Neutral Citation Number: [2022] EWHC 1701 (QB)

Case No: QB-2018-005956

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 June 2022

Before:

SIMON TINKLER
(Sitting as a Deputy Judge of the High Court)

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Between:

PAUL CHADWICK	**Claimant**
- and -	
(1) R H OVENDEN LIMITED	**Defendants**
(2) RIAN HAMILTON	

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- -

Giles Mooney QC (instructed by **Irwin Mitchell**) for the **Claimant**
Both Defendants appearing in person

Hearing dates: 11,12,13 and 19 May 2022

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Approved Judgment

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Simon Tinkler sitting as a Deputy Judge of the High Court:

Background

1. The Claimant, Mr Chadwick, was very badly injured in an accident at Manston Airfield in Kent on 3 February 2015 (the "Accident"). He had been working on a DC8 aircraft that was being dismantled at the end of its operational life. This was one of three aircraft being dismantled at the airfield at or around that time by the same people. He was using an angle grinder to cut through a metal sheet in the aircraft. Unknown to him, an oxygen cylinder was behind the sheet. The angle grinder cut through the sheet, but in doing so it cut into the cylinder. The oxygen ignited, causing an explosion. He was violently thrown backwards and knocked unconscious. His injuries were so serious that he was taken by air ambulance to a major London hospital, where he was in intensive care for almost two weeks. He has subsequently had to undergo multiple major operations and has permanent damage to his eyes and hands. He has not worked since.

2. Mr Chadwick has brought a claim against R H Ovenden Ltd (the "First Defendant") alleging that it is liable for the damages he has suffered. Mr Chadwick says that it had a duty of care to him as it had control, and therefore had to take reasonable measures to ensure the safety, of the workplace where the explosion happened. He says that in breach of that duty it did not take reasonable measures, and that this failure caused his injuries.

3. Mr Chadwick says that Mr Hamilton (the "Second Defendant"), was his employer. Mr Chadwick says that Mr Hamilton breached his duty of care to him by failing to take reasonable measures to ensure the safety of the workplace where the explosion occurred and is also therefore liable for the damage he has suffered.

4. Both Defendants deny liability. The First Defendant says that it did not have control of the workplace and had no duty of care. It also says that even if it did have a duty of care, the actions of the Claimant were so reckless that they broke the chain of causation. The First Defendant also says that even if it had control of the workplace its duty was only to take steps in relation to risks that were foreseeable. The presence of the oxygen cylinder was, they say, not foreseeable and as such there was no duty of care to prevent injury from it.

5. The Second Defendant denies that he was the employer of the Claimant. He says that either the Claimant was self-employed or alternatively was employed by another party. The Second Defendant says he therefore owed him no duty of care as an employer and had not breached any duty he had as non-employer. The Second Defendant also put forward the same defences as the First Defendant, in that he says that the Claimant was so reckless as to be the author of his own misfortune, and that in any event the presence of the oxygen cylinder was unforeseeable.

6. The hearing was solely to determine whether either Defendant has any liability to Mr Chadwick. If one or both Defendants are liable then the monetary amount for which they are liable will be determined by a further trial on quantum.

7. I have set out my full reasons below but, in summary, in my judgment both Defendants are liable to the Claimant for the damages he has suffered that were caused by the Accident. As both Defendants represented themselves. I have set out in some detail my

factual conclusions and legal analysis so that they can see clearly why I have reached my conclusions.

Legal issues

8. This case was brought as a common law claim in negligence following repeal of s47(2) of the Health and Safety at Work etc Act 1974 ("HSWA 1974"). That section had provided that a breach of health and safety regulations "*shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise".* I consider the impact of the repeal of that section of HSWA 1974 below, in particular on the common law duty of care in relation to the workplace of (a) an employer and (b) a person who has a degree of control over that workplace

Evidence

9. I have set out below my findings of material fact, derived from the documentary evidence and from witnesses who gave evidence in court. There were a number of matters that were disputed but not material, or that were not relevant to my determination and I have not included those but, for the avoidance of doubt, I considered all the evidence before me in order to assess what was material and relevant. Where matters were disputed I have set out why I have made my findings of fact.

10. The documentary evidence included evidence from the Health and Safety Executive ("HSE") investigator who inspected the aircraft immediately after the accident and interviewed both Defendants, amongst others. It also included subsequent statements given by witnesses to the HSE and photographs of the various aircraft at the time of the Accident. There were a number of ancillary documents such as bank statements and PAYE records. I refer below to the relevant documents when considering each factual area of dispute.

11. I heard witness evidence from the Claimant whose evidence was straightforward and, in general, not controversial – not least as he had little recollection of the Accident itself or the circumstances immediately prior to it. I also heard from Mrs Chadwick, the Claimant's wife, who gave straightforward evidence that largely corroborated that of the Claimant. The Second Defendant made a number of comments to try and discredit them when he was cross-examining both Mr and Mrs Chadwick relating to when Mr Chadwick precisely received his phone back after the Accident. The point was irrelevant to matters in dispute but in any event both Mr and Mrs Chadwick gave clear evidence as to what they could and could not remember and I drew no inferences at all from the points Mr Hamilton was trying to make.

12. The Second Defendant gave evidence in person. The First Defendant gave evidence through its director Mr Ovenden who had been the primary representative of the First Defendant in the course of the events in question. I deal in detail with the evidence of Mr Ovenden and the Second Defendant in relation to each relevant factual issue, but in general their evidence at the trial was highly questionable. In many places it was wholly inconsistent with the documentary evidence or with evidence from other witnesses. In other places their evidence had varied considerably over time and what they now said at trial differed significantly from the statements they had previously made, including to the HSE immediately after the Accident, in their defences, and in the witness statements they made in 2021. Although much of their evidence was in my view self-

serving and changed over time as their defence changed, that did not mean that everything they said was untrue; there were some kernels of fact that shed light on the reality of what occurred**.**

13. Other witnesses called by the Second Defendant included other workmen from the airfield who had worked for him over the years who largely described their current understanding of who employed them in 2015, and their view of the health and safety outlook and actions of the Second Defendant. I consider below how their evidence compared to the HSE evidence as to the health and safety state of the site.

