 (SI 2008/2307) (LOLER). These imposed additional inspection requirements over and above those I have already mentioned. Also relevant are the Provision and Use of Work Equipment Regulations 2008 (SI 2008/2306) (PUWER) and the Working at Height Regulations 2005 (SI 2005/735) (WHR).

16. It is convenient here to set out the relevant regulations.

17. Regulation 4 of LOLER provides:

> "*Organisation and planning*
>
> 4. - (1) Every employer shall ensure that work at height is -
>
> (a) properly planned;
>
> (b) appropriately supervised; and
>
> (c) carried out in a manner which is so far as is reasonably practicable safe,
>
> and that its planning includes the selection of work equipment in accordance with regulation 7."

18. Regulation 9 provides:

> "*Thorough examination and inspection*
>
> 9. - (1) Every employer shall ensure that before lifting equipment is put into service for the first time by him it is thoroughly examined for any defect unless either -
>
> (a) the lifting equipment has not been used before; and
>
> (b) in the case of lifting equipment for which [an EC declaration of conformity] [a declaration of conformity] could or (in the case of a declaration under [the Lifts Regulations 2016]) should have been drawn up, the employer has received such declaration made not more than 12 months before the lifting equipment is put into service;
>
> or, if obtained from the undertaking of another person, it is accompanied by physical evidence referred to in paragraph (4).
>
> (2) Every employer shall ensure that, where the safety of lifting equipment depends on the installation conditions, it is thoroughly examined—
>
> (a) after installation and before being put into service for the first time; and
>
> (b) after assembly and before being put into service at a new site or in a new location,
>
> to ensure that it has been installed correctly and is safe to operate.

> (3) Subject to paragraph (6), every employer shall ensure that lifting equipment which is exposed to conditions causing deterioration which is liable to result in dangerous situations is -
>
> (a) thoroughly examined—
>
> (i) in the case of lifting equipment for lifting persons or an accessory for lifting, at least every 6 months;
>
> (ii) in the case of other lifting equipment, at least every 12 months; or
>
> (iii) in either case, in accordance with an examination scheme; and
>
> (iv) each time that exceptional circumstances which are liable to jeopardise the safety of the lifting equipment have occurred; and
>
> (b) if appropriate for the purpose, is inspected by a competent person at suitable intervals between thorough examinations,
>
> to ensure that health and safety conditions are maintained and that any deterioration can be detected and remedied in good time
>
> …"

19. There was an issue about whether, pursuant to this regulation, the transporter should have had a thorough reg 9 LOLER inspection at least every six months, or at least every 12 months. For reasons I will explain later, I incline to the view that the relevant period was at least every six months, pursuant to reg 9(3)(a)(i). In saying this, I have not overlooked that the last LOLER inspection report done by the company from which Brands bought the transporter (ECM (Vehicle Delivery Service) Ltd (ECM)) said an inspection was due in 12 months from the date of its inspection.

20. But whether the minimum inspection period was six months or 12 months, does not in the end matter. The transporter's last reg 9 LOLER inspection before Brands bought it was on 5 July 2016. Thus, on any view, the next LOLER inspection was due no later than 4 July 2017, ie, more than five months before the accident.

21. I find on a balance of probabilities that had such an inspection been carried out, it would have identified the defective and corroded guard rail and so prevented the accident. That is the thrust of the expert evidence, and no-one suggested to the contrary. The photos taken after the accident show there were very obvious problems with the upper deck guard rails, which would have raised concern, had they been inspected pursuant to LOLER. As well as the corroded pillar which failed, another safety pillar had a large

bulge under its plastic sheath, indicative of some sort of problem. There had also been defective welding work carried out on one of the pillars (it is not known by whom).

22. Regulation 8 of the WHR is headed 'Requirements for Particular Work Equipment', and provides:

> "8. Every employer shall ensure that, in the case of -
>
> (a) a guard-rail, toe-board, barrier or similar collective means of protection, Schedule 2 is complied with
>
> …"

23. The relevant paragraphs of Sch 2 are these:

> "1. Unless the context otherwise requires, any reference in this Schedule to means of protection is to a guard-rail, toe-board, barrier or similar collective means of protection.
>
> 2. Means of protection shall -
>
> (a) be of sufficient dimensions, of sufficient strength and rigidity for the purposes for which they are being used, and otherwise suitable;
>
> …
>
> 4. Any structure or part of a structure which supports means of protection or to which means of protection are attached shall be of sufficient strength and suitable for the purpose of such support or attachment."

24. Sub-paragraphs (1) and (3) of reg 12 ('Inspection of Work Equipment') provides:

> "12. - (1) This regulation applies only to work equipment to which regulation 8 and Schedules 2 to 6 apply.
>
> ..
>
> (3) Every employer shall ensure that work equipment exposed to conditions causing deterioration which is liable to result in dangerous situations is inspected—
>
> (a) at suitable intervals; and
>
> (b) each time that exceptional circumstances which are liable to jeopardise the safety of the work equipment have occurred,

to ensure that health and safety conditions are maintained and that any deterioration can be detected and remedied in good time."

25. The following regulations of PUWER are also relevant:

> "*Suitability of work equipment*
>
> 4. - (1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.
>
> …
>
> *Maintenance*
>
> 5. - (1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.
>
> …"

26. In due course I will need to refer to s 47 of the Health and Safety at Work etc. Act 1974 (civil liability), as amended by s 69 of the Enterprise and Regulatory Reform Act 2013 (civil liability for breach of health and safety duties). As so amended, s 47 provides:

> "(1) Nothing in this Part shall be construed -
>
> (a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or
>
> (b) …
>
> (c) as affecting the operation of section 12 of the Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).
>
> (2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.
>
> (2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions).
>
> (2B) Regulations under this section may include provision for -

(a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);

(b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void.]

(3) No provision made by virtue of section 15(6)(b) shall afford a defence in any civil proceedings ...

(4) Subsections (1)(a) [, (2) and (2A)] above are without prejudice to any right of action which exists apart from the provisions of this Act, and subsection [(2B)(a)] above is without prejudice to any defence which may be available apart from the provisions of the regulations there mentioned.

(5) …

(6) …

[(7) The power to make regulations under this section shall be exercisable by the Secretary of State.]"

27. For the purposes of this case, the important provision is s 47(2). This excludes liability for breach of a duty imposed by a statutory instrument containing health and safety regulations. Whereby, prior to the enactment of s 69, an employee could sue for breach of statutory duty and rely upon a breach of health and safety regulations (which often imposed absolute liability), his or her remedy now lies in common law negligence, requiring them to show fault in the form of a breach of duty on the part of their employer. The parties were agreed, however, that such regulations remain relevant in defining the scope of that common law duty of care.

28. Section 1 of the Employer's Liability (Defective Equipment) Act 1969 (the 1969 Act) is also relied upon by the Claimant. I will return to this later.

The evidence

29. For the Claimant I heard live evidence from: Michelle Parsons; Andrew (Tony) Carr, the Claimant's father; and Steve Maynard, who worked as a freelance HGV driver for Brands and was with the Claimant on the day of the accident, although he did not see it. He had driven the vehicle on a few occasions prior to the accident on practice runs.

30. For Brands I heard evidence from David Sippitts, who was Brands' external transport manager. I need to say a word here about a transport manager's role because it is important in this case.

31. It is a statutory requirement that the holder of an operator's licence for goods vehicles (as Brands was) have the services of a transport manager: see The Goods Vehicles (Licensing of Operators) Act 1995, s 13A and Sch 3.

32. Large operators generally have internal, employed, transport managers, whereas smaller operators like Brands use the services of external transport managers who work on a freelance basis. Mr Sippitts was an external transport manager. He had a number of different clients, of which Brands was just one. He was paid a monthly retainer of £350 by Brands, and did a few hours work for it each month. His job was to ensure that Brands met its regulatory obligations (to put it neutrally) as the holder of an operator's licence for a heavy goods vehicle. I say 'neutrally' because, as I will explain, Mr Sippitts did not regard health and safety matters as being his responsibility. He only thought that the transporter's 'roadworthiness' – as he saw it - was part of his 'remit'.

33. For Trax, I heard from Keith Simpson, who at the time was its director. I also heard from Joshua Wheeler, who formerly worked for Trax as a mechanic, and inspected the transporter in November 2017.

34. Trax also relied on the statement of Phillip Harrison, a heavy goods vehicle technical operator for the Driver and Vehicle Standards Agency (DVSA), which was taken as read.

35. There was also a quantity of expert evidence. This was effectively agreed, and no party required any expert to be called. I was referred to the salient parts of this evidence, some of which I will mention later.

Evidence for the Claimant

36. Michelle Parsons was the Claimant's first witness. I am grateful to Ms Parsons for the clear and dignified way in which she gave her evidence. She could not have found doing so easy.

37. Ms Parsons explained the history of the company's formation; her role and that of the Claimant; how they had taken advice about share ownership, as well as other matters.

38. Through Ms Parsons I was taken to a quantity of documentation including: the Claimant's P60 for the tax year to April 2018 (the year of the accident) which showed he earned £9453.28 that year; a schedule prepared by Brands' accountants showing the Claimant's monthly earnings through 2016 and 2017 (there are others for him and Ms Parsons); and the employee and employer National Insurance (NI) contributions. The accountants would advise Ms Parsons or the Claimant when NI and PAYE was due. I was also shown evidence of an employee liability insurance policy. Ms Parsons told me that they had been taking advice about employee pensions, although nothing was ever put in place because of the accident.

39. I was also shown an unsigned contract of employment between Brands and the Claimant. Clause 2.1 stated:

> "You are employed as a 3.5 tonne Van Driver and you shall carry out such other role and/duties as the Company considers appropriate."

40. A salary of £11 000 pa was specified in clause 5.1.

41. There was no evidence about who drew up the contract, or when, but it certainly looks like it was professionally drafted.

42. Ms Parsons told me in terms that she and the Claimant were employees of Brands.

43. The definition of an employee is set out in the Employment Rights Act 1996, s 230:

> "In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

44. The determination of whether someone is an employee, or a worker, or an independent contractor, requires a factual assessment. Lord Leggatt summarised the approach in *Uber BV and others v Aslam and others* [2021] ICR 657, [118]:

> "118. It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal."

45. On this question Mr Killalea KC referred me to the judgment of Elias P in *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635, [98], where the following guidance was given as to whether the contract of employment of a majority shareholder should be given effect: (a) the onus is on the party denying a contract; (b) where an individual has paid an employee's tax and National Insurance, *prima facie* he is entitled to an employee's rights; (c) the mere fact of majority shareholding (or *de facto* control) does not in itself prevent a contract arising; (d) similarly, entrepreneur status does not in itself prevent a contract arising; (e) if the parties conduct themselves according to the contract (eg, as to hours and holidays), that is a strong pointer towards employment; (f) conversely, if their conduct is inconsistent with (or not governed by) the contract, that is a strong pointer against employment; (g) the assertion that there is a genuine contract will be undermined if there is nothing in writing; (h) although a majority shareholding and/or control will always be relevant and may be decisive, that fact alone should not justify a finding of no employment.

46. Applying this approach, I am satisfied that the Claimant was an employee. There is no inconsistency between being a sole director *and* an employee: *Lee v Lee's Air Farming Ltd* [1961] AC 12.

47. The factors supporting that conclusion are, in particular, that: the Claimant paid income tax on a PAYE basis; employee NI was paid; the company had employee insurance in place; the way the Claimant was treated by the company's accountants; the existence of an unsigned contract of employment specifying the Claimant to be an employee; his partner regarded she and he to be employees (and there is no evidence that he believed anything different from her); and that, although the Claimant was a director of the company, his job title at Companies House was 'manager'.

48. This means that Brands owed him a duty of care as its employee. I will need to consider later the nature of that duty, and whether Brands was in breach of it.

49. Ms Parsons said Brands bought the transporter because the Claimant was hoping to expand the business and needed a bigger vehicle. He had done some single vehicle recovery work, but had bigger ambitions. She was not involved in the purchase.

50. Brands was granted an operator's licence by the Office of the Traffic Commissioner in April 2017. The Traffic Commissioner ~~is~~ responsible for the licensing and regulation of those who operate HGVs, buses and coaches and the like.

51. Ms Parsons said that the Claimant had little experience of car transporters, and had never owned one before. She explained the legal requirement for a transport manager. After using one company for a time, they decided that they wanted someone more experienced, and so David Sippitts was engaged. He came to their house and had discussions with the Claimant. As far as she knew, Mr Sippitts never actually saw the vehicle. It was parked at a lorry park called Seclands in Coventry, to whom Brands paid a monthly fee.

52. In cross-examination by Lord Faulks KC for Brands, Ms Parsons said that she herself never saw the transporter and did not see any work done on it, although she knew work had been done by a third party. She never saw it fully loaded, but had seen it with a couple of vehicles on it. She thought that the Claimant did the collection on the day of the accident to see how long it would take to fully load it. She thought there had been some trial runs and practice sessions before that, but did not know the details.

53. She said that there is a legal requirement to have a registered inspector for trucks, and she saw Trax' website, which contained a range of services (including 'All commercial vehicle servicing and repairs carried out … LOLER testing …'). She knew that Trax had been selected as appropriate.

54. In cross-examination by Mr Kennedy KC for Trax, Ms Parsons said that the vehicle had been at Seclands apart from when it had an MOT and been painted. She did not know at the time, but has since learned, that Trax did two inspections. She was not familiar with all the maintenance details but knew work had been done on the brakes and that it had had an MOT.

55. She said that the Claimant had been looking for training for best practice going forward. David Sippitts created a Google Calendar containing the transporter's maintenance schedule. Google Calendar is an online a time-management and scheduling calendar service developed by Google. It allows users to create and edit events.

56. In re-examination by Mr Killalea, Ms Parsons was shown the Google Calendar. It had various colour codes for the different status of maintenance tasks, eg, those marked in red were due, those in yellow were complete. I will return to this topic later.

57. The next witness was the Claimant's father Andrew (Anthony) Carr, known as Tony. Again, I am grateful to him for his dignified and clear evidence.

58. He had worked with HGV vehicles for many years. He has no formal qualifications but lots of experience, although not with car transporters.

59. He was involved in the purchase of the vehicle with his son. The Claimant found ECM in Carlisle, who were a big operator. They went and looked at vehicles. They chose the one that they thought was the best set up at the time. The budget was £5000-£6000. The vehicle they bought seemed to be in a better condition than some of the others.

60. Tony Carr had gone with his son to make sure the vehicle was road fit, eg, that the tyres, trailer and brakes were satisfactory. They could see there were safety rails in place, and they had no reason to think there was anything wrong with them. They understood that the vehicle had been in regular use by ECM until recently.

61. In his statement Tony Carr made the following points: he did some preliminary work on the vehicle, but told the Claimant that Brands could not rely on him to do the maintenance because of his lack of transporter experience; it was obvious that the work would need to be contracted out; he knew that the Claimant was talking to an external transport manager about how to manage the vehicle; as well as an MOT, the vehicle required regular additional safety inspections every six weeks; he knew and trusted Trax, for whom he had worked on and off in the past on a freelance basis. He trusted Trax's inspection reports, and thought the Claimant would have done also.

62. In cross-examination by Lord Faulks, he said that they had inspected the vehicle. It had new flooring and new hydraulic rams and straps, and good tyres. It looked well maintained. It had good paint work. They tested the raising and lowering of the ramps but did not drive on to it. He did not see the corroded guardrail pillars, but if he had done so, he would have said something.

63. After ECM had delivered the vehicle, he did some painting and other preparatory work on it.

64. When he worked for Trax, he did all sorts of work on a wide range of vehicles, but could not say if he had ever seen a transporter. He said he may have told the Claimant that Trax were 'OK' to carry out inspections, and would have said if he did not think that. He knew the Claimant was relying on Trax to carry out a detailed inspection of the whole vehicle.

65. In cross-examination by Mr Kennedy, he said there may have been some corrosion, but that did not mean the vehicle could not be driven. The Claimant was looking to him for advice and help because of his experience.

66. He said the Claimant had asked him to do the preparatory work; the MOT had been done by a company called Brindleys, at which he had been present; and the vehicle had been driven there by Steve Maynard, who was the next witness.

67. Mr Maynard said he had known the Claimant for a long time. The Claimant was his son's best friend. Mr Maynard had been an HGV driver since 2006. He has a Class 1 licence. The transporter was covered by the licence, although he had not driven such a vehicle before. He confirmed he worked for Brands on a freelance basis.

68. He was shown the driver disclaimer (essentially confirming his competence to drive the vehicle) and confirmed he had completed it a few months before he accident. He explained that a separate form has to be completed for each company he works for.

69. He was shown an example of a defect log. He said he was not familiar with that particular form of layout. He confirmed that he would do a defect check on the vehicle he was due to drive every single day, which is what is required.

70. He was shown records of daily checks, and confirmed from August 2017 onwards until the accident he had driven the transporter on several occasions. (In fact, there was later tachograph evidence that showed he started driving a couple of months before that).

71. He said he thought the daily checks were the best record of when he had driven, because he always filled out a check form. He said his checks included, 'Steering, indicators, brakes, lights, handbrake everything. Everything to make sure that the vehicle is safe to go on the road.' He would check for loose straps as part of his inspection. He said carrying out checks was not a condition of his HGV licence, but was 'more a condition of the companies that you drive for.'

72. Mr Maynard described (in his statement) his involvement on the day of the accident. It is not necessary to dwell on the details. He did not see the Claimant fall, but saw him on the ground, obviously badly injured. Mr Maynard called the emergency services. He could see the broken safety rail, and said that, 'It seemed obvious that he had fallen through the railing and that it had not supported his weight.' He was shown a photo of the broken rail, and said that if the rails had been hanging down when he inspected the vehicle, he would not have driven it.

73. In cross-examination by Lord Faulks. Mr Maynard agreed that daily checks are important, and that he had a 'drill' for his inspections, which would take 10 or 15 minutes. He would not drive an unsafe vehicle, and had refused to do so in the past.

74. Mr Maynard said there had been some practice runs before the day of the accident when cars had been collected. These had been to make such the transporter was driving satisfactorily. The evidence was slightly unclear whether cars had been loaded or unloaded on those previous occasions – Mr Maynard said they had been. He said that the Claimant was more experienced on actually driving the cars onto the transporter, which required spatial awareness. He found that aspect of the job difficult. He said a man called George had also assisted with the loading.

75. In cross-examination by Mr Kennedy, Mr Maynard said he would go up on the deck and check the safety rails. He said, 'No one asked me to check handrails but I checked them anyway … I was near the handrails … a matter of feet away from the post that actually went'.

76. That was the case for the Claimant.

The First Defendant's case

77. The First Defendant's sole witness was David Sippitts. In many ways, he was the most important witness in the case.

78. He gave two witness statements: and first on 18 December 2020 to Brands' solicitors, and the second on 3 January 2021 to the Claimant's solicitors.

79. In his first statement he said he was contacted by the Claimant in April 2017 (in fact, it was more likely earlier than that, but nothing turns on exactly when it was – it was early 2017), and was engaged as Brands' external transport manager on a rolling one month contract, for which he would render monthly invoices of £350.

80. He said his role as transport manager was to ensure that his clients understood their compliance requirements. For Brands, the necessary procedures were only just being put into place at the time of the accident.

81. He saw paperwork for inspections in July and August 2017, prior to the MOT on 29 August 2017, and then for an inspection by Trax on 18 October 2017. He said that that inspection had been done two weeks late, and he discussed with the Claimant the implications of not adhering to the inspection schedule. The vehicle was due for inspection again around 26 November 2017, but he did not see the paperwork for that because he saw the Claimant before it took place. He was due to see the Claimant again during the week of the accident but did not do so because of it.