14. The Second Defendant also called as witnesses the neighbours of the Claimant, who the Second Defendant knew independently. They did not give much evidence that was relevant to the question of liability, and what evidence they did give (such as whether the Second Defendant was a friend of theirs) was contradicted by the Second Defendant himself, or (where they denied having been contacted about the Accident) by evidence from a text sent at the time. They seemed to have been called by the Second Defendant principally to tell the court that the Claimant had, despite not being on good speaking terms with them, specifically admitted to them on the one occasion where they did speak that he was making his claim up as the Accident was entirely his fault. I placed little weight generally on what evidence they did give, and no weight at all to the assertion about the Claimant's "admission" which seemed to me to be rather unlikely, to say the least.

15. In terms of witnesses of fact, I mention finally Mr Croney. He was the sole director of Smart Autotech Limited ("Smart"), a company which he had sold in or around 2017 and which has now been wound up. Mr Croney first appeared in this case in 2021, some six years after the Accident, to claim that actually Smart was the employer of the Second Defendant in 2015 and indeed that Smart had been the primary contractor for the dismantling of the aircraft at the time of the Accident. This was the first time that anyone, including the Second Defendant himself, had made this assertion about Smart employing him; until this point the Second Defendant had always said he was self-employed. I deal in detail below with Mr Croney's evidence but suffice it to say that Smart was, on the evidence, not the employer of the Second Defendant in 2015. It is my view that in 2021 Mr Croney and the Second Defendant came up with their version of events as they (wrongly) believed that by involving Smart as the "employer" (rather than the Second Defendant being the employer) then the Second Defendant would then not have any personal liability. They had of course forgotten or, more likely, not realised that the Second Defendant might still have liability for any breach of his personal duty of care to the Claimant even if the Second Defendant was employed by Smart. There was also no evidence that Smart was the primary contractor at the time of the Accident and for the reasons set out in detail below I discounted that assertion entirely.

16. The Claimant called Mr Walton to give expert evidence as to the correct methods for dismantling an aircraft, the prudent steps to take to ensure it was safe, and the correct methods of working. His evidence was clear and straightforward and in particular was crystal clear about the need for a competent and qualified person to conduct a safety inspection of the aircraft before starting any dismantling work.

17. The "expert" evidence that the Second Defendant attempted to introduce was an entirely different matter. The Second Defendant had filed a document with the court purporting to be an expert report from a Mr Marshall. It had a number of similarities

with the expert report subsequently filed by Mr Sharpe, an expert instructed by the First Defendant. When the Claimant's advisers attempted to contact Mr Marshall the Second Defendant failed despite at least five or six requests to pass on Mr Marshall's contact details. Eventually there was a court hearing and an order was made by Soole J for the experts to agree a joint statement, the court having been given Mr Marshall's contact details by the Second Defendant. Mr Walton then telephoned Mr Marshall who denied all knowledge of writing the report and the incident in question. After hearing representations at the start of the trial I was told that the Second Defendant would no longer be calling Mr Marshall as an expert witness. I ordered that no account be taken of the "expert evidence" of Mr Marshall and that the Second Defendant provide a sworn witness statement explaining this matter. The witness statement covered some aspects of a recent interaction between the Second Defendant and MrMarshall,and attached some evidence of communications between the Second Defendant and Mr Marshall. At best, it seemed that the Second Defendant had attempted to instruct Mr Marshall, had received a draft report but been unable to pay the fees to finish it, and had filed it at court notwithstanding that he had no permission to do so and that it was unsigned. The Second Defendant had then been so embarrassed by this and/or so optimistic that eventually he would agree fees that he failed to mention any of this to the Claimant's legal representatives during correspondence or, more alarmingly, at the hearing before Soole J. An alternative explanation is that the Second Defendant had attempted to instruct an expert, had failed to agree fees, and thus having no expert had written some or all of the report himself and hoped that he would get away with it. Given the timing constraints at the trial I did not have the opportunity to get fully to the bottom of this. Under any scenario, however, the Second Defendant had caused considerable extra work and so I made an order that all costs to the Claimant or the First Defendant caused by or related to the purported report be paid by the Second Defendant in any event, and I completely disregarded the contents of the "expert report" by Mr Marshall.

18. The First Defendant called Mr Sharpe to give expert evidence. His written report said that he had reviewed "the report by Mr Marshall", but in cross-examination Mr Sharpe denied having seen such a report, or having even written a paragraph saying he had. He continued to maintain that his report was entirely his own work, despite having just admitted that he had not seen "Mr Marshall's report" let alone written paragraphs saying that he had. Some of his report, which was fairly short, also strayed into commentary on matters of fact of which Mr Sharpe had no direct knowledge, or on which he was not an expert. Those sections of his report seemed to have a great deal of similarity with the words of the Second Defendant's witness statement, submissions and defence. Taken together with the inclusion of paragraphs which Mr Sharpe had clearly not written himself, I formed the view that large parts of his report were not independent, and could not be relied on. Notwithstanding this, his evidence in person when he spoke directly about matters within his area of expertise, namely the operation and layout of DC8 aircraft, was straightforward and shed light on the likely reason for the oxygen cylinder being where it was.

Findings of fact

19. The Claimant started working at Manston Airfield around October 2014. There was some dispute as to how he heard about the job there but that was not directly relevant to the question of liability. He was, it was agreed by all parties, interviewed for the job by the Second Defendant. The Second Defendant had implicitly denied this in his

Defence when he said that it "was not known who contracted or else employed the claimant", but by the time of the trial the Second Defendant accepted that he had interviewed him and that he knew that the Claimant was on site working under his instruction. The Claimant worked at the airfield most, if not all, days. He had no other work at this time. He was paid in cash each week for his work. On one day during the three month period he may have worked at another site owned, or otherwise under the day to day management, of the Second Defendant. The Claimant's role was to work on the demolition of three aircraft, with a small number of other men, usually four or five. The tasks they carried out each day were generally allocated by the Second Defendant in the morning when the men were in the site hut. Sometimes when the Second Defendant was away the allocation would be done by the Second Defendant's nephew. The men used tools from a tool shed on site which was under the control of the Second Defendant. The Second Defendant also provided most of the personal protective equipment used on site, although the Claimant brought his own work boots.

20. The First Defendant was the company to whom the airfield had granted permission to dismantle the aircraft, and who had accepted a number of obligations in relation to that dismantling. This was set out in a contract dated 21 October 2014 (the "Contract"). A company that was in the same group as the First Defendant, and which had common directors with the First Defendant, had obtained the Environmental Permit required for certain aspects of the dismantling of all three aircraft. It was, however, common ground that no-one from the First Defendant was physically present on the DC8 at the time of the Accident, nor did anyone from the First Defendant generally come to supervise the day to day work of the Claimant.