82. He did not know who had done the July and August inspections.

83. He said at [11]-[12]:

> "11. The six weekly inspections (including those conducted by Trax) are also for general roadworthiness. This would include things like brakes, lights and driver controls. Ancillary safety equipment like upper deck guard rails are not routinely checked at those inspections although this could be specifically requested by the operator.
>
> 12. I am not able to say whether a LOLER inspection had been carried out in relation to the vehicle. I had seen the previous certificate from the 2016 inspection and had discussed it with Mr Carr. As an operator he was not initially aware of the LOLER inspection requirements. During one of my last conversations with him he told me that he had called the vehicle vendor and been advised that the inspections should be done every 6 months. I told him I agreed and that it should be done every 6 months due to people working at height. I do not know if a LOLER inspection would specifically cover the upper guard rails."

84. I set out reg 9 of LOLER earlier. As I have indicated, in my view the minimum LOLER inspection period for the transporter was six months, by virtue of reg 9(3)(a)(i). My reasons are because the transporter was 'exposed to conditions causing deterioration which is liable to result in dangerous situations'. It was exposed to the elements (and no doubt other environmental factors) liable to cause corrosion both when it was being driven on the road, and when it was parked outside. Further, whilst primarily designed for lifting cars, the transporter must also have lifted persons. On the day of the accident,

the Claimant (or another driver, it matters not) drove the Skoda car up the transporter's lower ramp from ground level so that it sat at height above the cab. The driver was lifted 14 feet into the air. This in my view was a lifting operation involving a person within s 9(3)(a)(i).

85. But even if I am wrong about that, and the minimum inspection period was 12 months, there still should have been a LOLER inspection not later than 4 July 2017 which, as I have said, would have identified the dangerous corrosion to the failed pillar.

86. In his second statement, Mr Sippitts provided further details about the work he did for Brands. He provides guidance for small operators and what they and their drivers are required to do by way of compliance

87. As an external transport manager, his was not a full time role for Brands. He would spend a couple of hours a week on its affairs. He did not know who was going to drive cars on and off the transporter.

88. He said that the Claimant was sensible and responsible and wanted the business to grow.

89. He explained by reference to [24] of his statement that the purpose of the six weekly inspections of the vehicle was, 'to check it is above MOT standard'

90. He again reiterated that the Claimant did not know that he needed a LOLER inspection, and he (Mr Sippitts) had had to Google it. Such inspections were done by specialist companies. He said that Trax advertised that they did such inspections, although he had not dealt with them.

91. In cross-examination by Mr Killalea, Mr Sippitts said that working with the Claimant was 'refreshing' and that 'he wanted to do the right thing' although he lacked knowledge. His attitude was 'exceptional'.

92. He said that he went to the Claimant's house three or four times in order to advise him. The Claimant had limited experience. Mr Sippitts said he was 'choosy' about who he worked for. He said that sometimes operators had 'no idea', but in the Claimant's case, he had done research, and Mr Sippitts said he thought that the Claimant had 'wanted to do the right thing'. He said this attitude was 'refreshing', because a lot of operators 'did not want to know'. He added that the Claimant had done over and above what he needed to do at the time.

93. He said to Mr Killalea that the Claimant did more than he needed to do because at the time (early 2017) the vehicle was not being used (as Mr Sippitts understood it). As I have already said, in fact, from Mr Maynard's evidence is would appear that the vehicle started to be driven and loaded at some point in the period prior to the accident – likely from mid-2017 - however the tenor of Mr Sippitts' evidence was that he may not have known that.

94. Mr Sippitts was taken to an email which he sent to the Claimant's solicitor on 3 November 2018, nearly a year after the accident, and confirmed it was true:

> "…

> I have added you to my google drive storage which shows the service planner and the template of the defect reporting system along with process for reporting any defects, there is also a document file for some of the documents that scanned (sic) whilst checking them. It was early days in the operation and as always was work in progress.
>
> Andrew was a pleasure to work with as he really tried to understand his responsibilities around the compliance and maintenance of his vehicles.
>
> He had only just started to use the vehicle E4BTR as it had recently been bought and had spent time being painted and prepared ready for work, in fact I had not even seen the vehicle as every time I went to visit Andrew it was being worked on ready for the start of the operation.
>
> The previous six weekly inspections were done with one being a couple of weeks late but it had MOT'd in August and a six weekly inspection done in October, it was due again at the end of November but I had not visited Andrew after that date to confirm the inspection had been completed and the accident happened in December.
>
> My role as External Transport Manager is to check that vehicles are maintained according to the service schedule, drivers hours are being adhered to, drivers are completing daily walk around checks, speed limits are being adhered to and vehicles are not overloaded. Up until the point of the accident the vehicle was being inspected correctly with one being done late but we had spoken about that agreed that it would not happen again.
>
> The training side of things was to be done by Brands Transport as the safe loading of vehicles is not something I have any knowledge of, I generally do not offer training to any of my clients apart from the use of Tachograph equipment and drivers hours.
> …"

95. To this Mr Sippitts added orally, 'He was not cavalier or keen to cut corners – he was the opposite.'

96. Mr Sippitts agreed that being a transport manager is an important and safety critical role.

97. He had worked two to four hours per week for Brands, for which he charged £350 per month. He said that to become a transport manager a course needed to be passed, which had a low pass rate. He said that the Transport Commissioner regards a transport

manager's role as important. They have to be certified. He said the course was generally taken after industry experience on the job had been obtained.

98. Mr Sippitts was introduced to the Claimant by GVL Management Limited. He said that one of the things a transport manager does is to assist the operator to apply for an operator's licence, which he said was an 'involved' process.

99. He was shown Brands' operator's licence, which was issued on 24 April 2017. He said the transport manager's essential role was to check that things which should be done, were done, in relation to the licenced vehicle, and that is what he did with Brands and the Claimant. He created the Google Calendar showing when maintenance tasks fell due.

100. He said he had seen photos of vehicle, but it was not a type of vehicle he was used to. This this was the first car transporter he had been asked to manage.

101. He said that they started work on the maintenance schedule, and made sure that driver checks were in place. He had seen the MOT and the tachograph, and referred me to a blank defect log which the driver would fill in on his daily checks.

102. He said he was not told that the vehicle had been put into use. He explained that vehicles over 12 years old (as the transporter was) needed safety inspections every six weeks, at least as a starting point. He said although this figure was only a guide, an operator would be at risk if they left it longer and something went wrong.

103. Regarding the late inspection in October 2017, he told the Claimant that because the vehicle was not then being used, it would not affect his licence, but once the vehicle started to be used then he had to stick to six weeks.

104. This evidence conflicts with other evidence that, by then, the vehicle was being used. I cannot definitively resolve the conflict, but incline to the view, based on the documents and Mr Maynard's evidence, that the vehicle was being driven and, on occasion, loaded, from mid-2017 onwards.

105. Mr Sippitts said he was satisfied that apart from this, the Claimant had done everything, but he never got to see a LOLER inspection done.

106. That was the end of the first day's evidence.

107. At the beginning of the second day, Mr Sippitts showed me p543A, the Google Calendar, which he created for Brands to set out the required maintenance and inspection schedule for the transporter. The Claimant had access to the Calendar. Maintenance tasks were entered on the Calendar (eg, the six weekly inspections), with a colour coding scheme to show whether the task in question was pending (such entries were coloured red); whether the task had been completed (when the colour was changed to yellow); and whether Mr Sippitts had seen the appropriate paper work in relation to the task (when the colour was changed to green.)

108. The requirement for a LOLER reg 9 inspection no later than 4 July 2017 (at the very latest) was not entered on the Calendar. As I will explain in detail later, I find that if it

had been, given the Claimant's conscientious attitude, he would have had such an inspection carried out and, as I have already said, this would have prevented the accident.

109. Mr Sippitts then took a specimen application form to be added to an operator's licence as transport manager. It is form TM1, issued by the Office of the Traffic Commissioner. This does not specifically refer to Brands, but I assume an identical form for it was completed by Mr Sippitts.

110. Of very considerable importance for present purposes is the following, which stated under [13A], 'Transport manager's declaration' (emphasis in italics added):

> "*By signing the (sic) for the relevant declaration below (as per your answer to section 5 [viz, 'How many hours per week will you spend on your transport manager duties ?') you are confirming your status as an internal transport manager, an external transport manager, or both, and understand that your duties include:*
>
> …
>
> Vehicle administration – including ensuring that vehicle maintenance records are retained for a period of no less than 15 months, ensuring that vehicles are specified as required and operator licence discs are current and displayed correctly; *ensuring safe loading with appropriate indicators fitted*; that tachograph calibrations are up to date and displayed, that there are up to date insurance certificates, *a suitable maintenance planner is complete and displayed with preventative maintenance dates at least 6 months in advance, to include the Annual Test and other testing or calibration dates.*
>
> Vehicle engagement – *ensuring that vehicles and trailers are kept in a fit and roadworthy condition, that defects are either recorded and repaired promptly* and where not roadworthy are taken out of service; *to make vehicles and towed equipment [available] for safety inspections, service, repair and statutory testing available at the appropriate times and within the notified O-licence maintenance intervals*; *to liaise with maintenance contractors, manufacturers, hire companies as might be appropriate.* Ensuring that vehicles and trailers are parked at the nominated operating centre(s) when not in use.
>
> …"

111. Mr Sippitts said he would ensure monitoring of driver reported defects by looking at the defect book. This was cross-checking: if a defect was raised it would have been reported to the Claimant, who would be responsible for sorting the defect and recording it on the defect log.

112. He was then taken to a Technical Review Report prepared on behalf of Trax by Arc Investigations. He noted from p304, [4.8], point 1: – that a driver has to carry a daily walk around check; point 8: the system of safety inspections must be regularly monitored, especially in the early stages. He said (15 February 2022, p8):

> "Q. … Presumably, that's in the early stages, what, of the business being set up?
>
> A. I'm not entirely sure what that means, as in, 'Early stages', but I presume so.
>
> Q. Let me put it this way, would it be your view that it would be right that in the early stages of a business such as this one, it is important the system is regularly monitored by [inaudible]?
>
> A. Certainly, absolutely. You need to make sure that he's doing things right. And the good thing with Andrew is, even though he wasn't operating, he was fulfilling his obligations of the six-weekly inspections"

113. Mr Sippitts added that there had to be positive checking by him that there had been compliance with the requirement for presenting the vehicle for regular inspections and that the driver was doing his daily checks.

114. He then dealt with aspects of his own career. He qualified as a transport manager in 2008, and took on the role with DHL in 2013. Brands was his first car transporter. He said that although from a compliance perspective, there was no difference between this and other vehicles, there were height implications to be considered, eg, that the vehicle was not driven into a bridge which was too low. There was this exchange (p11):

> "Q. So, there's height implications, clearly in the physical size and height of the vehicle. Were there height implications in any other way, as far as you were concerned? At that point, when you first became aware of the fact that you were advising in respect of a car transporter?
>
> A. From my side, from the compliance side of things then, I wouldn't have thought there was much difference. But if you're asking about the health and safety side of things, which I don't tend to get involved in the actual health and safety regulations. Because I'm not trained in that. I did health and safety years ago. I have not got and I don't advise people on health and safety. There would be that issue for the company, because there would be people working at height."

115. Mr Sippitts said that on 24 March 2017 (so around the beginning of his engagement by Brands) he asked for a number of documents, including the vehicle and trailer MOT, and also the LOLER certificate. He said that he could not recall when he received them, but thought that he saw them on his next visit, some weeks afterwards. He took a scan of the

MOT in August 2017. He said he asked for the LOLER certificate because he knew the transporter had been, and would be, used for lifting loads.

116. The LOLER certificate at p492 is entitled 'Statutory Thorough Examination in Accordance with LOLER'. It is dated 5 July 2016 and was completed in-house at ECM. The vehicle was passed. Item 26 was 'Hand rail posts, bases and cables', and was ticked as a 'Pass'. The date of the next examination was given as 4 July 2017. As I have said, I think that reg 9 of LOLER, for this vehicle, in fact required inspections no later than every six months, ie, no later than 4 July 2017, but in any event the transporter should have been inspected well before the accident.

117. Mr Sippitts knew that for some lifting equipment an inspection is required every six months, whereas for other equipment it is 12 months. He was shown a report from a Mr Clarke of Hawkins, prepared for Brands for this case. Mr Sippitts said that his 'take' on the regulations is that they required 12 monthly inspections, but he would have advised on six months. However, he said, 'I am not a health and safety adviser'. He said he would always err on the side of caution.

118. Despite that disclaimer, he candidly admitted that: (a) he knew the vehicle needed a LOLER certificate; (b) it could be driven legally, but needed a LOLER certificate in order to carry out lifting work. He said this was a concern, because the transporter was an inherent part of the vehicle.

119. He said that the discussion he had with the Claimant about LOLER took place at the Claimant's house. He had told the Claimant to talk to ECM about LOLER inspections. He said that the Claimant told him that ECM had said that the minimum inspection period was six months (despite what was on the LOLER certificate to the contrary), meaning that its next inspection after July 2016 was no later than January 2017.

120. However, Mr Sippitts said that because the Claimant was not using the vehicle, 'there was no immediate rush'. ECM were happy with 12 months.

121. There was this exchange (15 February 2022, p18 et seq). Mr Killalea put part of the statement Mr Sippitts had made to Brands' solicitor to him:

> "Q. … 'It's during one of my last conversations with him, he told me that he called the vehicle vendor', that's ECM?
>
> A. Yes.
>
> Q. 'And being advised the inspection should be done every six months. I told him I agreed and that it should be done every six months, due to people working at height". It's your witness statement. Is that accurate?
>
> A. Look, it's a long time ago when I did this.
>
> Q. I accept that, of course. The thing with Andrew is quite often, I sent emails to Andrew and didn't get a reply. He liked to do things in person. I deal with a lot of people and this was done two

years after I last spoke to him. Obviously, it was before any accident. Obviously, I had spoken to him and he had no idea about a LOLER certificate. Even though he'd got one, he had no idea it was actual law, like legislation. I, you know, [inaudible], you need to speak to them. Found out who'd done the previous ones. In fact, I can't remember, when he called me when he was at his house, whether he said, 'Yes, I've spoken to them and one needs to be done.'

MR JUSTICE JULIAN KNOWLES: So, you cannot remember whether he said he had spoken to them?

A. No, he definitely spoke to them. He definitely spoke to them.

MR JUSTICE JULIAN KNOWLES: Right.

A. He 100% spoke to them. It's just that six-month thing. I'd prefer six months.

MR JUSTICE JULIAN KNOWLES: Yes.

A. Obviously, you know, they've given us a certificate for one year and they're saying that's okay. Me, I was more about the six months, rather than him. But, you know, these are more experienced than I am in using this equipment.

MR JUSTICE JULIAN KNOWLES: Right, yes.

Q. The conversation that took place between you two and the advice that you were giving him, is because this was a regulatory requirement that applied to the vehicle, wasn't it?

A. Yes, to the lifting equipment, yes.

Q. Yes, inherent in and part of the vehicle?

A. Yes.

Q. It's not something like a forklift, that you put on to it and then take off?

A. No.

Q. It's an inherent part of a car transporter?

A. It is the trailer, yes.

Q. It is the trailer, yes. And it was the trailer of his tractor and the trailer, that you as the external transport manager, were advising him about, in respect of compliance?

A. Yes.

Q. You have that conversation with him and you very candidly said and were obviously querying that it was a long time ago and what you remember. But obviously, there's the conversations that take place, whether it's six months preferably, or 12 months, [on the face of this report?]. And that you had that discussion with Andrew. When you set up the Google diary that is there to ensure compliance, why is LOLER not in the diary?

A. Because that is not the road compliance. The diary that I set up is what I use for other companies. It's just I just copy it, change the vehicle details, put the new date in for those things. I generally don't put the LOLER in, because that's a health and safety requirement. That is something that is done by the operator. In Andrew's case, because he was new and he'd never heard of that, that is why I spoke to him about that. It's something that I never used to put in that document. I've never done it before.

Q. Do you now?

A. If the company has asked me to. I've got one company that's got a couple of tail lifts. But they used to look after themselves and they missed one of their inspections, they were late. And they asked me whether I'd put it on the calendar for them, so it's all in one place."

122. Later he said (pp22-23):

"Q. Going back to the point, the LOLER regulations and the certificate, if one looks on the face of it, it relates specifically to the vehicle, doesn't it?

A Yes.

Q. It doesn't relate to a lifting system of work. It doesn't relate to the system of work that's used to lower cars, does it?

A. It relates to the equipment on the vehicle that is doing the lifting, yes.

Q. Which is an integral part of the trailer?

A. Yes.

> Q. Which Andrew was asking your advice on and you were giving him advice on?
>
> A. Which bit was Andrew? Andrew was asking me, he was asking me to make him compliant.
>
> Q. Mm hmm?
>
> A. To the-
>
> Q. Sorry, just stop there for a moment. Andrew was asking you to make him compliant, wasn't he?
>
> A. No. You stopped me in the wrong place there. Andrew was asking, I was put in place to make sure that Andrew complied with his operator's licence. That is what I am there for, to ensure that he complies that, the lifting equipment on his vehicle is nothing to do with the operator's licence. Not my remit. Not my level of expertise. If somebody has got stuff that they're not sure about, I would say, 'Speak to the people you need to, do a Google search, get somebody who is an expert in that field to tell you what you need to do. Because I don't understand.' I wouldn't go round and do a full inspection on his vehicle because I'm not a trained vehicle inspector. I would go round and say, 'Your tyre's a bit low. Your light isn't working.' Because I can see those things. So, that is as far as my, you know, 'Have you got a LOLER certificate? I understand that it needs to be in place because that is lifting equipment, you need to find the right people to do the right job.'"

123. He was shown the transporter manufacturer's Guidance Manual at p845: 'LOLER Inspection Guidelines'. He said that he had not seen this document before. They state they are intended to assisting in achieving compliance with reg 9 of LOLER, which I set out earlier.

124. Mr Sippitts said that it 'had not occurred' to him to see if there were other extra checks that were needed on a car transporter.

125. He was asked whether it had occurred to him to do additional and daily checks. He said no, he used the standard book issued by Road Haulage Association which had been used for many years.

126. He was then shown (at p25) p376, the manufacturer's daily safety checks in the 'Transporter Engineering EVO Range Transporter Drivers Manual'. This has as one of the said daily safety checks:

> "A visual inspection should be considered daily on the following items:
>
> …

> Safety hand rails are all secure and complete and wire ropes are tensioned and not defective.
>
> …"

127. He said that he had also not seen this document before. If he had seen it he would have expected additional training to be given to the drivers, and would have advised the Claimant to take advice about these checks.

128. He confirmed again that he had heard of LOLER, and was asked whether it had occurred to him to obtain manufacturer's guidance to see what differences there were in relation to transporters as compared with other HGVs. He said that, 'with hindsight', additional training for the driver would have been helpful and sensible. He said that he was aware of additional requirements due to the nature of the vehicle.

129. He said the Claimant had more knowledge of vehicle transport than he did. He never gave the impression that he was experienced with car transporter. He was there to make sure Brands complied with its operator's licence.

130. Mr Sippitts told the Claimant it was his first car transporter. The Claimant knew he did not have experience of lifting. If he had been aware of additional manufacturer's recommendations he would have advised on additional daily checks.