21. The three aircraft that were to be dismantled were very large aircraft. Two were Boeing 747 jumbo jets and the third was a DC8 that had been converted from a passenger plane into a cargo plane. They had been flown into the airfield but had been left on the airfield unused for some time. It was said that all three aircraft could have been made ready to fly again, although there was no time or cost estimate of what would have been required. Prior to the start of dismantling they all apparently still had fuel in the tanks, contained the electric control systems and oxygen systems, and had working engines. The dismantling started in October or November 2014 on each of the aircraft in turn. There was no safety inspection by a qualified aviation engineer prior to the start of the dismantling work on any of the three aircraft.

22. On 3 February 2015 the Second Defendant asked the Claimant to remove a metal panel on the DC8 in order to gain access to an avionics system in a void behind the panel, which he could then remove. The Second Defendant asked him to carry out this task using a 4" sander (also called a grinder) to remove the rivet heads which the Second Defendant said were holding the panel in place. The Claimant attempted this but the 4" sander did not remove the rivet heads so the panel could be removed. The Claimant then used a 9" metal angle grinder to cut through the metal panel as an alternative method of gaining access to the void behind it. Unknown to the Claimant and to the Second Defendant the area behind the panel was not actually a void, but contained an oxygen cylinder that had probably been left on the plane when it was converted from a passenger plane to a cargo plane. The angle grinder cut through the panel and straight into the oxygen cylinder behind it, which exploded.

Findings of fact in relation to the legal arrangements

23. It is clear as a matter of fact that on a day to day basis the three aircraft were being dismantled by a group of men under the supervision of the Second Defendant. It is, unfortunately, very unclear how the legal rights and obligations regarding the dismantling were structured. This was partly because the whole situation at the Airfield was time pressured and people were "getting on with job" rather than focussing on legal documentation. In my view, however, the principal reason was that none of the parties involved, whether the First Defendant, the Second Defendant, the owners of the airfield or the owners of the aircraft, thought about making it clear who was really responsible for what. If they did think about it there is little evidence they did anything with those thoughts. The impression I take from the evidence is that there were three aircraft that needed to be dismantled quickly. The parties were going to get the work done as fast as they could, sell whatever spare parts and scrap they could, and then divide up the proceeds. They were not going to incur any cost or create documents unless they had to, and a lot of questions were either not addressed or just kicked down the road, including for example exactly how the proceeds would be shared. It did not seem to be a priority to understand their respective roles and obligations despite the very serious and potentially dangerous work they were about to undertake.

24. This court, on the other hand, has to unpick the situation to establish what the arrangements were between the parties, and then whether the First Defendant or the Second Defendant have any liability to the Claimant. I have sifted through the evidence and my core factual findings are that:

    i) there was a primary contract between the Airfield and the First Defendant under which the First Defendant had the authority and permission to dismantle all three aircraft, from the very start of dismantling when fuel was taken off the aircraft through to the final clearance of the site;

    ii) the First Defendant had a number of other obligations under the Contract in relation to risk assessments, site safety and obtaining adequate insurance;

    iii) that contract continued until at least the date of the Accident;

    iv) at some point shortly after the Accident the contract was terminated and Smart became involved in the dismantling of the aircraft, probably as the replacement main contractor;

    v) the Second Defendant was self-employed at the time of the Accident and not an employee of Smart or anyone else;

    vi) the Second Defendant was sub-contracted by the First Defendant to physically dismantle all three aircraft;

    vii) that sub-contract did not cover all of the obligations of the First Defendant under the primary contract and in particular the First Defendant retained an obligation to carry out a safety inspection to ensure the aircraft was safe before any dismantling work started;

viii) the First Defendant had from the start of the contract, and retained throughout it, a significant degree of control over the aircraft and the Second Defendant, although as a matter of fact the First Defendant absented itself from the Airfield and often failed to exercise the control it had (describing to the HSE it as "hands off management"); and

ix) the Second Defendant was the employer of the Claimant throughout the entire time the Claimant was working at the Airfield including at the time of the Accident.

Contract between Airfield and the First Defendant

25. I turn first to the contract. This was signed on 21 October 2014 and is between the First Defendant and the airfield owners. It is only 2 pages long and is not complex. It

i) related to the dismantling of three aircraft at the airfield;

ii) allowed the First Defendant use of the Premises (being a designated part of the airfield) for the "sole purpose of dismantling the Aircraft" ("Dismantling") for 90 days starting when the owner of one of the aircraft paid £29,500 to the airfield owners;

iii) required the First Defendant to provide evidence to the airfield owners that the First Defendant had good title to the DC8, or consent from the owner, prior to starting the Dismantling works on the DC8;

iv) gave permission for the First Defendant to "remove the aviation fuel and other fluids from [the Aircraft] at its current location" but said that all other Dismantling was to take place at the designated part of the airfield;

v) stated that the First Defendant was responsible for obtaining all licenses, permits and consents, and to maintain adequate insurance for the Dismantling works,

vi) stated that the First Defendant at the end of the Contract term had to "ensure that the ….entirety of the Aircraft are removed from the Premises"; and

vii) required the First Defendant to provide a method statement prior to commencement of the works "setting out details of how the works are to be undertaken in a safe manner".

26. The aircraft owner paid £29,500 on 20 October 2014 and the parties agreed that the Contract came into operation on 21 October 2014 and ran until 19 January 2015 unless the parties agreed by words or conduct that it continued beyond that date. The First Defendant submitted that the Contract did not roll over and had therefore already expired on 3 February 2015, the date of the Accident. On the evidence of Mr Ovenden, however, at the date of the accident the First Defendant and the airport owners both expected the First Defendant to continue to complete the dismantling of the DC8, notwithstanding the ending of the 90 day period. There was no evidence that work on dismantling the Aircraft ceased or that anyone treated the Contract as having ended. I find as a matter of fact the Contract was therefore still in force at the time of the Accident and the parties were treating it as having continued on the same terms.