131. Mr Sippitts was then cross-examined by Mr Kennedy (15 February 2022, p29, et seq).

132. He said that he knew at the beginning the Claimant was not doing anything for hire or reward. He knew he was having the vehicle painted. The Claimant said he would let Mr Sippitts know when he got his first paying job.

133. Mr Sippitts said that if he had known the vehicle was being driven with cars for 2000 miles (the trial runs which I mentioned earlier, which were evidenced in the documents), then from an operator's licence point of view he was compliant, but he would have wanted to make sure the Claimant was doing the right thing.

134. He said he would not have been happy about transporter being used as such given the out of date LOLER certificate, but again it was 'really not my remit'. The full exchange was this (p31):

> "Q. If Mr [Sippitts], you had known that this vehicle was being driven with cars for those sorts of distances over, it looks like 2,000 miles, what would you have said about that?
>
> A. Well, from my point of view, the vehicle was, from his operator's license, the vehicle was okay.
>
> Q. Yes.
>
> A. I would rather have known, so that I could have made sure that the driver license checks were done correctly. As far as the

> LOLER regulations, I wouldn't have been happy about that. But then again, it's not really my remit. It's up to, you know, it's up to Carr's transport manager.
>
> MR JUSTICE JULIAN KNOWLES: So, if he was compliant, you would want to know, just because you would want to know?
>
> A. Yes.
>
> MR JUSTICE JULIAN KNOWLES: Because presumably, you would want to know what your clients are up to?
>
> A. Yes. I'd like to think that he'd done the right thing. Because if he's not doing that, is there anything else? But I would like to have known that he was driving, because I like to do the first driving license check, to make sure that the actual person is licensed to drive that vehicle, hasn't got any points. And also, know that the tachograph rules are followed. So, you know, I would have been much happier knowing that they were actually operating.
>
> Q. Why would you not have been happy about the LOLER certificate?
>
> A. Why would I not have been happy?
>
> Q. If these were just practise runs, why would you not have been happy with him doing this?
>
> A. Well, even with the practise run, if they're lifting and lowering the cars, surely somebody's doing that, whether it's Andrew or whether it's somebody he employs, he should follow the regulations really. I mean, that's a health and safety thing and not my remit, but I'd like to know he was doing the right thing.
>
> MR JUSTICE JULIAN KNOWLES: Just pause. 'I would not have been happy about the LOLER certificate, but it is not really my remit'".

135. In re-examination he was shown evidence from an expert showing that the vehicle had been driven some 1392km, between the MOT on 29 August and 18 October 2017, the date of the first Trax inspection. The tachograph disc information for the driver Steve Maynard indicated daily mileage had been between nine and 204km, in June, July and August 2017. He said it was the first he knew of it. He also said (in reference to Mr Maynard's evidence that cars had been loaded and unloaded (whether for reward or not) prior to the day of the accident) that he had not been aware of that either.

136. That was the case for the First Defendant.

The Third Party's case

137. Trax's first witness was Keith Simpson, its former director. He said that Trax is no longer active as a company. The company carried out vehicle repairs for vehicles of 3.5 tonnes and above. At the time there were three mechanics. He had 35 years' experience at the time.

138. He was involved in management, administration and working on vehicles. Trax carried out work before and after MOTs, but did not do the MOTs themselves. They did about 20 inspections a month.

139. He had a working relationship with Tony Carr, who he would sometimes hire as a sub-contractor when they were busy.

140. He met the Claimant through Tony and eventually agreed a maintenance contract for the six weekly inspections, which was one of the requirements for Brands to be granted an operator's licence. The agreement was signed on 23 January 2017.

141. The Claimant did not make contact until October 2017, and an inspection was then carried out at Secland. Mr Simpson attended with an apprentice, who carried out the inspection under his supervision.

142. At [23]-[24] of his statement Mr Simpson said this:

> "23. The inspection is intended to ensure that the vehicle is roadworthy. A full inspection of the underside of the vehicle is completed. The inspection is only a visual inspection and we complete the checklist as we are walking around the vehicle and cab. We check the underneath of the vehicle, tyres and wheel nuts.
>
> 24. We did not go onto the vehicle to inspect the trailer or the upper deck as this does not form part of a VOSA [now the DVSA] roadworthiness inspection. We would not inspect any lifting equipment as part of a VOSA inspection, as we are not certified for vehicle lifting apparatus. Lifting equipment should be inspected in accordance with [LOLER]. The trailer on Andrew's vehicle has a lifting top deck and should have been inspected in accordance with LOLER requirements."

143. He then set out what an inspection *did* involve. It involves checking for roadworthiness. They would start inside the cab and check: the handrail and steps getting into cab; seat adjustment; seatbelts; windscreen and steering and controls and switches and brake system; and then check that the warning devices are operational. Then they would walk around the vehicle and carry out further checks. Then there would be an inspection underneath, including of brake pads and checks for leaks

144. A second inspection was carried out in November 2017 by a Trax mechanic called Josh Wheeler. Mr Simpson reviewed his inspection sheet and prepared an invoice.

145. At [36] he said:

> "At no point during arranging the maintenance contract or before the inspections were we asked to inspect the upper deck of the trailer. Tony and Andrew would have known that our inspection did not include this as it would have required obtaining safety equipment and test equipment which they both knew we did not have."

146. In relation to Trax's former website, which made reference to LOLER inspections as being one of the services it offered, Mr Simpson said that if a customer required such an inspection, it would have been outsourced because they were not qualified to do them, and this would have been done with the customer's express agreement.

147. He concluded at [39]:

> "I do not agree that Trax (Coventry) Limited should have identified the defective pillar on the upper deck of the trailer as part of the two inspections that took place in October and November 2017. They did not form part of the agreed inspection and any reference to handrails or grab rails on the checklist relates solely to the rails on the cab and trailer which are at floor level and are checked to ensure they are secure."

148. This is a reference to Item 20 on the November Inspection Report completed by Josh Wheeler. This referred, under the heading 'Trailer Inspection', to 'Condition of body including Grab Handles and Safety Rails'. The format of this Report is completely different to the one which Trax completed following the October inspection. On my (admittedly very poor) copy of that report I cannot see any similar such reference on the October form. There was no evidence about how or why this change in format of the *pro forma* Inspection Report came about. Mr Simpson's evidence was that it was a generic downloaded document.

149. Mr Simpson was then cross-examined by Lord Faulks for Brands.

150. He was referred to the website and said it was a 'broad description' of the work Trax did. He said 99% vehicles are the same. There might have been some specialist vehicles or items of work they could not do, but they could do the majority of vehicles.

151. Trax was formed in 1999. He considered Tony Carr to be a friend, to whom he gave work and who helped him out when Trax were busy. When the Claimant was setting up his business with a small recovery vehicle, he sent work to the Claimant.

152. He agreed that there was quite a long gap between signing the agreement with Brands for inspections and the first inspection. He said that at the October/November inspections at Seclands no-one from Brands was there. The vehicles were outside.

153. He was asked about [24] of his witness statement, which I set out earlier. He said that the did not know if the transporter had a LOLER certificate or not, but he knew that it would need one.

154. He then said (15 February 2022, p46):

> "I do not tell the customers if the vehicle needs a LOLER at all. The customers come to me and request LOLER inspections. I don't have anything to do with LOLERS. I haven't got the experience for LOLERS. I just know that the vehicle or proper operation lifting equipment on vehicles, i.e. tail lifts, cranes, lifting decks, are all covered by LOLER. I don't have anything to do with advising the customers. All the customers have transport managers who manage their transport fleet, who should have all the documentation and control over maintenance. When I signed the maintenance agreement with Andrew, it was to carry out a vehicle inspection, a roadworthiness inspection. Nothing to do with tail lifts. Nothing to do with LOLER, or any other requirement on the vehicle. It was just for inspection purposes."

155. He reiterated his maintenance agreement was just for roadworthiness inspections (and not LOLER inspections).

156. He said that he did not offer the Claimant any advice. But if the Claimant had asked him whether he needed a LOLER inspection, Mr Simpson would have said yes. He added (p47):

> "I would have, yeah. But I would have also thought that he'd have already checked all this when he bought the vehicle type that he'd got and with his transport manager. Bearing in mind, I look after various fleets of vehicles for various customers. If I was doing this on a daily basis, advising my customers what they should entail, they wouldn't need transport managers. This is what the transport manager's job is to do, is to make sure their vehicle records and everything that they require, is all up to scratch. I shouldn't really, or I'm never asked by any of my customers, for advice on what should and shouldn't be done on the vehicles, other than signing a maintenance contract to look after their vehicles."

157. In relation to the website, and its reference to LOLER inspections as one of the services Trax offered, it was put to him by Lord Faulks that, 'but you don't offer them.' Mr Simpson replied (p48):

> "A. No, but I do offer them. I offer them to the customers. I'm still doing it now. I can show you, I can give you evidence of a LOLER inspection recently, or several inspections that I've done for customers, [and still fleet?] customers, that I'm still getting done now. So, yes, we do offer the LOLER inspection service, but we don't do them.

> Q. I understand that entirely. So, you do offer it, but you wait to be asked. Is that probably the best way to put it?
>
> A. That is exactly the way to put it, yes."

158. He said that he recalled the transporter. He was shown some of the post-accident photos, including of the pillar that had failed. He said that if a customer had brought in the vehicle in that state, he would not have ignored it.

159. He was asked about corrosion in the context of roadworthiness inspections. He said they checked for visible corrosion; check brake components for heavy corrosion; and cracks in the chassis. He said all the corrosion they would check for was underbody and components on the vehicle and around the sides.

160. He said corrosion was only checked for from underneath. He said that from the ground he could only see the tops of the pillars on the top deck, but not the base or the welding.

161. He said that they could inspect safety rails without going to height, at least in order to see if anything was hanging off.

162. He said from his inspection point, regarding the upper deck pillars, he would be able to see the tops, but not the bottoms. He added in relation to figs 11 and 12, pp467 and 468:

> "Again, we could see the top of the pillar, but not the base of the pillar. None of the pillars we could see from, the base of any of the pillars we can't see from floor level, because they're above our head. They're probably 10ft above us. So, without having a drone with a camera on it, or going up there, there's no way of seeing that, if it's at the top of the pillars."

163. He was asked about the bulge under the plastic sheaf in one of the pillars (not the one which failed) (15 February 2022, p54):

> "Q. If we look at figure 12, 468, there's a bulge there. Are you telling His Lordship that that wouldn't have been something you could have seen?
>
> A. Couldn't have seen, no.
>
> Q. If you had seen it, would that have caused you any alarm?
>
> A. Not necessarily, no. Because it's covered by rubber sheets, so I wouldn't know what was going on underneath it.
>
> Q. So, really what you're saying is that unless something is actually hanging off, it's not really your territory?
>
> A. If it looks like it's going to fail, that we can see at ground level, then it is our territory. But if we can't see something, then no, we

> can't advise on it. It's like when a car MOT is done, when you take a vehicle in for an MOT and it's got plastic guard covers covering components underneath the vehicle. It's not a requirement to remove any of them components to inspect for an MOT. It's something you can't see, so how can I advise on it if I can't see it ?

164. He said that he did not know who had done the welding to the pillar, but it had not been done properly because it had been done in such a way that a 'cup' for water had been created. (No-one suggested this allegedly defective welding played a role in the accident. The point of failure in the corroded pillar was further up).

165. Mr Simpson was then cross-examined by Mr Killalea.

166. He agreed he would not advise customers about LOLER. He was asked about transport managers and LOLER:

> "Q. Would it be right to say, when the questions were being asked to you by Lord [Faulks] and he was saying, 'Well, would you advise them on the LOLER regulations and getting this inspection done?' That when you refer to the transport managers, what you were effectively saying was, 'Well, no, I wouldn't. That's what you have a transport manager for?'
>
> A. Yes."

167. He was shown [36] of his witness statement, where he said, 'At no point during arranging the maintenance contract before the inspections, were we asked to inspect the upper deck of the trailer?' (15 February 2022, p59):

> "A. Yes.
>
> Q. I'm not disputing that.
>
> A. No.
>
> Q. 'Tony', who is obviously Mr Carr, senior?
>
> A. Yeah.
>
> Q. Who is the man that you've worked with and knew well?
>
> A. Yeah.
>
> Q. And Andrew?
>
> A. Yeah.

> Q. "Would have known that our inspections did not include this, as it would have required obtaining safety equipment and test equipment, which they both knew we did not have?"
>
> A. Yeah."

168. There then followed this exchange with Mr Killalea:

> "Q. The only question is, I won't ask you about Tony because he gave evidence yesterday and no questions were asked about this. But Andrew, why would he have known that you wouldn't have the safety equipment and test equipment? His dad might have done, but why would Andrew have known?
>
> A. Because he knew that we didn't participate in doing that kind of requirement. Andrew would work for his father as a mechanic for a short period as well. Nothing's been mentioned about that. So, Andrew was quite, what's the word? He knew his way round the vehicle, anyway."

169. He was shown the letter of claim sent by the Claimant's solicitors, alleging that there had been a failure by Trax to carry out an inspection of the guard rail which was safety critical equipment which required Trax's careful consideration as part of its vehicle inspection. He said, again, that they would inspect grab handles and safety rails at floor level, but did not work at height.

170. Finally, he was shown the November inspection report which referred to 'safety rails' and said this was just a generic form which was downloaded and intended to cover a wide variety of vehicles.

171. The next witness for Trax was Joshua Wheeler, who formerly worked for Trax as a mechanic (15 February 2022, p65).

172. He worked at Trax between 2015 and 2018 carrying out general repairs and safety inspections. After an inspection he would give Keith Simpson his job card and inspection sheet and verbally report any major defects, which would then be passed by Mr Simpson to the customer for further instructions.

173. He inspected Brands' vehicle at the lorry park on 29 November 2017. Nobody was present from Brands. The inspection was to ensure the vehicle was roadworthy and done to the same standard as an MOT. A full inspection involves inside and outside the cab, underneath the vehicle, and there is also a walk around. He said, 'At no time are we required to check the upper deck of the vehicle. We would require specialist training and equipment to inspect the upper deck.' Also:

> "The reference to grab rails and safety rails in the inspection form is in reference to rails at floor level such as the rails used to climb into the cab. We undertake a simply visual inspection to ensure that they are secure and will not fall off when the vehicle is on the road and cause damage to other road users."

174. Mr Wheeler could not remember if there were any major faults revealed by his inspection, but if there had been, he would have reported them on the Inspection Form. His inspection took one to two hours and he gave the completed inspection form to Mr Simpson.

175. He now works for Scania carrying out inspections, which again are all done at ground level, and the upper deck is not inspected. The only time he goes on to the top deck is if a customer has asked for grease points to be greased. This is charged for separately as it does not form part of the inspection.

176. In cross-examination by Lord Faulks he said that before November 2017 he had not inspected a transporter before, that he could recall. He had inspected wide variety of HGV vehicles. He had done a couple of recovery trucks and had looked at few trucks with lifting apparatus.

177. He said he examines more transporters in his current role at Scania. The upper deck does not form part of an inspection. He says he is standing for part of the inspection. So at ground level he is looking for things which might falls off, and so make the vehicle not roadworthy.

178. Some of the vehicles he inspects are quite old. He looks for corrosion at ground level, which might involve lack of road worthiness.

179. He said he knows LOLER exist, but did not know about them in detail.

180. That was the end of the live evidence on behalf of Trax.

181. Mr Kennedy also relied on the evidence of Phillip Harrison of the DVSA. His statement s dated 8 January 2021 and was taken as read. It exhibited his statement of 6 September 2020.

182. In summary, Mr Harrison said that he was a trained motor vehicle engineer with 40 years' experience in the transport industry. He is a heavy vehicle technical officer with the DVSA providing technical advice. His statement dealt with the requirements of the six weekly routine safety inspections as part of the undertaking of an HGV operator with a licence. The main requirements of the inspection are highlighted in 'The Guide to Maintaining Roadworthiness' (November 2018 Edition in Section 4 and Annex 4A) of that edition. He said:

> "As this is an inspection of the roadworthiness of the vehicle there is no requirement to climb onto the load area. A visual inspection of the items listed in the manual would be carried out from floor level or from underneath the vehicle, where necessary, to confirm that the body is secure on the chassis and that the load can be securely carried on or within the body to ensure that there is no risk of that load becoming a risk to other road users, pedestrians or passengers."

The expert evidence

183. As I have already indicated, there was a quantity of expert evidence from experts instructed by the parties. I had reports from Mr Rawden (engineer) for the Claimant; Mr Clarke (engineer) for Brands; Mr Botham (engineer) for Trax; and Mr Balderstone (vehicle inspection expert) for Trax.

184. I also had joint statements from Mr Rawden and Mr Clarke, and from Mr Balderstone and Mr Clarke.

185. There was also a report from the HSE's Mechanical Specialist Group, 'The failure of a guard rail on a car transporter' dated 12 July 2018. For some reason the author's name has been deleted, so I will just refer to this as the 'HSE Report'.

186. Whilst there were minor areas of disagreement, these were not such as to require the calling live of any expert witness. The following is a summary of the main points of the expert evidence.

187. Beginning with the HSE Report, the headline summary was as follows:

> "On 25 January 2018, the writer examined the guardrails on the car transporter which had been moved to Autorite Industries (Willenhall) Ltd.
>
> In the writer's opinion, when Mr Andrew Carr leant onto the guardrail or fell against it, the pillar gave way because it was corroded to such an extent it could not bear his weight.
>
> At the time of the accident, the guardrail pillar had not been maintained to the extent that it was of sufficient strength and rigidity for its intended purpose, that is, to prevent, so far as practicable, any person falling from height.
>
> The area was heavily corroded such that little of the original steel in the pillar was left, leaving it structurally unsound.
>
> Thus, in the writer's opinion, the guardrail pillar had not been maintained as described in the available benchmarks and practice."

188. At [4.1]-[4.2] the writer said:

> "4.1 The front nearside pillar on the deck above the cab was bent over such that all the cables were slack and provided no protection against a person on the top deck falling from height.
>
> 4.2 The area at which the pillar was bent was very significantly corroded, to such an extent that the in the

> writer's opinion, it would have had very little structural integrity, and would not have supported a force, such as would be applied to the guardrail, should a person have fallen onto it, or even leaned on it."

189. After citing various health and safety regulations, HSE guidance, and the transporter manufacturer's manuals (some parts of which I referred to earlier), the writer concluded at [4.13] that the vehicle had not been 'adequately inspected or maintained, as described in available benchmarks and guidance.'

190. Turning to the parties' experts, Mr Rawden referred ([6.10]) to the inspection by Trax on 29 November 2017 when the very heavy corrosion of the relevant section of the guard rail pillar would have been present. He said that:

> "The Tax (*sic)* inspection was by a specialist familiar with inspecting, testing and reporting upon vehicle condition and defects. One would have expected examinations to have covered the items of consideration in this case, in particular the pillar, and also to have reported upon its condition, i.e. unserviceable, not fit for purpose."

191. He also referred at [7.4] to the reference at Item 20 of the November Inspection Report, 'Condition of body including grab handles and safety rails'. This, in his view, could have included a trailer rather than the rigid element of the vehicle.

192. Mr Clarke said at [7.10]:

> "The LOLER state that an inspection of lifting equipment must be performed every 12 months (or possibly every six months depending upon the legal interpretation of the document). The last documented LOLER inspection was on 5 July 2016, ie 15 months prior to the incident. I am not a corrosion expert and therefore I cannot accurately determine when significant corrosion of the front nearside post guardrail post likely developed. However, if a LOLER inspection had been conducted shortly before the date of the incident, then I would expect a competent examiner to have identified the corrosion around the front nearside guardrail post and likely identified the weakness in the post."

193. At [8.2.1] he said:

> "The wall thickness of the front nearside post at the point of failure had reduced substantially due to the severe corrosion, which would have left it in a significantly weakened state. It likely took little force for the post to fail due to its reduced strength."

194. From this evidence, as I have already indicated, I am entirely satisfied on a balance of

probabilities that a timely reg 9 LOLER inspection (ie, no later than 4 July 2017) would have identified the corroded – or corroding – pillar. Even though I am no more expert in corrosion that Mr Clarke, I have extensive photos of the corrosion and it is obvious that in July 2017 the corrosion must have well set in, so that it would have been obvious to an expert LOLER inspector, who would have identified and rectified it. There is also the fact of the unexplained bulge in another pillar beneath the plastic sheath, which would have put the inspector on notice that all was not well with the upper deck safety rails and pillars, and that they therefore needed to be carefully examined.

195. At [8.5.3] he added:

> "I understand that the six weekly safety inspections are visual inspections only. If a visual inspection of the guardrails had been conducted as part of these safety inspections, then at the last safety inspection on 29 November 2017 (ie about three weeks prior to the incident), I would expect the significant corrosion around the front near side guardrail post to have been evident to a competent inspector. On seeing the corrosion, I would expect the inspector to have raised concerns about its condition."

196. Mr Botham (for Trax) referred to the need for LOLER inspections and referred to Mr Sippitts' evidence. On that basis, he suggested the Court might conclude that the Claimant was aware of the requirement for further safety inspections over and above those roadworthiness inspections which would be standard. It was his view that the contractual agreement between Brands and Trax did not extend to conducting any form of safety inspection of the car transporter structure and specifically the safety rails. In his view the driver should have checked the security of the deck rails as part of initial daily checks. His conclusion was that had the Claimant and Brands Transport adopted an adequate approach to vehicle safety, then the accident would have been prevented.

197. Mr Balderstone's conclusions included that: there was no contractual agreement between Brands and Trax to inspect the safety rails; Brands was under an obligation to have them inspected; the LOLER inspection was due no later than 4 July 2017 (as I have said, I disagree: the period was no less than six months from 5 July 2016); the driver safety checks should have taken in the rails; no adequate safety checks of the rails were conducted; had the Claimant and Brands adopted an adequate approach to vehicle safety and conducting thorough appropriate examinations, the accident could have been prevented; failings by Brands led to the corrosion advancing unseen and undetected.

198. In the joint statement of Messrs Rawden and Clarke they agreed on a number of things. Firstly that the term 'condition of body including grab handles and safety rails' would apply to the section of the transporter attached directly to the tractor unit. They agreed that the Trax inspections would have been from ground level and therefore not rendered the inspector capable of seeing the corrosion of the failed post. However they considered that the corrosion around the base of the post on the transporter body and the socket would have been visible and a cause for concern and should have been noted and perhaps elevated for further inspection.

199. The joint statement of Messrs Clarke and Balderstone showed there was agreement in relation to the need for a LOLER inspection and the likelihood of such an inspection

revealing the damage to handrail posts. As to the Trax inspection, they agreed that it was highly unlikely that an inspector would observe the structural corrosion to the handrail post during a visual only inspection at ground level. Where they disagreed was as to the large area of corrosion on the transport body at the base of the failed post and on the socket of the failed post, both of which are not the parts of the handrail system that ultimately failed but perhaps should have been an indication of the possible poor condition of the hand rail system. Whilst Mr Clarke thought that this was a matter that should have been raised by an inspector, Mr Balderstone took the view that the corrosion observed related to the surface not structural corrosion and that it was unrelated to the failed handrail post. None of the experts take issue with the report of the Health and Safety Executive after the accident.

200. The experts left it to the court to determine whether the entry on the inspection report nonetheless amounted to an indication of its safety (see joint report Clarke/Balderstone ([5.7]). The significance of the entry has been explained - it related to ground level grab handles and rails. No evidence has been adduced that it was understood differently.

201. Mr Clarke and Mr Balderstone disagreed as to whether an area of corrosion unrelated to the accident was an indication of wider corrosion which should have been raised with the Claimant/Brands, perhaps thereby setting off a train of inquiry [6.1-6.2]. Mr Clarke expected that an inspector would have raised concerns, but Mr Balderstone disagreed that it needed to be reported at all, considering the corrosion not only unrelated to the failed post, but also surface rather than structural corrosion and outwith the DVSA criteria.

202. Mr Simpson was cross-examined on this. He was clear that if there was an obvious defect at height, such as a pillar hanging off, he would not ignore it. The relevant area was not however part of his inspection and he only had a partial view of it. He was limited to what he could see. He did not accept the validity of Mr Clarke's position or that the state of the corrosion on the transporter was something he could reasonably have been expected to identify and take action about. It is in any event a somewhat speculative line of criticism removed from the actual problem which should have been identified by the inspection intended for that. The transporter properly passed its roadworthiness inspections.

The parties' cases

203. The following is a distillation of the parties' cases.

The Claimant's case

204. The accident was immediately caused by the failure of the corroded guard rail pillar, as found by the HSE and confirmed by the experts. The accident happened because of negligence for which Brands is responsible in law. LOLER, PUWER and WHR applied to Brands and to the work being carried out by the Claimant at the time of the accident.

205. In relation to the duty owed by Brands, whilst civil liability is excluded for the breach of these Regulations by reason of s 69 of the Enterprise and Regulatory Reform Act 2013, they assist in defining the common law duty which Brands owed to the Claimant.

206. The negligence by Brands included (Amended Particulars of Claim (APOC), [8]): (a) the failure to provide proper plant or equipment because of the defective safety rail; (b) the failure to ensure that all work equipment was so constructed as to be suitable for the purpose for which it was provided (reg 4, PUWER); (c) the failure to ensure that the guard rails on the transporter deck were maintained in an efficient state, in efficient working order and in good repair (reg 5, PUWER); (d) the guard rail was not of sufficient strength and rigidity for the purpose for which it was being used, and any structure or part of a structure which supports means of protection or to which means of protection are attached were not of sufficient strength and suitable for the purpose of such support or attachment (reg 8 of the WHR, and [2] and [4] of Sch 2); (e) failure to ensure the upper decks of the transporter were inspected so as to comply with LOLER (regs 4 and 9, LOLER)

207. Paragraph 8(vii) alleges breaches by Mr Sippitts, who is averred to have been Brands' servant or agent. It is said he: (a) failed to devise, institute or enforce a proper system of inspection and/or maintenance and/or repair of the hand rails/guard rails on the transporter; (b) failed to take any or any adequate steps to ensure that LOLER were complied with. He had seen the expired LOLER certificate and knew that a LOLER inspection had to be carried out and was overdue; (c) failed to notify or advise the Claimant that a LOLER inspection had to be carried out in order to ensure that the vehicle was legally compliant; (d) failed to exercise proper care and skill in and about the 'transport compliance' document that he provided to Brands which was sent to the Claimant on or about 16 February 2017, which listed what needed to be done to ensure vehicle compliance but made no mention of LOLER; (e) failed to exercise proper care and skill in and about the setting up of a system of inspection and/or maintenance and/or repair of the transporter trailer; (f) failed to heed and act upon the manufacturer's transporter maintenance manual, [2.3], which referred to the hand rails being 'an important part of the vehicle's safety equipment' which should be 'inspected at regular intervals to check for damage or deterioration in posts, cables and sockets … it is in the driver's own interests to include the hand rail system in the daily walk checks'; (g) failed to notify the Claimant or Mr Maynard of this guidance; (h) failed to heed section 7 of the same manual about the need to check for corrosion; (i) failed to exercise proper care and skill in his engagement/employment as transport manager.

208. Paragraph 10 alleges breaches by the (then) Second Defendant, Trax, however, as I said earlier, proceedings against it were later discontinued, and it is now subject to a claim by Brands for an indemnity/contribution in the event that I find Brands liable.

209. Amplifying his case, Mr Killalea said that it was not in dispute that there was no valid LOLER certificate in force at the time of the Claimant's accident, and a reg 9 LOLER inspection should have taken place no later than five months before the accident. A timely inspection would have identified the defective pillar and prevented the accident.

210. Mr Killalea said that: Mr Sippitts had been negligent; that his negligence was causative of the accident; that Brands was responsible in law for that negligence; and it is therefore liable to the Claimant for his injuries. Brands' liability was advanced on a number of different bases.

211. Firstly, the duty owed by Brands to the Claimant was non-delegable because he was an employee. Thus, even if Mr Sippitts was an independent contractor and not an employee (or akin to one), and so there was no vicarious liability on the part of Brands for his fault (as there would have been had he been an employee), Brands was, nonetheless, liable for Mr Sippitts' acts or omissions in the course of his role as transport manager.

212. In support of this submission, Mr Killalea referred me to *Woodland*, [7], [13] and [22], which he said followed a long line of well-established authority, eg, *Cassidy v Ministry of Health* [1951] 2 KB 543, 363. He also referred me the commentary in *Charlesworth & Percy on Negligence* (14th Edn) (as supplemented), [7.92]-[7.94] and [7.97]-[7.98], [7.100], [7.101], and [7.105].

213. Second, the role of transport manager of a road transport company like Brands was so central and fundamental to the existence and operation of the company (the company would not be permitted to operate without one) that Mr Sippitts had to be regarded either as an employee - or at least in a relationship akin to employment - so as to render Brands vicariously liable for his negligence.

214. Third, Brands is also liable for any established causative negligence/fault on the part of Mr Sippitts by virtue of s 1 of the 1969 Act. Whilst it is correct that the Claimant was Brands' sole director, it is not correct that he was the only person through whom it could act. Mr Sippitt was engaged in advisory and in practical roles relevant to compliance with the company's legal obligations and in law was responsible for his actions.

215. In response to Brands' plea of contributory negligence, Mr Killalea said there was no basis for such a finding. All the evidence showed that the Claimant had been careful and conscientious and would not have ignored an obvious danger. I should reach the conclusion that he relied entirely on Mr Sippitts.

216. Developing his case in his closing submissions, and responding to Brands' case relying on *Brumder*, Mr Killalea said that case did not defeat the Claimant's case. It was an extreme case which was distinguishable. The claimant, Mr Brumder, was sole director of the defendant company (and not an employee) and was injured at work as a result of health and safety failures for which he himself was solely responsible. He had totally abrogated his health and safety responsibilities. The Court of Appeal held he was not entitled to recover, because to do so would infringe the principle that a person cannot derive any advantage from his own wrong. Mr Killalea said that the *Brumder* defence was strictly applied and only narrowly available to an employer. In the case before me, the accident was not solely the Claimant's fault (if it was at all), and so *Brumder* did not apply.

217. With regards to the claim under s 1 of the 1969 Act, Brands had pleaded in response that: (a) the Claimant was not an employee. He was self-employed, alternatively was employed by himself through the company he owned and operated (9.1 and 9.2); (b)

218. Mr Killalea said that the issue for the Court to determine here was whether the Claimant was Brands' employee. 'Employee' is defined in s 1(3) of the Act as being, 'A person who is employed by another person under a contract of service.' If the Court finds that the Claimant was an employee under a contract of service, which Mr Killalea said he clearly was, then this is the end of Brands' argument.

219. Brands next contends that the Claimant was not provided with equipment by his employer. To this, Mr Killalea submitted that he plainly was: the car transporter was purchased by Brands, which was the registered keeper (and owner) of the vehicle. The Claimant was not the owner. The equipment was therefore provided by the Claimant's employer.

220. Next, Brands contends in the alternative that if it did provide equipment, it was in circumstances where the real and true provision of the equipment for use by the Claimant was by the Claimant himself. To that the Claimant simply responds that Brands is a separate legal entity from the Claimant, and that was not defeated by the fact he was the sole director through whom the company acted: *Lee v Lee's Air Farming Limited* [1961] AC 12, 26-27.

221. Next, Brands says that the defect was not attributable wholly or in part to the fault of the third party but was attributable wholly to the conduct of the Claimant. The Claimant responds by saying that the safety rail was plainly defective and this was as a result of Mr Sippitts' failures, and not wholly the fault of the Claimant. Further, the fact that Mr Sippitts was an independent contractor (and irrespective of the Court's finding on the issue of non-delegable duty) brings him squarely into the definition of a 'third party' in s 1(b) of the 1969 Act.

222. In relation to contributory negligence, the Claimant submits I should make no such finding, or if I do, then it would be just and equitable to apportion most of the blame onto Brands because of Mr Sippitts' fault.

Brands' case in response to the Claimant

223. Brands initially denied that the Claimant was an employee of Brands, however in post-hearing submissions it accepted that he was (albeit with an unsigned contract), but, it was as a manager, and he was the only person employed to do transporting work and was responsible for providing and maintaining the transporter and the safety equipment on it. The notional duty owed to him *qua* employee was *through* him as the alter ego of Brands. In the light of *Brumder*, therefore, he was not owed a duty. The position would have been different if a claim had been brought by an ordinary employee.

224. The common law duty of care owed by an employer to an employee is well established, viz, to provide a safe system of work, including safe equipment. The various health and safety regulations inform the nature of the duty of care, but are no longer actionable *per se* (see above).

225. Lord Faulks put *Brumder* at the heart of Brands' case (as had been anticipated at an early stage in pre-action correspondence). He said that the Claimant's claim was defeated because, on the principles discussed in that case, he was seeking to take advantage of his own wrong. It was clear that Mr Sippitts had drawn the Claimant's attention to the need for a LOLER inspection at an early stage in 2017, but the Claimant had not arranged one, and was therefore solely responsible for what then occurred.

226. In relation to the claim against Brands on the basis that the Claimant was owed a non-delegable duty of care by Brands, this failed in the light of *Brumder* and, in particular, in

the light of Lord Diplock's test in *Boyle v Kodak Ltd* [1969] 1 WLR 661, 672-673, referred to in *Brumder* at [30].

227. Lord Faulks said it was clear from Lord Sumption's judgment in *Woodland*, [13], that the Claimant's position was nothing like that of a vulnerable claimant to whom a non-delegable duty may be owed. Such a claimant is reliant on the employer (or other defendant) to take appropriate steps to ensure their safety.

228. In this case the Claimant did not place himself in the charge, custody or care of Brands. Rather, he was responsible for the condition of the transporter on which he was working. He was Brands. The putative non-delegable duty would thus, on the Claimant's case, be a duty owed *by* him *to* him. This, said Lord Faulks, was 'hopelessly circular', and fell foul of *Brumder.*

229. Lord Faulks submitted that in so far as LOLER, PUWER and WHR applied to Brands, it was the Claimant's personal obligation to ensure that Brands complied with the obligations set out in them. The regulations applied to him as an employee. Any negligence was brought about by the Claimant's personal failures by which he caused and/or permitted Brands to be negligent. None of Mr Sippitts' alleged failures can be attributed to Brands because he was an independent contractor.

230. Brands therefore submitted that the Claimant acted in breach of the duty upon him as an employee, and that his claim was defeated on the basis of *Brumder* because the accident was solely his fault. To succeed in this claim the Claimant would have to establish a failure to exercise the relevant care, skill and diligence by the company. However, such a failure can only have been the Claimant's own failure.

231. Although in the Amended Particulars of Claim Mr Sippitts was described as a 'servant or agent' of Brands, it was now no longer contended that he was. The Claimant accepts that Mr Sippitts was at all material times an independent contractor. In those circumstances, any fault on his part would not result in Brands being vicariously liable. Lord Faulks said that was the fundamental difficulty about the case as against Mr Sippitts on the basis of vicarious liability - he was never an employee of Brands but was an independent contractor who invoiced the Brands for his work. Brands was just one client of his. The Claimant's case against Brands on the basis that Mr Sippitts was 'akin to an employee' therefore failed on the basis of *Barclays Bank Plc.*

232. Mr Sippitts owed Brands a contractual duty to carry out his duties as an external transport manager with reasonable care and skill. He fulfilled that duty. He was not at fault. The scope of his duties was to ensure the roadworthiness of the transporter. He did that. LOLER inspections were outside his field of expertise as a transport manager and beyond his responsibilities. Even if (which Brands denies) he was obliged to remind the Claimant of the need for a LOLER inspection, his unchallenged evidence was that the Claimant was aware of the need for such an inspection, but he had failed to get one done. And this was despite using the transporter quite extensively in the months before the accident, including driving cars on to the upper level of the vehicle. Hence, Mr Sippitts was not in breach of any duty and carried out role properly.

233. In response to the claim under s 1 of the 1969 Act, liability is denied on the basis that: (a) the Claimant was not an employee; (b) he was not employed by another person, but

was employed by himself through Brands; (c) he had not been provided with equipment by Brands, but by himself, through the company which he owned and/or directed; (d) alternatively, if it was, the 'real and true' provision was by himself; (e) the fault was wholly attributable to the Claimant, not a third party (wholly or in part); (f) in so far as the defect was due to the said fault on the part of a third party, any deemed negligence was that of the Claimant, who was self-employed or his own employer; (g) insofar as he seeks to claim against Brands, he would be claiming against himself; (h) at all times the Claimant as his own employer (or effective employer) was responsible for providing himself with non-defective equipment.

234. Finally, in relation to contributory negligence, as pleaded in [11] of the Amended Defence, the Claimant had been negligent in a number of ways, and so Brands contended that I should find contributory negligence to the level of 100%.

Brands' claim against Trax

235. Brands' Notice of Additional Claim against Trax is dated 27 January 2020. In the event (contrary to its primary case) that it is found to be liable to the Claimant, Brands claims a contribution from Trax under the Civil Liability (Contribution) Act 1978, on the basis that Trax failed to exercise proper care and/or skill in and about the carrying out of the safety inspections of the transporter and trailer in October and November 2017.

236. Lord Faulks said that Trax's duty encompassed ensuring that the vehicle was safe and roadworthy and carrying out the appropriate checks to ensure it met those standards. The duty in tort would be owed to anyone foreseeably affected by any failure on Trax's part, such as the Claimant or any user of the vehicle, or any other road user.

237. Brands' claims against Trax therefore focusses upon the scope of the inspections which were carried out; what was or should have been visible from those inspections; and whether (as advertised on their website) Trax had familiarity with and/or capacity to carry out LOLER inspections.

238. Lord Faulks said that the pillars and railings on the upper deck should have been included in Trax's inspections. There were no other features of the transporter which fitted the description contained in the November inspection sheet. A check of these features, even of a rudimentary nature, would or should have shown their corrosive and unstable character.

239. Further, in the light of Trax's knowledge of the Claimant's lack of experience and because they advertised the service of carrying out LOLER inspections (albeit only apparently included on the website for marketing reasons), they should have directed the Claimant/Brands to the need for a LOLER inspection as a matter of legal requirement, given its age and the lifting purpose for which it was to be primarily used. If Trax could not do the work itself (despite the impression on the website), it should have recommended an appropriate company to carry out such an inspection.

240. Brands relies upon some of the expert evidence, for example, the opinion of Mr Rawden for the Claimant, to the effect that the corroded pillar should have been identified by Trax at its inspection in November 2017 (when the corrosion would have been present) (1/146, [6.10]):

> "The Tax (*sic*) inspection was by a specialist familiar with inspecting, testing and reporting upon vehicle condition and defects. On would have expected examinations to have covered the items of consideration in this case, in particular the pillar, and also to have reported upon its condition, i.e. unserviceable, not fit for purpose."