27. The First Defendant made two further submissions as to why the Contract did not apply to it at the time of the accident. The first submission was that the Contract only came into force in relation to a specific aircraft once certain preliminary work had been done on it by third parties. The First Defendant says that the preliminary work had not been completed in relation to the DC8 and that therefore someone else was the contractor with the airfield and aircraft owners for the preliminary work on the DC8. In making this argument the First Defendant placed much emphasis on the different stages of dismantling of aircraft, the complexity of ownership of aircraft, and the legal implications of these differences. There are undoubtedly different tasks when dismantling an aircraft and different terminology associated with these tasks. The first task was to remove fuel from the fuel tanks on the plane. This was generally carried out in the same way as a"normal" de-fuelling of a plane that was in active service. The next task was referred to as "parting out". This is in essence the removal of parts that can be sold for re-use. The final task is the cutting up of the aircraft into scrap and waste metal, generally referred to as "demolition". There are other tasks, for example removal of items that are neither saleable nor waste, and general preparation of the aircraft for demolition.

28. The Contract made no distinction between any of these tasks. There is nothing to suggest that the contract only came into force when the dismantling had reached a certain stage, even if that certain stage was as clearly demarcated as the First Defendant and the Second Defendant said it was. The Contract did not say that it only related to "demolition" of the aircraft. The Contract did not say that it only came into force when "parting out" had finished. On the other hand, the Contract made specific provision for the very first task in dismantling, namely removal of aviation fuel prior to the plane being moved to the designated part of the airfield for dismantling. It also made provision for clearance of the site after the dismantling was complete. In my view it is clear that the Contract covered, and was intended to cover, the entire process of dismantling the Aircraft from the initial draining of the fuel to the final demolition and removal of all waste and scrap.

29. In any event, such a theoretically clear demarcation of tasks was not what happened in reality. Although the tasks generally took place in a certain sequence they often overlapped, and were at different stages at the same time in different parts of the plane. For example, it was sometimes necessary to remove an item that only had value for scrap, or indeed had no value at all, in order to get access to an item that could be sold for re-use. In other words, the removal of "waste" or items that could be sold for scrap could start before "parting out" had finished. This conclusion is reinforced by the statement under caution to the HSE by Mr Ovenden himself in March 2016 in which he said that "the boundaries between each stage can become blurred". There is a significance of the different tasks in dismantling the aircraft, but it was, however, nothing to do with the Contract. It is that disposal of waste from the aircraft needed a permit from the Environmental Agency but that other aspects of dismantling did not. That, of course, did not mean that the tasks had to be carried out in a particular sequence, it just meant that when waste was created and disposed of a permit was needed. The waste could arise at any stage of the demolition, although more waste was likely to arise towards the latter stages of dismantling when all valuable or useable parts had been removed.

30. If the Contract was to start only when the Aircraft had been "parted out" and was ready to be dismantled then another party would have had access to the airfield, and would have had a contract with the airfield owners and/or the owners of the aircraft to do the "parting out" and other preliminary work. No such other party was ever identified by the airfield owners, who provided the Contract to the HSE as the only contract that related to the dismantling of the aircraft. There is no documentary evidence of any other contract with any other party relating to the dismantling of those aircraft.

31. The First Defendant said in his written statement to HSE in March 2016, over a year after the Accident, that the contract with the First Defendant was for, in his exact words, "three aircraft to be dismantled and removed" by the First Defendant as "AvMan already owed [the airfield owners] money and....the Second Defendant was a sole proprietor with no assets". The First Defendant went on to say that he "agreed to the...contract". The HSE investigated the Accident and the only people they identified as possible controllers of the aircraft were the First Defendant and the Second Defendant. They sent prohibition notices to the First Defendant immediately after the Accident and Mr Ovenden from the First Defendant emailed back to say that they would "get these issues rectified".

32. In 2020, however, the First Defendant and the Second Defendant stated that there was another party who had the contract for the preliminary work. The First Defendant claimed that they had been contracted by Smart and/or another company. Smart was of course the company previously owned by Mr Croney and which now was no longer owned by him and furthermore had been dissolved. The First Defendant has never produced any documents that back up the claim that it "was contracted by ...Smart" or that Smart had a contract with the airfield. In submissions, the First Defendant was unable to point me to any documentary evidence, or indeed evidence at all apart from the witness evidence of Mr Croney and Mr Ovenden, that the contract existed or what its terms were said to be. The Second Defendant has similarly never produced any evidence of such a contract for anyone except the First Defendant to do the preliminary work.

33. It is likely that Smart did eventually have a role in relation to the aircraft but the evidence all shows that this role started after the Accident when the First Defendant no longer wished, or was allowed, to continue working on the dismantling. The documentary evidence reinforces this conclusion. The first collection note from Ripleys, the waste handling merchants, is dated 5 February and after the Accident. The first invoice to Smart for disposal of waste and materials is dated 16 February 2015 some two weeks after the Accident. All other such invoices also post-date the Accident. The bank accounts of Smart do not show any payment from Ripleys, the scrap metal merchants, for the sale of scrap prior to the Accident, with the first one being 19 February 2015. There are 2 invoices from 2014 that refer to "Smart" and "Manston Airfield" but there is no evidence as to what they relate, and bearing in mind that there were on the evidence a significant number of other disposal and dismantling operations on the airfield at that time I do not consider those to be evidence that Smart was a contractor on the aircraft before 3 February 2015.

34. There is no evidence that in 2015, or in the six following years, when Smart was still in existence and owned by Mr Croney that anyone had a belief that Smart was the contractor at the time of the Accident. The claim was only made once Smart had been sold and then been dissolved. Mr Croney and the First Defendant's assertion that Smart

was the main contractor all along is flatly contradicted by almost all the documentary evidence and by the behaviour of all parties from 2015 to 2020. In my judgment the claim that Smart was the primary contractor at the time of the Accident is plainly wrong and is another attempt to pass the buck onto an entity that, rather conveniently, no longer exists. The simple truth was that the First Defendant was the primary contractor until the Accident, and that Smart took over that contract at some point in the immediate aftermath of the Accident.

35. The final submission by the First Defendant was that the Contract only came into force in relation to a specific aircraft once ownership of that aircraft had passed from the current owners to the First Defendant, or possibly to the airfield operator. They said that in relation to the DC8 that transfer of ownership had not happened. The relevant clause in the Contract required the First Defendant to provide evidence to the airfield owner that ownership had passed or permission had been granted before dismantling began. The purpose of this clause seemed to be to ensure that the airfield owner was not sued by other people who owned parts of the aircraft. This is because parts of aircraft are often owned by different people. In the case of the DC8, the owners gave consent for the demolition of the plane on 5 December 2014 but subject to the removal of the engines and avionics. In other words, when the First Defendant was dismantling the plane it had no right to take and sell the engines or avionics. Subject to that constraint, the owners thought they had given the First Defendant permission for dismantling to take place, and clearly the Second Defendant also thought that as he started work on the aircraft prior to the Accident with no further communication from the aircraft owners. The aircraft owners confirmed this was their understanding when on 24 February 2015 they emailed to say "we gave consent [past tense]...with the provision that the engines and avionics were to be stored with [a third party]". I find as a matter of fact that the aircraft owners had given consent to the First Defendant to commence dismantling, but even if that was not the case the only implication would be that the First Defendant was in breach of the Contract, and not that the Contract was somehow not in force.