241. Mr Clarke, the engineer instructed on behalf of Brands, took the view that even with a visual inspection the significant corrosion around the front nearside guard rail post would have been evident and that on seeing the corrosion, he would expect the inspector to have raised concern about its condition.

Trax's defence to Brands' claim

242. Before it was discontinued, the Claimant's case against Trax was that the vehicle safety inspections it undertook on the transporter in October 2017 and November 2017 were undertaken negligently. In particular, the Claimant relied on the fact that following the November 2017 inspection. Trax had ticked the 'Serviceable' box on its Trailer Service and Inspection Reports under the heading '20. Condition of body including grab rails and safety rails'. These ticks, the Claimant said: (a) amounted to representations as to the safety of the peak deck; (b) which were false; (c) were made negligently, and (iv) which (implicitly by virtue of the allegation of a causal link) were relied on by the Claimant and Brands as indicating that the peak deck was safe to use.

243. In its Defence to Brands' claim dated 12 February 2020, Trax adopted its original Defence dated 14 January 2020 to the Claimant's discontinued claim. This was to the effect that: (a) the Claimant's claim was effectively against himself; (b) the inspections carried out by Trax on the vehicle pursuant to its written agreement with Brands were as to roadworthiness only, and not the safety of those working on the vehicle. The criterion for failing a vehicle was (in summary) something which would cause an imminent danger to other road users. Accordingly, the safety rails were not part of this inspection. The obligations imposed by LOLER placed obligations on Brands, and hence the Claimant. There was no LOLER inspection done by the (latest) due date of 4 July 2017.

244. Trax denied its October and November 2017 inspections were negligent. It only conducted a ground level inspection. It denied that the state of the safety rail was included in its inspection.

245. Other matters were pleaded which I do not need to go into.

246. Trax's case can therefore essentially be summarised in the propositions: (a) that it conducted the inspections it was asked to do properly; and (b) it was not under a duty to do anything further.

247. In his submissions, Mr Kennedy took me in detail through the evidence. He said there could not be any serious dispute but that one or both of the Claimant and Brands had obligations to ensure the safety of the transporter when work was being done on it. There was agreement amongst the experts that the transporter's lifting equipment, including the handrails, should have been subject to a periodic inspection under a LOLER regime, and

no later than 4 July 2017, and that had such an inspection been conducted when it should have been, the unsafe condition of the post would likely have been identified.

248. He said the thrust of the expert evidence, in particular that of Mr Clarke and Mr Balderstone and [5.3] and [5.4] of their joint report, was that the safety rails were outside the scope of the roadworthiness inspection which was conducted a ground level. Absent specific agreement therefore, the relevant handrails and posts are outside the scope of the roadworthiness inspection.

249. The central part of Trax's case was that it had never made any representations to the Claimant that it would inspect the upper levels of the cab or trailer, nor was it under a duty to do so. It did not have the equipment to do so. The Claimant (and his father, who worked on a freelance basis for it) knew that was the case.

250. Drawing the threads together, Trax's case in defence to Brands' claim is as follows: (a) Trax made no representations as to the safety of the hand rails on the peak deck. They were outside the scope of its inspection. The documentation had the meaning described in evidence by Mr Simpson and Mr Wheeler. They related to rails inspectable from floor level and so did not cover the rails and posts involved in the accident, which were at height; (b) as a matter of fact, neither the Claimant (and so nor Brands) interpreted the form as a representation as to the safety of the handrails on the peak deck. Mr Sippitts evidence showed that they both intended to establish the safety of the handrails via a LOLER inspection; (c) there was no wider duty on Trax to advise the Claimant/Brands about the need for a LOLER inspection. Its role was clear and confined; (d) neither the Claimant nor Brands can show that they relied on any representation by Trax concerning the safety of the handrails on the peak deck.

Discussion

(i) Brands' duty of care to the Claimant

251. I have found that the Claimant was Brands' employee. It accordingly owed him a common law duty of care according to long recognised principles: see eg *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57, 84; *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783; *Charlesworth*, [12-03]-[12-05].

252. That duty, and its relationship with the amendments to s 47 of the Health and Safety at Work etc Act 1974 made by s 69 of the Enterprise and Regulatory Reform Act 2013, was described in by Collins-Rice J in *Cockerill v CXK Limited* [2018] EWHC 1155 (QB), [15]-[18], as follows:

> "15. The effect in this case of section 69 of the Enterprise and Regulatory Reform Act 2013 ('the 2013 Act'), which amends the Health and Safety at Work etc Act 1974, was not disputed. The case proceeded on the agreed basis that there was no longer a self-standing cause of action available to the claimant for any breaches of the statutory duties of employers under what have become known as the 'six pack' of health and safety regulations. Her only cause of action against CXK lay in common law negligence – in other words, by establishing that the common law duty of care

owed to her by her employer had been breached, and that that breach had, foreseeably, caused her accident.

16. No cases on the effect of the 2013 Act were cited to me. For guidance on the nature of the duty of care now owed by employers at common law, I was taken to two sources of law. The first was the pre-existing caselaw on employers' liability at common law, developed before the statutory health and safety regulatory regime came into existence. I was taken to some of that earlier caselaw – some of it considerably earlier – in the course of legal argument, and consider its application further below. But the essence of the employers' duty at common law, briefly stated, is to take reasonable steps to provide a reasonably safe place of work, and system of work, for their employees, so as to protect them, so far as reasonably practicable, from reasonably foreseeable harm. The caselaw is clear about the importance of context, in understanding what is reasonable, and in giving detailed meaning to that duty, in individual cases.

17. The second source was the statutory health and safety regulatory regime itself. The claimant's case – and, again, this was not disputed – was that in considering the nature of the modern common law employers' duty it is still permissible to have regard to the statutory duties, to understand in more detail what steps reasonable and conscientious employers can be expected to take to provide a reasonably safe workplace and system of work.

18. Care is needed with this analysis. In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s 69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s 69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent. It is no longer enough to demonstrate a breach of the regulations. Not all breaches of the statutory regime will be negligent. Before the 2013 Act, the statutory regime had produced results in which employers were fixed with legal liability for accidents even where they had taken reasonable precautions against them. *Stark v Post Office* [2000] EWCA Civ 64 became a well-known example. A component in a postman's bicycle gave way even though the machine had been sensibly maintained and

> checked; the Post Office was held liable to the claimant even though it had not been negligent. Section 69 changed that framework, with a view to producing different results."

See also *Chisholm v D&R Hankins (Manea) Ltd* [2018] EWHC 3407 (QB); *Palmer v Perrins Hill Partnership* [2019] 4 WLUK 542; *James v White Lion Hotel* [2020] 1 WLUK 39; *Jagger v Holland* [2020] EWHC 46 (QB); and *Harris v Bartrums Haulage and Storage Ltd* [2020] EWHC 900 (QB).

253. In light of these principles, and having regard to the relevant health and safety regulations (LOLER, PUWER and WHR) which, as I have said and the parties agree, assist in defining the scope of the common law duty of case what steps a reasonable and conscientious employer could have been expected to take to provide a reasonably safe workplace and system of work for the Claimant, Brands' duty of care to him included the following: (a) a duty to ensure that work at height was properly planned, appropriately supervised; and carried out in a manner which was, so far as was reasonably practicable, safe; (b) a duty to ensure that the lifting equipment in question, viz, the cab and trailer, which were exposed to conditions which would result in deterioration which was liable to result in dangerous situations, was thoroughly examined according to an examination scheme (as defined in reg 2(1) of LOLER) at least every 12 months (and, in fact, I think, as I said earlier, at least every six months) to ensure that health and safety conditions were maintained and that any deterioration would be detected and remedied in good time; (c) a duty to ensure that the guard-rails on the cab and trailer were of sufficient strength and rigidity and that the structures supporting the guard were of sufficient strength and suitable for the purpose of such support or attachment; (d) a duty, in any event, to ensure the equipment was inspected at suitable intervals to ensure that health and safety conditions were maintained and that any deterioration can be detected and remedied in good time; (e) a duty to ensure that the safety rails on the cab and trailer were maintained in an efficient state, in efficient working order and in good repair.

(ii) Mr Sippitts' role

254. Let me say at once that I regard Mr Sippitts as an honest and conscientious person. He is and was plainly horrified by what happened to the Claimant. He has cooperated throughout this case, and has been open and honest by giving witness statements for both the Claimant and Brands, as I mentioned earlier. He gave his evidence frankly. His attitude is to be commended.

255. Mr Sippitts was under a duty to perform his obligations as transport manager with reasonable care and skill, as the Claimant submitted. He owed that duty to Brands and to the Claimant and to anyone who worked on or drove the transporter, such as Mr Maynard, and indeed any road user. I consider that the scope of those obligations was principally defined by the transport managers' declaration which he signed when he was engaged by Brands.

256. I find that Mr Sippitts failed to exercise reasonable care and skill in the exercise of his functions vis-à-vis Brands in the particular circumstances of this case, and thus was negligent. That is because, in short, he did not fulfil the obligations which he undertook when he signed the transport manager's declaration on TM1. That failure contributed to the accident which befell the Claimant.

257. I set out the declaration earlier, but to recap, among the things Mr Sippitts undertook to do included, in particular: 'ensuring safe loading with appropriate indicators fitted'; ensuring 'a suitable maintenance planner is complete and displayed with preventative maintenance dates at least 6 months in advance, to include the Annual Test and other testing or calibration dates'; 'ensuring that vehicles and trailers are kept in a fit and roadworthy condition, that defects are either recorded and repaired promptly' and where not roadworthy are taken out of service'; 'to make vehicles and towed equipment available for safety inspections, service, repair and statutory testing available at the appropriate times and within the notified O-licence maintenance intervals'; 'to liaise with maintenance contractors, manufacturers, hire companies as might be appropriate.'

258. I emphasise the words are fit *and* roadworthy. Mr Sippitts' duty was thus to ensure the vehicle was both fit and roadworthy – and not just 'roadworthy', as he perceived it.

259. In cross-examination by Mr Killalea, Mr Sippitts said this (15 February 2022, p16):

> "Yeah, but again, that for me, it's a health and safety issue, rather than a road compliance issue. And that's why I try not to get too involved. Just because it's on a vehicle, it's a health and safety thing. It's not a road compliance issue, which is what I'm trained in. I'm not a health and safety advisor."

260. Later he added (p20):

> "Q. You have that conversation with him and you very candidly said and were obviously querying that it was a long time ago and what you remember. But obviously, there's the conversations that take place, whether it's six months preferably, or 12 months, [on the face of this report?]. And that you had that discussion with Andrew. When you set up the Google diary that is there to ensure compliance, why is LOLER not in the diary?
>
> A. Because that is not the road compliance. The diary that I set up is what I use for other companies. It's just I just copy it, change the vehicle details, put the new date in for those things. I generally don't put the LOLER in, because that's a health and safety requirement. That is something that is done by the operator. In Andrew's case, because he was new and he'd never heard of that, that is why I spoke to him about that. It's something that I never used to put in that document. I've never done it before."

261. Mr Sippitts was plainly aware that the transporter required a LOLER inspection because its operation involved lifting, and also working at height. That is why he asked for sight of the LOLER certificate when he was first engaged by Brands. He knew that LOLER inspections were required at least every 12 months (and hence, in this case, no later than 4 July 2017) or possibly – as he said, 'erring on the side of caution' – every six months. In the latter case, that meant an inspection was already overdue by the time he saw the certificate within weeks of March 2017.

262. With that knowledge, in my judgment it was negligent for Mr Sippitts not to have entered that date on the maintenance planner which he had created via Google Calendar specifically for the purpose of telling the Claimant what inspections were due, and when. That was a specific duty according to the TM1 declaration he had signed. On his own evidence he knew an inspection was overdue, or would become due during 2017. He did not need to be a health and safety expert to know that. After all, he had first raised LOLER with the Claimant and was aware of the six month/12 month issue.

263. Ensuring safe loading also fell squarely within Mr Sippitts' responsibilities according to the declaration he signed, and so ensuring that the vehicle was properly inspected for the purposes of LOLER was part of that duty. Safe loading could not be carried out in the absence of a LOLER inspection, because loading involved work at height. Ensuring the vehicle was 'fit and roadworthy' also required an accurate and up to date maintenance planner, as did the duty upon him to make sure the vehicle was available for safety inspections and statutory testing.

264. I do not accept there is a rigid dividing line between roadworthiness and health and safety which justified Mr Sippitts not entering the date on the Google Calendar. I regard the word 'fit' as encompassing any health and safety inspections required by the use to which the vehicle is to be put. Roadworthiness inspections and health and safety inspections are therefore all part of the spectrum encompassing an operator's duty to keep their vehicle safe for whatever use it is to be put to – a duty which, in Brands' case, it was Mr Sippitts' duty to ensure they fulfilled.

265. Mr Sippitts' said the reason he did not take that step was because he was not a health and safety expert ('I don't tend to get involved in the actual health and safety regulations'). I quite accept that he was not qualified to carry out LOLER inspections himself. Nor, I suspect, was he qualified to carry out a roadworthiness inspection, or an MOT, but that did not stop him from putting the due dates on the planner. Mr Sippitts knew about LOLER; he knew about the need for inspections at regular intervals; and he discussed the matter with the Claimant. That was all he needed to know. He therefore should have put the relevant date on the Google Calendar.

266. Nor do I regard it as an answer to say that because the Claimant had had a conversation with ECM about the LOLER inspection, that relieved Mr Sippitts of the need to include the LOLER date on the Google Calendar. It would appear from the evidence that there was uncertainty about the due date for the next LOLER inspection. The report from July 2016 said twelve months; Mr Sippitts said the Claimant told him ECM had told him six months. Mr Sippitts knew, or should have known, that the Claimant was relying on the Calendar to remind him what needed to be done on the transporter, and when. He knew the Claimant was enthusiastic but inexperienced, and he knew the Claimant was heavily reliant upon his advice and expertise. This was plainly a very busy period for the Claimant as he began to set up his new business. He had to deal with the PAYE, NI, accountancy, etc, side of matters; he had to comply with his many regulatory obligations regarding the vehicle; and no doubt he was also looking for new business opportunities. All of this, as well as bringing up a young family. The scope for him to forget a particular date was considerable, making it all the more important that there be an accurate and up to date maintenance planner so that the scope for a date to be overlooked was minimised.

267. Furthermore, Mr Sippitts was unfamiliar with car transporters, as this was the first such vehicle with which he had been involved. That made it all the more important that he be absolutely rigorous in ensuring all necessary and relevant dates were entered on the planner, including LOLER inspection dates.

268. I find that had Mr Sippitts put the LOLER date onto the planner then the Claimant, as an assiduous operator, would have had a reg 9 LOLER inspection carried out, that this would have identified the defect on the upper safety rail, and that this in turn would have prevented the accident.

269. The inference I draw from the evidence is that somehow, at some point after the Claimant and Mr Sippitts had their discussion about LOLER, the need for an inspection must have slipped the Claimant's mind because of its absence from the Google Calendar.

270. As I set out earlier, the manufacturer's Drivers Manual recommended that a visual inspection be considered daily to ensure that, 'Safety hand rails are all secure and complete and wire ropes are tensioned and not defective.' I find it was negligent for Mr Sippitts not to have obtained and familiarised himself with the manufacturer's manuals relating to the transporter. It was especially important for him to do because, as I have said, he was not familiar with this type of vehicle. He admitted that if he had seen them, and in particular the need for the daily driver's safety check to include the safety rails, he would have expected additional training to be given to the drivers, and would have advised the Claimant to take advice about these checks. He also said (15 February 2022, p30):

> "Q. If you had been aware of the fact that the manufacturer's advice or guidance, in respect of drivers' daily checks, was to check additional items, you would have raised that with Andrew, wouldn't you? If you had known that?
>
> A. If I'd have known that, I would have just said, "Look, you know, would you like to do an additional daily check, just on an A4 bit of paper, that the drivers come up and check theirs?"

271. However, because he had not obtained or read the manuals, no such advice was given, and no such training took place. In cross-examination by Mr Kennedy, Mr Maynard's evidence was, 'Well I do that to see that the rails and the stretch is okay anyway. They looked okay.' This suggests, to me, a fairly perfunctory check. Had Mr Sippitts seen the manuals he would have ensured proper training was given in relation to safety rail inspections (including the pillars).

272. Now, I quite understand that in the case of this vehicle, carrying out that task might not have been straightforward. The trailer had an upper deck which could be lowered, which would have allowed for the inspection of the safety rails at ground level by the driver. However, the cab unit, as I have said, had a fixed platform at height whose safety rails could not readily be inspected from ground level. In particular, I accept the evidence that the bottom of the guard pillar (where the corrosion had occurred) could not be seen from the ground. But had Mr Sippitts read the manual, or indeed physically seen the vehicle (which he never did), he would have appreciated this difficulty and, I am sure, advised appropriately on how a suitable inspection regime ought to be devised (if only, by

advising the Claimant to take specialist advice and perhaps working with him to find a suitable maintenance contractor).

273. Again, I find that had these steps been taken, appropriate inspections would have taken place which would have prevented the accident.

274. Mr Sippitts' evidence was that he was relatively relaxed about LOLER because he did not think it mattered because he thought the transporter was not actually being used (15 February 2022, p19):

> ""Well, because we had seen it and it said, 'The next one is due 2017', I was thinking, 'Well okay, that's their idea.' We weren't using a vehicle at the moment and that's when I had this discussion with Andrew and said, 'This is what we need to be doing. You need to have a new certificate. They're saying 2017. It runs out. You're not using at the moment, but you need to get it done before you do start using it. I would be happier about the six-monthly.' And that's when he's had this thing. And apparently, he said, 'Six-monthly's good.' And that was where I left it. Because he wasn't using the vehicle, there was no immediate rush to go out and get it because he wasn't, well he told me he wasn't actually using it at the time."

275. I do not think that Mr Sippitts was necessarily right to think that because the transporter was not actually being used, that impacted on the need for an inspection and a valid LOLER certificate. Regulation 2 of LOLER defines 'equipment' be 'work equipment for lifting or lowering loads and includes its attachments used for anchoring, fixing or supporting it'. The thorough inspection required by reg 9(3) applies to 'lifting equipment which is exposed to conditions causing deterioration which is liable to result in dangerous situations'. On its face, no distinction is drawn whether the lifting equipment is actually being used, or not. That, it seems to me, is common sense. Even if lifting equipment is not currently being used, it still needs to be inspected so as to make sure that it was not deteriorating whilst not being used, so that as and when it was used again, it was in a safe condition.

276. Given the safety critical nature of working at height, and the apparent uncertainty of whether an inspection was already overdue, or due in July, Mr Sippitts should have been much more emphatic to impress upon the Claimant the very important need to have absolute clarity and certainty on LOLER inspections, and the relevant period going forward.

277. Overall, for these cumulative reasons, I find that Mr Sippitts failed to exercise the degree of care and skill that a reasonably competent transport manager would have exercised in relation to this vehicle, in the circumstances of this case. Had he done so, the accident would not have happened.

(ii) Is Brands liable for Mr Sippitts' negligence on the basis that it owed a non-delegable duty of care to the Claimant as one of its employees ?

278. The first way in which Mr Killalea for the Claimant put his case on why, in law, Brands was responsible for Mr Sippitts' failures is that it owed the Claimant a personal, non-delegable, duty of care and that it cannot therefore escape liability on the basis that he was an independent contractor.

279. As his employer, Brands was under a duty to take reasonable care for the Claimant's safety: *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57, 78; *Stokes v Guest, Keen and Nettlefield (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783, cited with approval by the House of Lords in *Barber v Somerset County Council* [2004] 1 WLR 1089, [65]; *Charlesworth*, [12-03]-[12.04]. In *Stokes*, Swanwick J said:

> "From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

280. Three strands of this general duty are: the duty to provide a safe place of work; the duty to provide and maintain adequate plant and equipment (which may include carrying out regular inspections); and the duty to provide a safe system of work (which includes taking precautions for the safety of workers); *Charlesworth*, [12-24], [12-27], [12-59], [12-78].

281. If Mr Sippitts had been an employee of Brands then, possibly subject to the *Brumder* issue I discuss later, there can be little doubt that the company would have been responsible for the Claimant's injury on the straightforward basis that a company is vicariously liable as a matter of policy for the negligence of its employees, even if it is not itself at fault. Mr Sippitts' negligence would have put Brands in breach of its duty of care to the Claimant.

282. In *Majrowski v Guy's and St Thomas's NHS Hospital Trust* [2007] 1 AC 224, [7]-[9], Lord Nicholls described vicarious liability in the following terms:

> "7. Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is 'while acting in the course of his employment'. It is thus a form of secondary liability. The primary liability is that of the employee who

> committed the wrong. (To a limited extent vicarious liability may also exist outside the employment relationship, for instance, in some cases of agency. For present purposes these other instances can be put aside.)
>
> 8. This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.
>
> 9. Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. They are summarised in Professor Fleming's *Law of Torts*, 9th ed (1998), pp 409–410. Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of "good practice" by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment."

283. But Mr Sippitts was an independent contractor. Of that there is no doubt. Ordinarily, those who engage an independent contractor are not liable for injuries caused by the contractor's negligence, as I will discuss later. The question therefore is whether Brands is not liable on that basis.

284. In *Woodland* the issue was whether a local education authority was liable for negligence by swimming instructors (who were independent contractors, and not council employees) which led to a child being severely injured in a swimming accident during a school swimming lesson. Lord Sumption said at [4] that the question at issue was what was the scope of the duty owed by the authority to the pupils in its care. Was it a duty to take reasonable care in the performance of functions entrusted to it, so far as it performed those functions itself, through its own employees ? Or was it a duty to procure that reasonable care was taken in their performance by whomever it might get to perform them ? On either view, Lord Sumption said, any liability of the education authority for breach of it was personal, and not vicarious.

285. He went on to say at [5] that, generally speaking, a defendant is personally liable only for doing negligently that which he does at all, or for omissions which are in reality a negligent way of doing that which he does at all. The law does not in the ordinary course

impose personal (as opposed to vicarious) liability for what others do or fail to do. However, as he went to say:

> "The expression 'non-delegable duty' has become the conventional way of describing those cases in which the ordinary principle is displaced and duty extends beyond being careful, to procuring the careful performance of work delegated to others."

286. What this means, in simple terms, is that where the duty of care in question is of the type which the law regards as non-delegable, then the defendant will be liable for the negligence of another person whom it has engaged to carry out a task falling within the scope of that duty, whether that person is a defendant or an independent contractor.

287. *Charlesworth* summarises the position at [7-106]-[7-107]:

> "7-106. As a general rule, a person who engages an independent contractor to carry out a task or perform an activity is not responsible for any shortcomings on the part of the contractor …
>
> *Nature of non-delegable duty*
>
> 7-107. Exceptionally, however, the courts may hold that an employer or principal who is under a duty to take care cannot delegate the duty to another person. This means that the defendant cannot delegate legal responsibility in respect of the duty, rather than that the defendant cannot delegate actual performance of a task to another person. The defendant's duty in these circumstances is to ensure that care is taken."

288. In *Woodland,* Lord Sumption analysed the law relating to non-delegable duties and identified two broad categories of case where such duties had been held to arise. The first were extra-hazardous activities, which I do not need to address. The second was where there was a personal protective duty. At [23] he identified five factors as relevant to the existence of the duty:

> *"*(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to

> perform those obligations, i.e. whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him."

289. In [19] of Brands' Closing Skeleton Argument (15 February 2022) it was contended:

> "The argument based on non-delegable duty is not understood. The facts of *Woodland* are wholly distinguishable. None of the unusual circumstances in which the courts are prepared to find a non-delegable duty apply to the facts of this case."

290. I do not agree. It is well recognised that an employer's duty of care towards its employees is non-delegable, and falls into the second of Lord Sumption's categories. *Charlesworth* says at [7-112] and [12-10] (citations omitted):

> "7-112. [Having identified Lord Sumption's five factors] A clear instance was the non-delegable duty of an employer to maintain a safe system of work.
>
> …
>
> 12-10. The employer's duty to an employee is a single, personal duty, which is non-delegable, so that the employer must not simply take care, he must see that care is taken, by all those persons engaged by him. Judicial definitions have included: 'The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case' and 'the duty of taking reasonable care … so to carry on his operations as not to subject those employed by him to unnecessary risk'. 'The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle.' It follows that the employer's duty is stricter than the duty to take reasonable care for oneself, and it exists whether or not the employment is inherently dangerous."

291. This is a reference to [25(1)] of Lord Sumption's judgment, where he said in relation to the criteria he had identified in [23]:

> "(1) The criteria themselves are consistent with the long-standing policy of the law, apparent notably in the employment cases, to protect those who are both inherently vulnerable and highly

> dependent on the observance of proper standards of care by those with a significant degree of control over their lives."

292. In *Wilsons & Clyde Coal Co. v. English* [1938] AC 57 the House of Lords held that the duty of care owed by an employer to an employee was non-delegable, with the consequence that the (then) defence of common employment was not available to an employer who was the owner of a mine where injury was caused to a miner through the failure of the mine manager appointed as agent in charge of the employer's mining activities to provide a safe system of work. The employer was held liable because the system of work was not reasonably safe, although the system had been devised by the manager to whom the employer was obliged by statute to leave the matter and the employer had personally done everything that it could to provide a safe system. Lord Wright said (at p78):

> "... the ... duty was personal to the employer, in this sense that he was bound to perform it by himself or by his servants. ... The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill."

293. Later, in discussing the limits of the obligation, his Lordship said (at pp83-84):

> "The true question is, What is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence. ... the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a company, and whether or not the employer takes any share in the conduct of the operations."

294. His Lordship went on to say (at pp.84-85):

> "It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow-servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foreman, or other employees."

295. In *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906, 919, Lord Brandon said:

> "A statement of the relevant principle of law can be divided into three parts. First, an employer owes to his employee a duty to exercise reasonable care to ensure that the system of work provided for him is a safe one. Secondly, the provision of a safe system of work has two aspects: (a) the devising of such a system

> and (b) the operation of it. Thirdly, the duty concerned has been described alternatively as either personal or non-delegable. The meaning of these expressions is not self-evident and needs explaining. The essential characteristic of the duty is that, if it is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty."

296. *Paine v Colne Valley Electricity Company* [1938] 4 All ER 803, 807, provides an early but neat example of the non-delegable duty in action. A workman was fatally electrocuted by an improperly insulated metal kiosk containing electrical equipment which had been manufactured by a third party. Goddard LJ held:

> "… the first defendants had failed to provide a safe place for their workmen, and had, therefore, committed a breach of their common law duty as recently laid down in *Wilsons & Clyde Coal Co Ltd v English.* This is a duty which cannot be avoided by delegation. It is no answer to say, as counsel for the first defendants submitted: 'We employed competent contractors to provide a safe place or plant.' The class of cases in which the employment of a competent contractor affords a defence belongs to a wholly different category in the law of negligence. I have no hesitation in holding that the first defendants have no defence whatever to the plaintiff's claim."

297. Hence, I agree with Mr Killalea's primary submission under this head that Brands was responsible for the fault on the part of Mr Sippitts, notwithstanding his status as an independent contractor, on the straightforward basis that the present case falls within Lord Sumption's second broad category of non-delegable duty in *Woodland*, namely a case within the employer – employee category.

298. That is sufficient to dispose of this issue in the Claimant's favour. If the Claimant had been an employee of Brands *simpliciter*, without also being its sole director, I think there would be little room for argument but that Brands was liable for his injuries. Similarly if Mr Maynard had been an employee, and had fallen from the deck. Does it make a difference that the Claimant *was* its sole director ? On this issue, I consider not. He was an employee; Brands therefore owed him the duty which I have outlined; and because of Mr Sippitts' breaches, Brands was in breach of that duty. The otherwise non-delegable duty did not cease to be such simply because the Claimant was the sole director as well as an employee. It seems to me that the Claimant's status as sole director, and whether it operates so as provide Brands with a defence, falls to be analysed in the context of *Brumder*, which I will discuss later.

299. Mr Killalea was not content to rest his case under this head on the Claimant's employee status alone. He also submitted that, applying Lord Sumption's five criteria, the Claimant fell into the second category of case where a non-delegable duty arises. I broadly agree with Mr Killalea's analysis.

300. The important context of this analysis is that Mr Sippitts was conducting a statutory function without which Brands could not lawfully operate. He was engaged to provide expert, specialist advice in a field which he himself said was complicated (as witnessed by his evidence about the high failure rate for those seeking to become transport managers). Also, as Mr Sippitts again frankly acknowledged, although the Claimant was enthusiastic and keen to learn, and had done some research, he was also very inexperienced and – I infer - was relying on Mr Sippitts very heavily, if not entirely – which Mr Sippitts knew - to provide him with the necessary advice to keep his vehicle fit, legal and roadworthy (and so to keep himself safe).

301. Hence, addressing the first of Lord Sumption's criteria, whilst the Claimant was not vulnerable in the same sense that a patient or child is vulnerable, the vulnerability of the Claimant as an employee arose from the exceptional requirement arising from the vehicle operator's licence to have a professionally competent and suitably experienced transport manager (whether internal or external) as a continuing and mandatory requirement. If the Claimant had had extensive and/or appropriate technical and/or employment experience which enabled him to form his own views on the transport issues Mr Sippitts was specifically engaged to deal with, then I can see that, in that case, it might be less appropriate to categorise him as especially vulnerable.

302. Here however, the Claimant did not have any such experience and/or knowledge. In specific terms, as Mr Sippitts stated, the Claimant had not, for example, even heard of LOLER. The Claimant was precisely the sort of person, namely an employee, who was dependent upon the protection of his employer Brands (as a transport company complying with their licence requirements by engaging Mr Sippitts) against the risk of injury arising from the use of a specific type of heavy goods vehicle with the associated and specific risk of a necessity to work at height.

303. As to the second of Lord Sumption's criteria, the antecedent relationship placing the Claimant in the charge or care of his employer at work arose from the technical and specialised nature of the transport requirements which directly impacted upon the Claimant's safety whilst at work on a specialised HGV. I consider that this gave rise the assumption of a positive duty to protect the Claimant from harm as the Claimant, whilst engaged in working at height, was almost totally reliant upon the positive steps required to be taken by his employer – operating through Mr Sippitts - in order to devise, institute and enforce, a safe system of work, and also to ensure compliance with the various regulatory regimes including keeping the vehicle roadworthy via the six-weekly inspections; and compliance with LOLER, PUWER, and the WHR.

304. As to the third factor, control, neither the Claimant personally, nor he nor Ms Parsons as employees, could perform the obligations required of a transport manager. Mr Sippitts had complete autonomy.

305. I also consider the fourth of Lord Sumption's criteria is applicable. I agree with Mr Killalea that it is difficult to envisage a function that was more an integral part of the positive duty owed by Brands as the Claimant's employer than the duties Mr Sippitts had as its transport manager to devise, institute, and enforce a safe system of working by ensuring that there was a full and accurate maintenance planner of the required inspections of the car transporter.

306. Finally, the fifth criteria is undoubtedly satisfied. Mr Sippitts was not negligent in some collateral respect but in the performance of the very function assumed by Brands and delegated by Brands to him.

307. Taking a step back, once Brands (acting through the Claimant) had engaged Mr Sippitts, the Claimant became just an employee, wholly dependent on the lawfulness of the business, and his own safety, on the advice which Mr Sippitts, paid for and retained by the company, provided. *If* the Claimant's status as the sole director makes a difference, as I have said, then this falls to be analysed in relation to *Brumder*, as I will consider next.

(iii) Is the claim defeated by the principles outlined in Brumder ?

308. In *Brumder* the question which fell for decision was whether the sole director and shareholder of a company who suffered personal injuries as a result of the breach by the company of an absolute statutory obligation to maintain equipment in efficient working order could bring a claim against the company, even though the company was only in breach because he himself was in breach of his obligations to the company to exercise reasonable care in order to enable the company to fulfil that obligation, and the company could only do so vicariously through him. Further, he had totally abrogated his health and safety responsibilities.

309. Mr Brumder was the sole director and shareholder of the defendant company. It specialised in servicing vehicles and putting them through MOT inspections. While the claimant was trying to climb down to ground level from a raised hydraulic ramp in the defendant's workshop after the compressor in the ramp mechanism failed, he caught his hand and a finger was severed. The claimant brought a claim for damages for personal injury against the company.

310. The judge found that the company was in breach of its obligation under reg 5(1) of PUWER to ensure that work equipment 'is maintained in an efficient state, in efficient working order and in good repair', that the defect in the compressor was causative of the accident, and that, therefore, there was 'primary liability' on the part of the company. However, he nevertheless dismissed the claim on the basis that the claimant, who had not given *any* consideration to health and safety matters in the workshop, including the need to comply with PUWER, was responsible for the breach, and thereby 100% contributorily negligent.

311. On the claimant's appeal the defendant sought to uphold the dismissal of the claim on the basis that the defendant had a complete defence to the claim, and the judge had been wrong to make a finding of primary liability against it.

312. Beatson LJ, with whom Longmore LJ and Sir Alan Ward agreed, dismissed the appeal, and affirmed the decision of the trial judge, but on different grounds. I take the following from the headnote at [2013] 1 WLR 2783.

313. Once an employee bringing a personal injury claim against his employer has established that his injury had been caused by a breach of an enactment which made the employer absolutely liable, he need do no more. However, it is then open to the employer to set up a defence that the employee was alone to blame, and that defence applied: (a) where

the act or omission of the claimant himself had the legal result that the defendant was in breach of a statutory duty, but (b) only where the employer proved that he had done all that he could to ensure compliance with the duty. The policy reasons for imposing the absolute statutory duty on employers, namely to relieve injured employees from the need to show fault and thereby protect them as the weaker party in the relationship and to encourage high standards of compliance by those responsible for the performance of an employer's duty, did not apply to a claimant who was a director of the employer and the only person through whom the employer company could act; and for that reason. and since the claimant as a wrongdoer fell within one of the justifications for the defence, which was the common law principle that a person could not derive any advantage from his own wrong, the defence was available to the defendant company. The Court also held that the finding of 100% contributory negligence was wrong in principle (because that would only have arisen had the judge been correct to find some liability on the part of the company, which it did not have).

314. At [8] Beatson LJ said:

> "8. The key question is whether this case falls directly or by analogy within the principle and defence identified in *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414 by Pearson J, and considered with approval by the House of Lords in *Boyle v Kodak Ltd* [1969] 1 WLR 661, 666f, 669, 670f, 671 and 672e, to which I will return. At this stage it suffices to refer to the statement of Lord Reid in *Boyle v Kodak Ltd* summarising the effect of the authorities. He stated, at p 667:
>
> > "once the [claimant] has established that there was a breach of an enactment which made the employer absolutely liable, and that that breach caused the accident, he need do no more. But it is then open to the employer to set up a defence that, in fact, he was not in any way in fault, but that the [claimant] employee was alone to blame."
>
> If that defence applies either directly or analogically in the circumstances of this case, that is the end of the matter and the appeal must be dismissed. If it does not, the question is whether any part of the claimant's damage resulted from his own fault, and, if so, the extent to which the claimant's damages should be reduced under the 1945 Act."

315. At [19] Beatson LJ noted that there was no challenge to the judge's finding that the claimant had not at any time considered health and safety issues.

316. At [25] and [26], Beatson LJ considered *Ginty*. That case concerned the prohibition from working on asbestos roofs without using boards, which bound both employers and employees. Belmont was to strip an asbestos roof at a factory owned by Pirelli and replace it with new sheeting. Belmont's instructions to its employees including Mr Ginty were that they were not to work on roofs without boards. The ladders and boards for the job were to be supplied by Pirelli, but the responsibility under the Regulations for providing them remained with Belmont. Pirelli's employees told Belmont's men who

had come to do the job that the roof was unsafe, showed them a variety of boards, and told them to help themselves to what they wanted. The next day the men were seen working on the roof without boards and Pirelli's employees left two boards where the men working on the roof could see them. The men knew of the prohibition in the Regulations but did not use the boards. Several days later Mr Ginty fell through the roof, and was seriously injured. Pearson J held that, although both the worker and Belmont were in breach of their duties under the relevant Building Regulations, he was not entitled to recover damages because the fault was his, and there was no fault on the part of Belmont which went beyond or was independent of his own omission.

317. At [26] Beatson LJ said this:

> **"**26. Pearson J stated, [in *Ginty*] at p423: 'The actual wrongful act was the [claimant's] wrongful act, but in one aspect it constitutes a breach by himself and in another aspect it constitutes a breach by his employer.' In such a case, he stated, 'the important and fundamental question … is not whether there was a delegation, but … whose fault was it ?' He stated, at p424: 'if one finds that the immediate and direct cause of the accident was some wrongful act of the man, that is not decisive', and one had to inquire:
>
> > 'whether the fault of the employer under the statutory Regulations consists of, and is co-extensive with, the wrongful act of the employee. If there is some fault on the part of the employer which goes beyond, or is independent of the wrongful act of the employee, and was a cause of the accident, the employer has some liability.'

318. At [30]-[32] Beatson LJ referred to Lord Diplock's speech in *Boyle v Kodak Ltd*. In that case, a man who was going up a ladder failed to lash it to the top of an oil storage tank and fell from height. Regulation 29(4) of the 1948 Building Regulations provided that, 'every ladder shall so far as practicable be securely fixed so that it can move neither from its top nor from its bottom points of rest'. As the injured man could have lashed the ladder to the rail at the top of the tank by using a staircase running round the outside of the tank rather than mounting the ladder before it had been fixed, there was a breach of that provision. Beatson LJ said of this case:

> "30. As to the position of an employer who is sued by an employee where the non-compliance with statutory duty was also a breach of the statutory duty by the employee himself, Lord Diplock stated, at pp 672–673:
>
> > 'The plaintiff establishes a prima facie cause of action against his employer by proving the fact of non-compliance with the requirement of the regulation and that he suffered injury as a result. He need prove no more … if the employer can prove that the only act or default of anyone which caused or contributed to the non-compliance was the act or default of the plaintiff himself, he establishes a good

> defence … To say 'You are liable to me for my own wrongdoing' is neither good morals nor good law.'
>
> 31. The court has taken a strict approach to the availability of the defence. The onus is on the employer to prove that he did all he could to ensure compliance with the duty. Only if the employer does, will he have a defence against the injured employee whose act or omission put the employer in breach of the regulation. In *Boyle v Kodak Ltd* the employer had not given the workman an order forbidding him from using the ladder before it was lashed, and it was held that the defence was not available. In *Anderson v Newham College of Further Education* [2003] ICR 212, para 11 Sedley LJ stated that *Boyle v Kodak Ltd* showed how high a standard of proof was required to shift the entire blame to the employee.
>
> 32. … the failure of the employer to instruct the employee not to use the ladder before it was lashed was fatal to the defence. There was no evidence entitling the finder of fact to conclude that the employee would have disobeyed any instructions not to use the ladder before it was lashed. It was inferred that, had the employer given such instructions, the employee would have obeyed them."