Was the Second Defendant a self-employed contractor (and if so, to whom was he contracted) or was he employed by Smart?

36. The next issue was identifying the capacity in which the Second Defendant was on the site. Was the Second Defendant (a) acting on his own account as a contractor and if so with whom was he contracting or (b) an employee of Smart (or some other entity)?

37. In 2021 the Second Defendant and Mr Croney filed witness statements in which they both claimed that the Second Defendant had been employed in 2015 by Smart. This was the first time the Second Defendant had ever mentioned that he was employed by anyone, let alone Smart. Until that time he had asserted that he was self-employed. This was his position in all interviews with the HSE, in his draft defence, and in his actual Defence, and indeed in every piece of evidence prior to 2021. In particular, the Second Defendant did not mention Smart to the HSE when interviewed immediately after the Accident; on 4 February 2015 he told HSE that he was a "self employed aircraft engineer". He did not mention Smart to the HSE when the HSE issued prohibition notices requiring the "controller" of the site to stop work whilst serious HSE failings were addressed. No other person who interacted with HSE mentioned even a possibility that the Second Defendant was employed by Smart or was anything except a self-employed contractor. Mr Ovenden, on behalf of the First Defendant, told the HSE that

the "airport owners were not willing to leave [the dismantling] to the Second Defendant as...the Second Defendant was a sole proprietor with no assets". The Second Defendant filed a draft defence on 4 December 2019 in which he did not say that Smart was his employer. He specifically said he was "working...at Manston Airfield as a self-employed sub-contractor". For the sake of completeness I note that in the draft defence the Second Defendant went on to say that at various times he had "worked for" a long list of companies, including the owners of the airfield, the owners of the aircraft, the operators of the aircraft, the First Defendant, Smart and "others". As that list of entities cannot have all been his employers, and the Second Defendant has not claimed they were, I take the phrase "worked for" to mean "carried out tasks for" rather than "was employed by".

38. In his Defence dated 19 March 2020 the Second Defendant said that he was carrying out work on the day of the accident which he was "sub-contracted to carry out". There is again no mention of Smart, or any other alleged employing entity, nor does the Second Defendant say he was an employee – he explicitly states he was carrying out sub-contracted work.

39. In his witness statement dated 21 July 2021 the Second Defendant changed his position and said, for the first time, that in 2015 he was actually employed by Smart "full time on PAYE". The Claimant therefore asked for specific disclosure of the relevant PAYE records. When they were produced, the PAYE records did not back up the Second Defendant's claim. There is no PAYE record showing the Second Defendant ever being employed by Smart. For the tax year in question the only PAYE record shows that the Second Defendant worked for a company called Universal Services (UK) Limited ("Universal") which paid him a total of just £2,136 in the tax year April 2014 to April 2015. When asked at trial to explain who Universal were, the Second Defendant claimed that actually Universal was the "umbrella company" for the Smart group of companies. There is no documentary or other evidence to support this claim. Mr Croney, the owner of Smart, stated in his witness evidence that Universal had no connection with Smart and I completely discount the assertion by the Second Defendant that Universal was somehow Smart operating under a different guise.

40. As outlined in paragraph 15 above, in 2021 Mr Croney appeared in the case and gave a witness statement saying that he now recalled that the Second Defendant was indeed employed by his company, Smart, in 2015. When he gave oral evidence Mr Croney was unable to recall many things that were put to him in cross-examination. He could not recall much at all from 2015 or indeed much after that time. Mr Croney said that one of the few things he specifically could recall was that in 2015 Smart had employed the Second Defendant, and other staff. He said this was properly done via PAYE. As set out in the preceding paragraph, the tax records of the Second Defendant do not show any payments made to the Second Defendant by Smart via PAYE. Mr Croney also said that Smart had paid the Second Defendant via the Second Defendant's bank account, and also sometimes in cash for bonus payments. The bank statements of Smart, however, show no payments to the Second Defendant's account, nor any withdrawals of cash that could have been used to pay him bonuses. The Second Defendant had even given evidence that he did not have a bank account at the relevant time.

41. I formed the view that Mr Croney's memory was conveniently selective. For example, he said he could not even recall which person had typed up his witness statement in 2021. Other witnesses gave evidence, sometimes through gritted teeth, that the Second

Defendant was the person who had typed up their witness statements. These were largely in the same format as that of Mr Croney. I have no hesitation in concluding that it was the Second Defendant who assisted and typed up Mr Croney's witness statement. Mr Croney's purported lack of recollection on this point reinforced my view that his evidence was a contrived attempt to try and assist the Second Defendant's defence. There is some background to explain why Mr Croney did this. The Second Defendant and Mr Croney seem to have had some sort of business relationship from time to time. The Second Defendant gave evidence for example that Mr Croney had provided him loans related to his garage business, and at various occasions had assisted him or they had worked together. It seemed that Mr Croney operated in the background behind or around the Second Defendant from time to time.

42. The Second Defendant called witness evidence to try and support the suggestion that Smart was his employer from three men who also worked at Manston Airfield at or around the time of the Accident. They were men who at the time had worked for or with the Second Defendant, and in some cases continued to do so. Mr Adams and Mr Evans said that they were self-employed sub-contractors, with Smart as the primary contractor. Mr Wells said he was a full time employee of Smart Autotech. None of them gave any evidence about the employment status of the Second Defendant, nor seemed to have much awareness of Mr Croney. The supervision of their day to day activities was all by the Second Defendant and they were paid by the Second Defendant. The court was, in effect, being invited to infer that because these individuals now said they were contracted in one way or another by Smart, then it followed that the Second Defendant was also employed or contracted by Smart. In my judgment almost no weight can be placed on this witness evidence to support that assertion. There is no documentary evidence to support what the witnesses said they remembered of events over seven years ago. The bank accounts and PAYE records of Smart do not show that any of these witnesses were employees or sub-contractors of Smart and there was no documentary evidence of any contract between Smart and any of them. The men also had little or no visibility on the Second Defendant's employment or contracting status. I do not conclude that they deliberately misled the court as part of the collaboration between the Second Defendant and Mr Croney, but I am not convinced that the question of who their legal employer was even crossed the minds of these witnesses at the time, and I do not rely on what they now say they remember about it. I draw no inference that the Second Defendant was employed by Smart from their evidence.