319. Given the reliance by Brands on Lord Diplock's *dictum*, I should emphasise the word 'only': '… the *only* act or default of anyone which caused or contributed to the non-compliance was the act or default of the plaintiff himself'. Here, it is the Claimant's case that even if he himself was at fault (which he denies), the accident was also caused by Mr Sippitts' fault, for which Brands is liable, and so he was not *solely* at fault.

320. At [38] onwards Beatson LJ considered the three explanations for the defence advanced by Pearson J in *Ginty*. The first of these was:

> "… the common law principle that a person cannot derive any advantage from his own wrong which, in this context, meant that a person cannot by his own wrongful act impose on his employer the liability to pay damages to him."

321. At [41] Beatson LJ said:

> "41. *Ginty's* case and *Boyle v Kodak Ltd* concerned an employee claimant, and not a claimant who was the employer company's director, let alone its sole director and shareholder. In the circumstances of the present case, moreover, as the corporate first defendant who is sued can only act through its sole director, the claimant, there is no question of the director/claimant disobeying the company's instruction. The fact is that the director's acts and omissions constitute the company's breach of its duty under the Regulations. Can the *Ginty/Boyle v Kodak Ltd* defence apply in this situation, and, if it can, how is it to be explained ?"

322. He went on to hold that the claimant, not being an employee, did not owe a duty under the relevant health and safety regulations (which only imposed duties on employers and employees). However, as a director of the defendant company, the claimant owed a duty to use reasonable care and skill pursuant to s 174 of the Companies Act 2006 ('a director of a company must exercise reasonable care, skill and diligence'). He went on at [47]-[48]:

> "47**.** Where, as is the position of the claimant, a director/claimant has paid no attention whatsoever to health and safety issues, and has abrogated his responsibilities as owner and director of the company for them, he will be in breach of his duty q*ua* director under section 174(2)(a) of the 2006 Act. The facts that the claimant was not a mechanic, or skilled in operating a workshop, and that there were other people who were more closely involved in the setting up and day-to-day running of the workshop do not, given the findings of the judge, mean that he can satisfy the standard required in section 174.
>
> 48. The consequence of this is that the claimant is a wrongdoer and falls within the first of Pearson J's explanations or justifications for the defence; the common law principle that a person cannot derive any advantage from his own wrong. The common sense proposition in Lord Diplock's speech in *Boyle v Kodak Ltd* [1969] 1 WLR 661 that 'to say 'You are liable to me for my own wrongdoing' is neither good morals nor good law' appears to me to be applicable where the director/claimant has paid no attention whatsoever to health and safety issues, and in the judge's words (at para 59) had "abrogated his responsibilities as owner and director" of the company. I do not consider that it lies in the mouth of a claimant who is the defendant's sole director and shareholder, and through whom the company must act, to assert that the company has not proved that it has done all it could to ensure compliance when it is only through the claimant director's acts that the company can act."

323. At [54] Beatson LJ said the case before the court was an 'extreme case', and at [55]-[56]:

> "55. I observe only that the statutory formulation in section 174 of the 2006 Act recognises that there will be variations between different types of directors and between different types and sizes of company. Directors are permitted to engage in substantial delegation of management functions to non-board employees, just as they were at common law: see *In re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 429. Directors are not, however, permitted to escape from being in a position to guide and monitor management and from "the duty to supervise the discharge of the delegated functions": *In re Barings plc (No 5)* [1999] 1 BCLC 433, 489, approved by the Court of Appeal [2000] 1 BCLC 523,

> 536, and *Equitable Life Assurance Society v Bowley* [2004] 1 BCLC 180, para 41. In the latter case Langley J stated that the law as to the extent to which non-executive directors may be able to rely on the executive directors and other professionals to perform their duties is in a state of development and is "fact sensitive". One factor may (see *Gower & Davies, Principles of Modern Company Law*, 9th ed, para 16-34) be "the quality of the internal controls". … In this case, where there was no attempt by the claimant to enable the company to fulfil its health and safety obligations, even by expressly delegating them (subject to appropriate supervision) to Mr Lewis, such considerations are not applicable.
>
> 56. For these reasons I have concluded that the first defendant was entitled to rely on the *Ginty/Boyle v Kodak Ltd* defence ..."

324. I turn to my conclusions under this heading.

325. *Clerk & Lindsell on Torts* (23rd Edition), [12-89] says of the *Ginty*/*Kodak*/*Brumder* defence:

> "The defence will apply only the claimant is the sole author of his own misfortune. The employer will be liable if he himself was at fault."

326. For the reasons I explained earlier, an important causative factor for the accident was Mr Sippitts' failure to update the maintenance planner on Google Calendar with the last date for a LOLER inspection, and he did not familiarise himself with the relevant manuals relating to the transporter, which would have alerted him to the important need for safety rail inspections. Had he done so, the Claimant would have had the necessary inspections carried out and the accident would not have happened. The company bears responsibility for Mr Sippitts' failures on the basis of its non-delegable duty.

327. On all the evidence I heard, much of which I recited earlier, the Claimant's attitude to health and safety was the very opposite of Mr Brumder's attitude, which was one of total indifference. In contrast, the Claimant was assiduous and wanted to 'do the right thing'. Mr Sippitts could not have been more generous in his assessment of the Claimant's attitude to his responsibilities.

328. The health and safety regulations in question applied to the Claimant as an employee. For example, reg 3(2) and (3) of LOLER provides:

> "3. (1) These Regulations shall apply -
>
> …
>
> (2) The requirements imposed by these Regulations on an employer in respect of lifting equipment shall apply in relation to lifting equipment provided for use or used by an employee of his at work.

> (3) The requirements imposed by these Regulations on an employer shall also apply—
>
> (a) to a relevant self-employed person], in respect of lifting equipment he uses at work;
>
> (b) subject to paragraph (5), to a person who has control to any extent of—
>
> (i) lifting equipment;
>
> (ii) a person at work who uses or supervises or manages the use of lifting equipment; or
>
> (iii) the way in which lifting equipment is used,
>
> and to the extent of his control."

329. Regulation 3 of PUWER and the WHR apply to employees (reg 3(2)).

330. The Claimant obviously had control of the transporter, because ultimately it was for him to book and pay for inspections. I do accept, on the basis of Mr Sippitts' evidence about what the Claimant told him ECM had said about LOLER inspections, that the Claimant had a degree of fault for not having a LOLER inspection carried out. But it was, I find, a world away from the 'total abrogation' of responsibility for health and safety which marked the claimant in *Brumder*, whose attitude had been 'cavalier' (see at [18] of Beatson LJ's judgment). The Claimant obviously had a lot 'on his plate' in the course of setting up his new business, and to err, as he did, is human. Given he was the one who was principally going to be loading cars on the transporter at height, I reject as very implausible that he would have deliberately neglected health and safety issues relating to working at height.

331. In short, the Claimant's own fault was not co-extensive with company's own fault arising from Mr Sippitts' errors for which the company, in law, is liable. The *Brumder* defence does not, therefore, apply.

(iv) Did Mr Sippitts occupy a position akin to an employee so as to make the company liable ?

332. Mr Killalea submitted in the alternative that Brands was responsible for Mr Sippitts' fault because he stood in a position analogous to an employee, despite in law being an independent contractor. This submission requires an analysis of the cases up to and including *Barclays Bank Plc*.

333. For those of us who learned their tort law in the early 1990s, Mr Sippitts' status would have meant Brands was not responsible for his actions because, as classically understood, the law of negligence only imputed vicarious liability to an employer for the actions of its employees carried out in the course of their employment, and not for

the actions of independent contractors: *Salsbury v Woodland* [1970] 1 QB 324, 336); *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, 208.

334. Since that time, however, the law has moved on and there is no longer the rigid dichotomy between employees on the one hand, and non-employees on the other. Decisions in recent years have significantly extended the doctrine of vicarious liability, by including within its ambit relationships that are regarded in law as being 'analogous to employment'. The new developments were driven in part by cases involving child abuse, in circumstances where the defendant being sued was not the abuser's employer (because they were not subject to a contract of service for any one of a number of reasons). However, the wider test has not been limited to such cases, and it has been applied in other circumstances, such as prisoners working in prison kitchens, and foster carers.

335. The principal cases before *Barclays Bank Plc* (discussed in *Charlesworth*, [7-34] et seq) were: *John Doe v Bennett* [2004] 1 SCR 436 (Supreme Court of Canada); *E v English Province of Our Lady of Charity* [2013] QB 722 (Court of Appeal); *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (hereafter *Christian Brothers*); *Cox v Ministry of Justice* [2016] AC 660; and *Armes v Nottinghamshire County Council* [2017] 3 WLR 1000 (all Supreme Court).

336. In *Catholic Child Welfare Society*, the institute was a lay Roman Catholic order. Its full title is the Brothers of the Christian Schools. It was founded in 1680 in Rheims by Jean-Baptiste De La Salle. The members of the institute are lay brothers of the Catholic Church. Its mission was to provide a Christian education to children. Its members took vows of chastity, poverty and obedience and lived a communal life together as brothers, following a strict code of conduct and obeying the orders of their superiors. They renounced any salaries payable for their teaching work which were instead paid to a charitable trust for the benefit of the institute, which was itself an unincorporated association. In return the institute met all the brothers' material needs. The diocesan bodies responsible under statute for managing a Roman Catholic boys residential school left it to the institute to nominate a brother to act as headmaster and appoint other brothers to teach there. The brother teachers lived communally within the school grounds. In the 1990s evidence emerged of serious sexual and physical abuse of boys by brother teachers spanning more than three decades. Almost 200 former pupils brought claims for damages against various representatives of the diocese and the institute. On a preliminary issue the judge determined that the defendants with vicarious liability for any abuse which could be established were the two diocesan bodies (referred to in the judgment as 'the Middlesborough Defendants') which had been responsible under statute for management of the school during the relevant period and had employed the brother teachers. The judge found a second group of defendants (the De La Salle Defendants), which were various legal bodies established by the institute (which itself is an unincorporated association). The Court of Appeal upheld his decision. The diocesan bodies appealed on the grounds that the institute should share joint vicarious liability for the acts of its brother members.

337. [19]-[22], Lord Phillips said:

> "19. The law of vicarious liability is on the move. On 12 July 2012, shortly before the hearing of the appeal in this case, the

Court of Appeal handed down its judgments in *E v English Province of Our Lady of Charity* [2013] QB 722. That case was concerned with the preliminary issue of whether the diocesan trust could be vicariously liable for acts of sexual abuse committed by a parish priest in the diocese. The court held, by a majority, that he could. Before us Mr Leggatt, for the Middlesbrough defendants, suggested that the court would no doubt wish to read the judgments in full. He was right to do so. The hearing of that case before the Court of Appeal lasted but a day, but the impressive leading judgment of Ward LJ evidences consideration of case law and academic writings that goes far beyond the material to which counsel can have had time to refer in that short hearing. At paras 20 and 21 of his judgment, Ward LJ traces the origin of vicarious liability back to the middle ages, but rightly identifies that the law upon which he and I cut our teeth rendered the employer, D2, liable for the tortious act of the employee, D1, provided that the act in question was committed "in the course of the employee's employment". Thus, in a case about vicarious liability, the focus was on two stages: (1) was there a true relationship of employer/employee between D2 and D1? (2) was D1 acting in the course of his employment when he committed the tortious act?

20. Since Ward LJ and I cut our teeth the courts have developed the law of vicarious liability by establishing the following propositions. (i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members: *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15, 99; *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, 66–67; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366. (ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence: *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; *Brink's Global Services Inc v Igrox Ltd* [2011] IRLR 343. (iii) Vicarious liability can even extend to liability for a criminal act of sexual assault: *Lister v Hesley Hall Ltd* [2002] 1 AC 215. (iv) It is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1: *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510.

21**.** None of these developments of the law of vicarious liability has been challenged by Lord Faulks, who has represented the institute. I consider that he was right not to challenge them, for they represent sound and logical incremental developments of the law. They have, however, made it more difficult to identify the criteria that must be demonstrated to establish vicarious liability than it was 50 years ago. At para 37 of his judgment in this case,

> Hughes LJ rightly observed that the test requires a synthesis of two stages: (i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (ii) Hughes LJ identified the second stage as requiring examination of the connection between D2 and the act or omission of D1. This is not entirely correct. What is critical at the second stage is the connection that links *the relationship between D1 and D2* and the act or omission of D1, hence the synthesis of the two stages.
>
> 22. Both stages are in issue in the present case. There is an issue as to whether the relationship between the institute and the brothers teaching at St William's was one that was capable of giving rise to vicarious liability. There is also an issue as to whether the acts, or alleged acts, of sexual abuse were connected to that relationship in such a way as to give rise to vicarious liability.
>
> 23**.** It is the institute's case that the relationship of the individual brothers to the institute, considered as a body, is insufficiently close to give rise, of itself, to vicarious liability on the part of the institute for sexual abuse by brother teachers. Only a body managing a school and employing a brother in that school as a teacher, will have a sufficiently close relationship to that brother teacher to be vicariously liable for his wrongdoing. That is why the Middlesbrough defendants are liable and the De La Salle defendants are not, as held by the courts below.
>
> 24. It is the Middlesbrough defendants' case, as developed by Mr Leggatt, that the courts below have failed to give effect to the principles properly to be derived from the relevant authorities, particularly those dealing with vicarious liability for sexual abuse. The necessary closeness of connection between the relationship between the institute and the brothers and the abuses committed by the brothers is provided by the fact that the institute sent the brothers to St William's to further the purpose of the institute, clothed with the status of members of the institute, and thereby significantly increased the risk that brothers would sexually abuse the children with whom they were in close physical proximity. This is indeed a synthesis of stage 1—the relationship of the brothers with the institute and stage 2—the connection between that relationship and the acts of abuse."

338. I note here that the two-stage test to which Lord Phillips referred at [21] has been picked up and referred to in subsequent cases: see eg *Barclays Bank Plc*, [10].

339. At [35] Lord Phillips said:

> "35. The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a

> contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer."

340. At [56]-[58] he said:

> "56. In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.
>
> 57. The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.
>
> 58. Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of an employer and its employees."

341. At [62] he went on to consider Stage 2 of the two-stage test to which he had referred at [21]:

> "*Stage 2: The connection between the brothers' acts of abuse and the relationship between the brothers and the institute*

> 62. Where an employee commits a tortious act the employer will be vicariously liable if the act was done "in the course of the employment" of the employee. This plainly covers the situation where the employee does 21something that he is employed to do in a manner that is negligent. In that situation the necessary connection between his relationship with his employer and his tortious act will be established. Stage 2 of the test will be satisfied. The same is true where the relationship between the defendant and the tortfeasor is akin to that of an employer and employee. Where the tortfeasor does something that he is required or requested to do pursuant to his relationship with the defendant in a manner that is negligent, stage 2 of the test is likely to be satisfied. But sexual abuse can never be a negligent way of performing such a requirement. In what circumstances, then, can an act of sexual abuse give rise to vicarious liability ?"

342. In relation to the last question, having considered a wealth of authority, he concluded (at [85] onwards) that there could be circumstances where an employer would be liable for acts of sexual abuse (and held the institute to be liable as well as the Middlesborough Defendants on that basis).

343. As the editors of *Charlesworth* note at [7-45], in none of *Christian Brothers*, *Cox* or *Armes* was the court required directly to address the question whether the relationship between an employer and an independent contractor might also be regarded as 'analogous to employment'. But in *Barclays Bank Plc* that question squarely arose.

344. The Bank had engaged a doctor in private practice to carry out pre-employment medical examinations on the claimant job applicants, many of whom were teenagers applying for their first jobs after leaving school. The Bank arranged the appointments, told the claimants when and where to go, and provided the doctor with a *pro forma* report to fill in. The doctor was not paid a retainer by the Bank, but was paid a fee for each report. The work he did for the Bank was a comparatively minor part of his portfolio practice (which included working as an employee at hospitals, as well as other private work besides the Bank's work, eg, doing insurance work). The examinations took place in a consulting room in the doctor's house.

345. The claimants alleged that they were sexually assaulted in the course of those examinations. Following the doctor's death, they sought damages for personal injury from the Bank on the basis that it was vicariously liable for the assaults. On a preliminary issue, the judge determined that the Bank was liable for any such assaults that the doctor was proved to have perpetrated. The Court of Appeal upheld that decision.

346. The Supreme Court granted permission to appeal. The issues for the Supreme Court were: (a) whether an employer was vicariously liable for the torts of an independent contractor; (b) if not, whether the five criteria identified by the Supreme Court in *Catholic Child Welfare Society* and *Cox* were applicable to cases involving independent contractors; and (3) whether the relationship between the doctor and the bank was one that was capable of giving rise to vicarious liability.

347. Baroness Hale said at [1]:

> "Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the *Wm Morrison* case [which was a parallel case: [2020] AC 989]."

348. At [7]-[8] she summarised the parties' cases as follows:

> "7. The parties' respective positions can be simply put. As Lord Bridge of Harwich stated in *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, 208 (echoing the words of Widgery LJ in *Salsbury v Woodland* [1970] 1 QB 324, 336), "It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work". The bank argues that, although recent decisions have expanded the categories of relationship which can give rise to vicarious liability beyond a contract of employment, they have not so expanded it as to destroy this trite proposition of law, which has been with us since at least the decision of Baron Parke in *Quarman v Burnett* (1840) 6 M & W 499.
>
> 8. The claimants, on the other hand, argue that the recent Supreme Court cases of *Christian Brothers* [2013] 2 AC 1, *Cox v Ministry of Justice* [2016] AC 660 and *Armes v Nottinghamshire County Council* [2018] AC 355 have replaced that trite proposition with a more nuanced multi-factorial approach in which a range of incidents are considered in deciding whether it is "fair, just and reasonable" to impose vicarious liability upon this person for the torts of another person who is not his employee. That was the approach adopted both by the trial judge and the Court of Appeal in this case."

349. At [16] she said that there appeared to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of his employee, set out in [35] of *Christian Brothers*, with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability. She said that may have arisen because of what Lord Phillips said at [47]:

> "At para 35 above, I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'. That was the approach adopted by the Court of Appeal in *E*'s case [2013] QB 722."

350. She went on:

> "18**.** I do not believe that by his reference to "those incidents" Lord Phillips was saying that they were the only criteria by which to judge the question. This is for two reasons. First, in *E's* case [2013] QB 722, Ward LJ had adopted the test of 'akin to employment' but he had not asked himself whether those five 'incidents' were present. He had conducted a searching enquiry into whether the relationship between the priest and the bishop was more akin to employment than to anything else. Secondly, when it came to applying the 'akin to employment' test in the *Christian Brothers* case [2013] 2 AC 1, Lord Phillips did not address himself to those five incidents but to the detailed features of the relationship. Thus …"

351. Baroness Hale then set out [56]-[58] of Lord Phillips' judgment, which I also set out earlier, and continued:

> "I have quoted these paragraphs at length to show that he was answering the questions by reference to the details of the relationship, and its closeness to employment, rather than by reference to the five 'policy reasons' in para 35."

352. At [20]-[22] she said:

> "20. The next case was *Cox v Ministry of Justice* [2016] AC 660. The issue was whether the prison service could be vicariously liable for injuries caused to a prison catering manager by the negligence of a prisoner who was working under her direction on prison service pay. There was no contract of employment between the prison and the prisoners. Nevertheless, applying the *Christian Brothers* case, this court held that the prison was vicariously liable. It is fair to say that Lord Reed JSC did focus on the five policy factors identified by Lord Phillips. He pointed out that they are not all of equal significance. Factor (i), deep pockets, is not in itself a principled reason to impose liability, although the absence of any other source compensation may sometimes be taken into account (para 20). Factor (v), control, does not have the significance which once it did. In today's world an employer is likely to be able to tell an employee what to do but not (at least

always) how to do it. But the absence of even this vestigial degree of control would point against liability (para 21). That left three interrelated factors: (ii) that the tort was committed as a result of activity undertaken by the tortfeasor on behalf of the defendant; (iii) that the activity was part of the business activity of the defendant; and (iv) that by employing the tortfeasor to do it, the defendant created the risk of his committing the tort (para 22). He summed up the principle thus, at para 24:

> "The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (*rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party*), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question." (Emphasis supplied.)

21. Lord Reed JSC went on to refer to Lord Phillips' citation of *E's* case and the "sufficiently akin to employment" test (para 26) and to his application of that test to the facts of the Christian Brothers' activities (para 27). He emphasised that this new general approach was not special to cases of alleged sexual abuse (para 29). He repeated the distinction between integrated activities and activities entirely attributable to the conduct of a recognisably independent business of the tortfeasor or some other person (para 29). And he pointed out that references to "business" and "enterprise" did not mean that the employer's activities had to be commercial in nature (para 30). He had no difficulty in concluding that the prison service was vicariously liable for the prisoner's tort.

22. It seems to me obvious that in *Cox* the result was bound to be the same whether it was expressed in terms of the test stated in para 24 of Lord Reed JSC's judgment or in terms of the "sufficiently akin to employment" test. Indeed, the case for vicarious liability for torts committed by prisoners in the course of their work within the prison seems to me a fortiori the case for vicarious liability for the work done by employees for their employers. There is nothing in Lord Reed JSC's judgment to cast doubt on the classic distinction between work done for an employer as part of the business of that employer and work done by an independent contractor as part of the business of that contractor."

353. She then went on to consider *Armes*, which concerned foster parents and whether a county council could be vicariously liable for physical and sexual abuse allegedly carried out by

two of the foster parents with whom the claimant was placed by the council while in its care. At [23] she said:

> "23. The last, and perhaps the most difficult, case is *Armes v Nottinghamshire County Council* [2018] AC 355. The issue was whether the county council could be vicariously liable for physical and sexual abuse allegedly carried out by two of the foster parents with whom the claimant was placed by the county council while in their care. Lord Reed JSC repeated his analysis in *Cox*, prefacing his account with the statement that, while the classic example of a relationship justifying the imposing of vicarious liability was employer and employee, as explained in *Cox* and *Christian Brothers* 'the doctrine can also apply where the relationship has certain characteristics similar to those found in employment' (para 54). In applying the five 'incidents' identified in those cases, he placed more emphasis on the lack of any other source of compensation if there were no vicarious liability and on the extent of the control exercised by the local authority over the foster parents' care for the children (para 62). In applying the three interrelated factors, he held that the relevant activity of the local authority was the care of children committed to the local authority's care (para 59). The foster parents were an integral part of the local authority's organisation of its childcare services, carried on for the benefit of the local authority (para 60). By placing the children in foster care, the local authority had created the risk of the harm being done (para 61). Significantly, having examined the relationship between the foster parents and the local authority in some detail, he concluded that 'the foster parents … cannot be regarded as carrying on an independent business of their own' (para 59)."

354. At [24] Baroness Hale commented:

> "24 There is nothing, therefore, in the trilogy of Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. Two cases decided by common law courts since *Christian Brothers* and *Cox* have reached the same conclusion."

355. At [27] she concluded:

> "27. The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the

> context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers* [2013] 2 AC 1, *Cox* [2016] AC 660 and *Armes* [2018] AC 355, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."

356. Applying that approach to the facts, she concluded that the Bank was not vicariously liable for the doctor's actions (at [28] and [30]).

357. Commenting on this decision, the editors of Charlesworth state at [7-48]:

> "The line between one who works for another and one who carries on a recognisably independent business certainly is a valuable and principled one, and should not be affected by the 'analogous to employment' test. Rather, the proper sphere of application of that test is to non-contractual relationships and to atypical working relationships involving persons who are neither employees nor independent contractors. In *Barclays* itself it is apparent that the doctor did not surrender his autonomy to the bank, and a number of other indicators, in particular those pointed to by Lady Hale, supported his being an independent contractor."

358. In *TVZ v Manchester City Football Club Limited* [2022] EWHC 7 (QB), Johnson J reviewed the authorities and helpfully set out the sort of relationship falling within the 'akin to a contract of employment' formula (at [258]-[259]):

> "258. It follows from these, and other, authorities that relationships that may be akin to employment so as to give rise to vicarious liability include:
>
> (1) The relationship between a bishop and a parish priest - see *E per* Ward LJ at [122], or between the unincorporated association known as "the Brothers of the Christian Schools" and the lay brothers of the Catholic Church that were members of that association - see *Christian Brothers*, or between a congregation of Jehovah's Witnesses and one of its Elders - see *BXB v Watch Tower and Bible Tract Society of Pennsylvania and anor* [2021] EWCA Civ 356 [2021] 4 WLR 42 *per* Nicola Davies LJ at [72]-[81].
>
> (2) The relationship between a prisoner and the prison governor where the former is paid to do work in a prison and for the prison's benefit - *Cox*.
>
> (3) The relationship between a foster-parent and a child placed under local authority control - *Armes*.

(4) The relationship between members of the armed forces and the Crown. The former are not, strictly, employees - see *Newell v Ministry of Defence* [2002] EWHC 1006 (QB) *per* Elias J at [3], but the Crown can be vicariously liable for their conduct - see *Bici v Ministry of Defence* [2004] EWHC 786 (QB) *per* Elias J at [2] and [63] (and see Attiyah on Vicarious Liability in the Law of Torts (1967) at p395: '… it is in practice unthinkable that the Crown would today deny vicarious liability for members of the armed forces.')

(5) The relationship between a police officer and a chief officer of police. Police officers are not (usually) employees, but they fall under the direction and control of their chief officer and must comply with lawful instructions. The relationship might be said to be akin to employment and the chief officer is, by statute, responsible for torts committed by subordinate officers in the course of their functions - see s48 Police Act 1964 and s88 Police Act 1996.

(6) A further possible example is the relationship between a scoutmaster and a scout association. In *Murphy v Zoological Association and another* The Times 14 November 1962, a 10-year-old boy died after being mauled by a lion at Whipsnade Zoo. Atkinson J held that 'the Boy Scouts Association could not be said to have been vicariously liable for the acts of scoutmasters and cubmistresses.' However, in the first instance judgment in *JL* (unreported, Manchester County Court, transcript of judgment given on 27 May 2015), HHJ Platts held that the Scout Association was liable for acts of sexual abuse by a scoutmaster (the subsequent appeal on a different aspect of HHJ Platts' decision did not address this issue). The question of vicarious liability was conceded by the Scout Association in *KCR v The Scout Association* [2016] EWHC 587 (QB).

259. In each of these cases the tortfeasor was not the defendant's employee, but nor was the tortfeasor said to be an independent contractor. There was no contract of service, but the relationship was, in material respects, akin to that of employment and the tortfeasor was closer to the position of an employee than an independent contractor."

359. He went on at [260]:

"260. Relationships that have been held not to be akin to employment and so not to give rise to vicarious liability include:

(1) The relationship between a bank and a doctor engaged to carry out pre-employment medical screening for the bank - see *Barclays Bank*.

> (2) The relationship between a school and a teacher who was contracted to provide compulsory swimming lessons to the school's pupils - see *Woodland v Swimming Teachers Association* [2013] UKSC 66 [2014] AC 537 *per* Lord Sumption at
>
> (3) The relationship between a debt collection company and a registered bailiff to whom it sent work - see *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157.
>
> (4) The relationship between a company and a contractor that had been engaged to carry out demolition works on the company's premises - see *Ng Huat Seng v Mohammad* [2017] SGCA 58 (cited in *Barclays Bank* at [26]).
>
> (5) The relationship between the football club and the football scout/coach in *DSN* [viz, *Blackpool Football Club Ltd v DSN* [2021] EWCA 1352]."

360. In *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157 (a decision which was expressly approved in *Barclays Bank Plc* at [25]) Singh LJ said:

> "20. Historically the common law has imposed vicarious liability on a person where there was a relationship of employment between that person and the tortfeasor. That has required the courts to consider the distinction between a relationship of employment and the relationship that may exist with an 'independent contractor'. That in turn has required the courts to draw a distinction between a contract of employment (or contract of service, as it was described in the Particulars of Claim in this case) and a contract for services.
>
> 21. In recent years the courts have had to address the question whether there can be vicarious liability even where there is no relationship of employment in the strict sense but where there is something "akin to employment". However, it is important to note that this development has not undermined the conventional distinction between a contract of employment and a contract for services, which continues to be relevant in the vast majority of situations."

361. With that lengthy recitation of principles, I turn to their application to the facts of the case before me.

362. It seems to me clear that the Claimant's case under this head cannot succeed. Mr Sippitts was unquestionably an independent contractor who worked under a contract for services with Brands – as well as for many other clients – to whom he rendered monthly invoices. His Brands work was therefore just one part of a portfolio of activities. The profits or losses he made from his work as an external transport manager accrued to him and not Brands. Whilst he owed a duty to Brands and others to exercise reasonable care

and skill, he did not owe it a duty of obedience in the sense that term is used in relation to employees and in other contexts.

363. It was clear from Mr Sippitts' evidence that what he did from month to month varied, How much time he spent on each client was down to him. It was also down to him where and how he carried out his work; as I have said, it transpires that he never physically saw the transporter, and visited the Claimant at his house. None of his clients, and certainly not Brands, had any control over what he did. In fact, it was quite the reverse. His evidence was quite clear that Brands (and the Claimant, through whom it operated) were totally dependent on his knowledge and advice. No doubt there were months when he was more occupied with some clients than others, if their regulatory requirements that month were more onerous. However, he was not required to spend any particular amount of time each month on Brands' affairs, or any of his other clients. Provided that in respect of each client he fulfilled the undertaking he had given in the transport manager's undertaking for that client, and ensured that they 'stayed legal', then how he organised his time was down to him.

(v) The claim under the Employers Liability (Defective Equipment) Act 1969

364. Section 1 provides:

> "(1) Where after the commencement of this Act -
>
> (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and
>
> (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not),
>
> the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.
>
> (2) In so far as any agreement purports to exclude or limit any liability of an employer arising under subsection (1) of this section, the agreement shall be void.
>
> (3) In this section -
>
> 'business' includes the activities carried on by any public body;
>
> 'employee' means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person, and
>
> 'employer' shall be construed accordingly;

> ‘equipment’ includes any plant and machinery, vehicle, aircraft and clothing;
>
> ‘fault’ means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland; and
>
> ‘personal injury’ includes loss of life, any impairment of a person’s physical or mental condition and any disease.
>
> (4) This section binds the Crown, and persons in the service of the Crown shall accordingly be treated for the purposes of this section as employees of the Crown if they would not be so treated apart from this subsection.”

365. On a straightforward application of this section, I find for the Claimant on the basis that: (a) he was an employee; (b) he suffered personal injury in the course of his employment; (c) this was caused by defective equipment; (d) this was provided by his employer, Brands; (d) the defect was in part at least due to the fault of a third party, namely, Mr Sippitts.

366. I do not consider there is any difficulty posed by the fact that the Claimant was Brands’ sole director. He was also an employee. A company is a distinct legal personality from its directors, and a director can also be an employee.

367. *Lee v Lee’s Air Farming Ltd* [1961] AC 12 concerned s 3(1) of the Workers' Compensation Act, 1922, of New Zealand, which provided that if ‘personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall be liable to pay compensation,’ and ‘worker’ was defined in s 2 as ‘any person who has entered into or works under a contract of service … with an employer … whether remunerated by wages, salary, or otherwise.’

368. The Appellant's husband, who had formed the respondent company for the purpose of carrying on the business of aerial top-dressing, was the controlling shareholder of the company, and was by its articles of association appointed governing director and employed at a salary as its chief pilot. In his capacity as governing director and controlling shareholder he exercised full and unrestricted control over all the operations of the company. Pursuant to its statutory obligations the company had insured itself against liability to pay compensation in the case of accident to him. While piloting an aircraft belonging to the company in the course of aerial top-dressing operations the aircraft crashed and he was killed. The Appellant claimed against the Respondent company for compensation, alleging that at the time of the accident her husband was a ‘worker’ employed by the respondent company within the meaning of the Workers' Compensation Act, 1922, as amended.

369. Lord Morris said at pp24-25:

> "The substantial question which arises is, as their Lordships think, whether the deceased was a "worker" within the meaning of the Workers' Compensation Act, 1922, and its amendments. Was he a person who had entered into or worked under a contract of service with an employer? The Court of Appeal thought that his special position as governing director precluded him from being a servant of the company. On this view it is difficult to know what his status and position was when he was performing the arduous and skilful duties of piloting an aeroplane 25which belonged to the company and when he was carrying out the operation of top-dressing farm lands from the air. He was paid wages for so doing. The company kept a wages book in which these were recorded. The work that was being done was being done at the request of farmers whose contractual rights and obligations were with the company alone. It cannot be suggested that when engaged in the activities above referred to the deceased was discharging his duties as governing director. Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor in their Lordships' view could it reasonably have been suggested) that the company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If, then, it be accepted that the respondent company was a legal entity their Lordships see no reason to challenge the validity of any contractual obligations which were created between the company and the deceased."

370. The requirement for the defect to be at least in part the fault of a third party means that, by definition, the *Brumder* principle does not apply – or at least cannot easily apply - because the employee cannot easily be the sole author of his own misfortune. I suppose it is possible to conceive of circumstances where, for example, a third party supplied a defective piece of equipment to an employer, who then gave it to an employee to use, and the employee with full knowledge of the defect and through voluntary conscious choice, used it and suffered injury, so that the original fault of the third party became a matter of mere history, *Brumder* might come into play. But that is not this case. In any event, contributory negligence is available as a defence to a claim under s 1: *James v Durkin Civil Engineering Contactors*, The Times, 25 May 1983; *Charlesworth,* [12-18], and in the example I have given a judge might conclude that whilst the employer was strictly liable under s 1 (as opposed to having a complete *Brumder* defence which excludes liability altogether) a finding of 100% contributory negligence was justified. In any case, the policy principle underlying Ginty/Kodak/Brumder, that no-one should benefit from their own wrong – would not be infringed.

(vi) Contributory negligence

371. Paragraph 11 of the Amended Defence alleges contributory negligence on the part of the Claimant. The particulars alleged include: causing or permitting the use of the transporter with corroded safety supports; failing to take account of the corroded and/or defective safety equipment on the transporter's top deck; failure to ensure that the posts and safety supports on the top deck were of sufficient strength and rigidity; failing to take sufficient care to prevent himself from falling on the top deck. There is no express particular relating to the Claimant's failure to have the transporter inspected under LOLER, but this is inherent in the allegation that he caused or permitted the transporter to be used with corroded safety supports. Brands' trial Skeleton Argument put the Claimant's liability at 100%.

372. At common law where some fault on the part of the claimant contributed to the damage of which he complains, that contributory negligence was a complete defence: *Butterfield v Forrester* (1809) 11 East 60. Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 removed this bar on claims and provided for apportionment of the loss:

> "(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: …"

373. Section 1(1) does not specify how responsibility is to be apportioned, beyond requiring the damages to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage (not, it is to be noted, responsibility for the accident). Further guidance can, however, be found in the decided cases. In particular, in *Stapley v Gypsum Mines Ltd* [1953] AC 663, 682, Lord Reid stated:

> "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

374. In *Clerk & Lindsell*, [3-101], the editors state (by reference to *Jackson v Murray* [2015] 2 All ER 805, [28]:

> "The court has to weigh both the causative potency of the conduct of the defendant and claimant as well as their respective blameworthiness. This is a rough and ready exercise which can produce a range of legitimate views as to what is just and equitable."

375. In this case, I have found that the Claimant was told of the need for a LOLER inspection some time soon after he engaged Mr Sippitts, which was around March 2017. Although there was some uncertainty over the inspection period, he knew or should have known that on any view it was due no later than 4 July 2017. He had a document from ECM which told him that. As the employee with control over where, when and how the transporter was inspected, he had an absolute duty under LOLER to ensure compliance. There was in my judgment a culpable failure by him to have the vehicle inspected.

376. On the other hand, as I have also found, Mr Sippitts was also at significant fault for not putting the relevant date on the maintenance planner, which was one of his primary duties, as was ensuring safe loading (which meant ensuring safety equipment necessary for safe loading was properly maintained). He knew the Claimant was inexperienced and had many tasks to attend to in setting up his business. The possibility that the Claimant might overlook or forget a date was ever present (and came to pass later in the year when he missed a roadworthiness inspection). Given all that is known about the Claimant's conscientious attitude, as I have already said, had the date been on the planner then I find it more likely than not that a reg 9 LOLER inspection would have been carried out, and this would have identified the defects on the upper deck and prevented the accident.

377. I find that there was a joint failure by both the Claimant and Mr Sippitts to deal properly with the LOLER issue. They both knew an inspection was due, and both failed in different ways to make sure it was carried out. On a just and equitable basis, I find that the Claimant was 40% responsible, and the damages will accordingly be reduced by that amount.

(vii) Brands' claim against Trax for an indemnity/contribution

378. It seems me that the claim must fail on the simple basis that the agreement between Brands and Trax did not include inspection of the upper deck safety rails as part of a reg 9 LOLER thorough inspection, and that as a matter of fact this was known to the Claimant.

379. This was Mr Simpson's clear evidence and I have no basis for rejecting it. He gave cogent reasons why that was so – not the least of which was that Trax did not have the necessary specialist equipment it would have needed to carry out such inspections, which the Claimant (and his father) knew.

380. Mr Simpson's evidence was corroborated by Mr Wheeler's evidence. ('They're all completed at road level and the upper deck does not form part of the inspection', 15 February 2022, p66). Whatever was said on Trax' website about offering LOLER inspections, so far as the Claimant and Brands was concerned, it did not and was not asked to do so with respect to the transporter.

381. I noted earlier the ambiguity in the November inspection report and its reference to safety rails. Mr Simpson's evidence was that this form was just a generic download, applicable to different types of vehicles. I am unable to place too much reliance on this document, because there was no real evidence about it, other than that Mr Wheeler completed it and Mr Simpson signed it off. I am unable to conclude that it evidenced

work at height. Further, there was no evidence the Claimant ever relied upon it as evidence that all was well on the upper deck, and that the rails were in a safe condition.

382. It is particularly relevant that Tony Carr worked for Trax on a freelance basis. I can therefore safely conclude he would know what work it did or did not do. He was involved in the purchase of the transporter. At no stage did he say that Trax carried out LOLER work, let alone that he thought it was doing so on the transporter.

383. Given the Claimant knew he needed a LOLER inspection, and knew that Trax was not doing such an inspection, I reject the claim that Trax was at fault for not telling the Claimant of the need for such an inspection. Had it done so, it would just have been telling him what he already knew.

384. I therefore reject Brands' claim against Trax.

Conclusion

385. There will, accordingly, be judgment for the Claimant in these terms. Brands' claim against Trax is dismissed.

386. I invite the parties to draw up an order consistent with the terms of this judgment.