43. I should record that the Second Defendant's assertions about the identity of his alleged employer were still fluid as late as his final submissions, in which he indicated that perhaps he, the Second Defendant, had not been employed by Smart but actually been employed by a Miriam Cooper, an apparent associate of Mr Croney. Miriam Cooper had never been mentioned in this case before that moment, had not been called to give any evidence, and there was no documentary or other evidence to indicate she had ever employed the Second Defendant. I completely discount the possibility that she employed the Second Defendant.

44. In summary, I have no hesitation in concluding that the alleged employment by Smart of the Second Defendant was a fiction created by the Second Defendant and Mr Croney during these proceedings in an attempt to assist the Second Defendant. There is no credible evidence of any such employment. It was a story put together between the Second Defendant and Mr Croney in 2021 when the penny dropped with the Second

Defendant that he potentially had serious personal liability. The Second Defendant may at some point have done a small amount of work for Universal but that had nothing to do with work at the airfield or Smart. When he was at the airfield the Second Defendant was not an employee of Smart, or anyone else. The inescapable conclusion is that the Second Defendant was working for his own account and his own benefit when carrying out work at Manston Airfield. He was working there, carrying out tasks on the aircraft, with men he had recruited and was paying.

To whom was the Second Defendant contracted when working at the Airfield?

45. If the Second Defendant was a contractor, then to whom was he contracted? The primary contractor in relation to the aircraft was the First Defendant. There is no evidence of the Second Defendant or any other person having a contract with the airfield, or aircraft owners, for the dismantling of those aircraft. Indeed, in his response to the HSE after the Accident the First Defendant says that the airfield did not want to contract with the Second Defendant as he was "a sole proprietor with no assets". In a call on 4 February 2015 the First Defendant told the HSE that it paid the airport and the Second Defendant paid it, further evidencing the sub-contractual relationship with the Second Defendant, and the absence of any contract with Smart or anyone else. In my view the answer is clear - the Second Defendant was acting as a subcontractor to the First Defendant in relation to the dismantling of the aircraft. There may have been other tasks that the Second Defendant carried out from time to time for other people, or even occasionally on the fire station or other parts of the Airfield, but in relation to the three aircraft to be dismantled the Second Defendant had been contracted by the First Defendant.

Was the Claimant self-employed or was he an employee?

46. I now turn to the question of whether the Claimant was an employee, either of the Second Defendant or another person, or whether he was a self-employed sub-contractor. The Claimant says he was employed by the Second Defendant. The Second Defendant, on the other hand, has said at various points since the Accident that the Claimant was either self-employed, or that the Second Defendant didn't even know who had employed or contracted him. At one point the First Defendant suggested that the Claimant had been employed by Smart and not by the Second Defendant.

47. I will deal firstly with the assertion that the Claimant was a self-employed sub-contractor. It was not a question to which Mr Chadwick had, according to his evidence, given much thought when he was working at the airport; he was just turning up for work, doing what he was told to do and being paid for his day's labour.

48. The definition of an employee is set out in the Employment Rights Act 1996 s230:

> "*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.*"

49. The assessment of whether someone is an employee, or a worker, or an independent contractor is a factual assessment. Lord Leggatt summarised this in *Uber BV and others v Aslam and others [citation] i*n which he said:

> "*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.*"

50. Key factors have been identified and discussed in numerous cases over the years including control (*WHPT Housing Association v Secretary of State Services [1981] ICR 737),* a multiple factor test identifying control, ownership of tools, and chance of profit (*Montreal v Montreal Locomotive Works Ltd [1947] DLR 161)* and factors such as provision of equipment, who hired the helpers of the person, as well as financial risk (*Market Investigations Limited v Minister of Social Services [1969] 2 QB 497)*. The courts have stressed the importance of mutuality following the Employment Rights Act 1996; an employee who is ready to work and an employer who is ready to pay, as for example in *Clark v Oxfordshire HA [1998] IRLR 125*.

51. The description given to the role by the parties may indicate how they viewed it, but ultimately it is a factual question as to whether someone is an employee or not. In this case there is no documentary evidence to assist the court. There was no written contract with Mr Chadwick, either of employment or as a contractor. All payments from the Second Defendant to the Claimant were made in cash and there are no tax records of any description. I am therefore reliant on the witness evidence given at the trial and also from interviews and statements made after the Accident. A large number of the core facts were agreed by the time of the trial. In this case, almost every single factor pointed in one direction – that Mr Chadwick was an employee. I place particular emphasis on the following:

    i) the Claimant had no control over the selection of tasks he was to carry out – they were given to him by the Second Defendant (and occasionally by the Second Defendant's nephew if the Second Defendant was offsite);

    ii) the Second Defendant gave instruction to the Claimant on how to carry out those tasks;

    iii) tools for those tasks were provided to him by the Second Defendant on site and were not the Claimant's own;

    iv) the Claimant was required to work full time at the airport, other than the very occasional work on other nearby projects also managed by the Second Defendant;

    v) the hours of work were set by the Second Defendant;

vi) he was paid in cash each week by the Second Defendant at a fixed rate and the Claimant had no share in any profit made on the dismantling of any aircraft or any part of it;

vii) the common expectation of the Second Defendant and the Claimant was that the Claimant would work at the airport until the dismantling of the aircraft was complete;

viii) there had been some discussion about the Claimant continuing to work for the Second Defendant after the airport work had ended;

ix) there were other men who worked with the Claimant on the site but the only person who supervised the Claimant's work was the Second Defendant; and

x) there was no possibility of the Claimant sending someone else to work in his place.

52. The cumulative evidence that the Claimant was an employee on a contract for the duration of the dismantling is overwhelming. The only evidence pointing the other way was a statement made by the Claimant to the HSE after the accident in which he called himself a "self-employed contractor". It may be that the Claimant at that stage thought that is what he was, or it may be that he was concerned about getting into discussions with governmental authorities about being paid in cash. It is equally possible that he may not have thought about it any detail at all or really understand the legal difference between an employee and a contractor. I did not place much weight on his statement to HSE, but looked instead at the factual matters set out above as to his actual status.

53. An argument was raised at one point that even if the Claimant was an employee, then he was an employee of Smart (or possibly another entity) and not of the Second Defendant. I will deal briefly with this. Throughout the entire proceedings the Second Defendant has never claimed that he recruited the Claimant to work for Smart. He has only ever said that the Claimant was a sub-contractor. Mr Croney, the director of Smart, denied that the Claimant was his employee; he listed the Claimant instead as his sub-contractor and referred to him as such in his witness statement. The Claimant has never said he thought he worked for Smart; he had never even spoken to Mr Croney. Having concluded that the Second Defendant was self employed, and not an employee of Smart, and having concluded that the Claimant was an employee and not a self-employed contractor, the inevitable and only conclusion is that the Second Defendant was the employer of the Claimant.

54. In my judgment, the Second Defendant recruited and paid individuals to carry out tasks that he supervised. He may not have thought very carefully, if at all, about whether they were employees of his, or self-employed sub-contractors, or about his legal responsibilities to those people who he recruited. In my view, however, there can be no doubt that as a matter of law and fact the Claimant was employed by the Second Defendant.

Duty of Care

55. The First Defendant was said to have owed a duty of care to the Claimant because he was in control of the premises where the Accident occurred. The Second Defendant

was said to have owed a duty of care to the Claimant as an employer. Both the First Defendant and the Second Defendant were said to have breached these duties. There was a further basis of claim that was relevant if (a) the Claimant was not an employee of the Second Defendant but was a self-employed contractor of the Second Defendant or (b) the Second Defendant was an employee of Smart; I did not need to address these questions as I found that, as a matter of fact, the Claimant was employed by the Second Defendant, who was a self-employed contractor to the First Defendant.

56. The claim against both Defendants was in negligence, not for breach of statutory duty. The parties, however, placed weight on duties that arose under s47(2) of the Health and Safety at Work etc Act 1974 ("HSWA 1974") and so I had to consider the interaction of that act and the common law duties.

57. Until 1 October 2013 s47(2) HSWA 1974 provided that breach of a duty imposed by health and safety regulations "*shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise*". That section applied to breaches of regulations that were negligent, and also where the regulations imposed strict liability irrespective of a lack of negligence by the person acting in breach. It applied to employers and also to persons who had any degree of control over work premises. S47(2) was, however, repealed by section 69 of the Enterprise and Regulatory Reform Act 2013 ("ERRA 2013"):

> "*(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.*"

58. The above provisions applied to accidents on or after 1 October 2013, and thus to the Accident. The underlying section of HSWA 1974 that imposes statutory duties, however, remains in force. It sets out the duties of a person to third parties who come into a workplace which is, to any extent, under their control. It requires persons to take "such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises....are safe and without risks to health". A breach of those duties can lead to criminal prosecution and investigation by the HSE as the responsible regulator.

59. The impact of ERRA 2013 on common law claims in negligence was considered by Collins-Rice J (as she now is) in relation to employers and occupiers in *Cockerill v CXK Ltd [2018] EWHC 1155* where at paragraphs 15-18 she said:

> "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.*"

60. On the other hand, His Honour Judge Allan Gore QC sitting in the Queen's Bench Division at Exeter Combined Court in *Tonkins v Tapp* D90EX006 said at paragraphs 103 to 106:

> "*103. Also in those circumstances it is unnecessary for me to decide the unresolved issue of whether breach of a statutory duty rendered non-actionable by Section 69 of the Enterprise and Regulatory Reform Act nonetheless constitutes negligence ipso facto. Bearing in mind that what I believe was a line of authority dealing with the analogous issue of whether breach of statutory duty in the days before statutory duties were ever civilly actionable, constituted common law negligence, none of which was cited to me or discussed, as opposed to merely being referred to by Ms Rice, sitting as a Deputy High Court Judge in Cockerill v CXK Ltd [2018] EWHC 1155, which decision is persuasive but not binding upon me, I choose not to follow it and express my concern that the danger of producing the contrary result would be to emasculate the statutory duties.*
>
> *104. That cannot have been Parliamentary intention in 2012, for if that had been the intention, Parliament would instead have chosen to repeal the statutory duties in question. Ms Rice does identify that in [18] of her judgment but, with respect to her, I do not understand how it can be said in neighbouring sentences that, on the one hand, those statutory duties bind employers in law and continue to be relevant to the question of what an employer ought reasonably to do while, on the other hand, were evidently intended to make a perceptible change in the legal relationship between employers and employees. Those concepts seem to me to be mutually inconsistent.*
>
> *105. It seems to me to be no answer to that argument to say that Parliament could not do so because many, if not now most, of the statutory duties had their origin in EU law which the UK was obliged to implement. That begs the similarly unanswered question of whether to deprive the statutory duties of civil actionability would have constituted a breach of EU law for failure to implement EU directive intent. I accept that that is not the Claimant's pleaded case in this case but, had it been necessary to fully argue and determine this point, it might have become his pleaded case by amendment, which amendment*

> *would not have been said to have caused any evidential prejudice to the Defendant despite having been made very late.*
>
> *106. Accordingly, I would not have been prepared to find, without much more analysis and argument, that the effect of Section 69 was to deprive an accident victim of entitlement to rely upon a finding that breach of statutory duty constituted ipso facto negligence as constituting breach of the scope and standard of care reasonably required of the alleged tortfeasor by the statutory duty even if no civil right of action was available for its breach.*"

61. His Honour Judge Gore makes it clear that he had not heard sufficient argument on the point, and his comments were made obiter. In my judgment it is clear that, contrary to what he said in paragraph 104, the underlying statutory duties remain in place unchanged, certainly in relation to the criminal consequences of breach of those duties and so far as the HSE as the responsible regulator remains concerned. It also does not seem to me to be correct to say that a breach of statutory duty under HSE regulations will after ERRA 2013 automatically constitute negligence; s69 ERRA 2013 removed the automatic link between a breach of the regulations and the right to claim damages. The most obvious situation where this occurs is where a regulation provided for strict liability for non-negligent breaches; following ERRA 2013 there is no claim in such a situation and that is a change that ERRA 2013 put into effect. Parliament has not, on the other hand, legislated in ERRA 2013 to remove or amend the common law liability of a person for negligence. I have set out below my analysis in relation to the Second Defendant as employer. That is followed by analysis in relation to the First Defendant as someone having control, bearing in mind that, in my judgment, those statutory duties continue to exist but that this is a claim in negligence and that a breach of regulation no longer automatically provides a civil remedy.

Duty of care of the Second Defendant as employer of the Claimant

62. The Second Defendant was, I have found, the employer of the Claimant. I adopt Collins-Rice J's summary of the common law duty to employees in *Cockerill* that:

> "*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.*"

63. The reasonable steps that an employer should take are situation specific, and in particular will be influenced by the work that is to take place, and the harm that is foreseeable. It is an objective test as to whether an employer took reasonable steps and it is not for an employer to substitute their own test. An employer will be in breach of this duty if it fails to take a reasonable step even if the employer has not thought about whether or not it should take that step. That is the background to the evolving case law in relation to risk assessments to be carried out prior to starting any work. The position was set out clearly by Lords Reed and Hodge in *Kennedy v Cordia*:

> "*110. The context in which the common law of employer's liability has to be applied has changed since 1909, when Morton v William Dixon Ltd was decided. As Smith LJ observed in Threlfall v Kingston-upon-Hull City Council [2010] EWCA Civ 1147; [2011] ICR 209, para 35 (quoted by the Lord Ordinary in the present case), in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. The duty to carry out such an assessment is therefore, as Lord Walker of Gestingthorpe said in Fytche v Wincanton Logistics plc [2004] UKHL 31; [2004] ICR 975, para 49, logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care.*"

64. This was amplified in the following further passage from Lords Reed and Hodge in *Kennedy v Cordia:*

> "*89. The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in the case of Allison v London Underground Ltd [2008] EWCA Civ 71; [2008] ICR 719. Smith LJ observed at para 58 that insufficient judicial attention had been given to risk assessments in the years since the duty to conduct them was first introduced. She suggested that that was because judges recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause. Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para 59, cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree.*"

65. In this case, the Claimant says that one of the reasonable steps required was a safety inspection carried out by a qualified aviation engineer to identify and then address risks on the aircraft, and that such a safety inspection should have been carried out prior to the start of work on the aircraft. The Claimant adds to this by saying that this was particularly the case when the men working on the site had no experience of dismantling aircraft, had been given no training and were given little onsite supervision.

66. There was clear evidence from Mr Walton that in his view it was essential before starting work on dismantling an aircraft that it should be made safe. It would be hard for there to be any other view. Mr Sharpe did not disagree with this. The method statement prepared by the First Respondent specifically identified in sections 6 and 7 that "all potentially hazardous materials have been/will be removed" and that "any system that operates under pressure [such as the oxygen] will have been safely discharged". Both of those documents set out the process of dismantling from the very first step and not just when "parting out" was completed. Mr Ovenden accepted in cross-examination that the method statement required the safety inspection to be undertaken before any work was carried out.

67. It was said by the First Defendant and the Second Defendant that they would have paid for a "formal" safety inspection later during the dismantling of the aircraft. This was due to their common view that because a "full safety check" was required by the Environment Agency permit, they only had to get an expert to check the plane at the stage when the Environment Agency permit was needed, that is when they started removing waste. In essence, the Environment Agency required a safety inspection at the point when the Environment Agency licence kicked in and so that was when the First Defendant and the Second Defendant were going to do it, irrespective of the fact that potentially dangerous work would take place prior to that time. This was a fundamental misunderstanding of their obligations – they might only have needed for Environment Agency purposes to carry out an expert safety inspection prior to start of the Environment Agency permit, but that was not a reason to wait until that point to ensure the aircraft was safe when considering the safety of the workers. They should have done it at the very start of the dismantling.

68. It was common ground that no qualified aviation expert conducted an assessment of the aircraft prior to the start of the dismantling to make sure it was safe. The evidence is that the only person who inspected the plane was the Second Defendant who, as best he could, identified and removed or otherwise made safe anything he could find that looked dangerous. He described this sort of activity as conducting a "live risk assessment". The Second Defendant, however, had no engineering qualifications. He referred to himself as being "a skilled engineer with many years of experience in aircraft maintenance and engineering" although he did not provide any evidence of, or detail relating to, this assertion. His experience of dismantling aircraft seemed to be limited to having, over the years, been involved in dismantling a small number of planes, perhaps not even five, of an unknown type and size.

69. One problem with the "safety check" being carried out by someone who is not qualified to do it is that they will not be fully competent to look for the unexpected, or to think about what may be unusual. It was well known, even to the Second Defendant, that there would be oxygen on board for the crew. It was known to the Second Defendant and the First Defendant that this aircraft had been a passenger plane that had been converted into a cargo plane. The evidence from Mr Sharpe was that the oxygen cylinder that exploded was in his

view likely to have been mistakenly left after the conversion of the plane as it would have been the oxygen for the crew who were looking after passengers. As the Second Defendant was not a qualified or experienced aviation engineer it had not occurred to the Second Defendant that such oxygen cylinders might still be on board. Nor did it occur to the Second Defendant to investigate the pipes which probably emerged from the void in which the oxygen cylinder was stored, or to check the controls in the cockpit which, according to Mr Walton, would have indicated the presence of a pressurised oxygen cylinder still on the plane, or to check the outside of the plane for the valves/gauges through which the oxygen cylinder would be checked and refilled. The clear evidence from both experts was that if a qualified aviation engineer had conducted the inspection then they would have located the oxygen cylinder which could then have been safely removed. The reasons why the cylinder was not located were that (a) neither the First Defendant nor the Second Defendant arranged for the safety inspection of the plane by a qualified aviation engineer prior to starting the dismantling, and (b) that the Second Defendant did not himself have the experience or competence to conduct such an inspection properly, and in particular to consider and identify the unusual. As a direct consequence of these failures the presence of the oxygen cylinder behind the panel was not identified.

70. The Second Defendant was the employer of the Claimant and he had a duty to ensure that a proper safety inspection had been carried out. It was not relevant to his duty whether or the First Defendant also had a duty to carry out such an inspection. They could both have satisfied such a duty by carrying out a joint inspection but a failure by the First Defendant to carry out a proper inspection did not relieve the Second Defendant of his independent duty to carry it out.

Foreseeability

71. The next question was whether the harm caused was reasonably foreseeable, because an employer's duty does not extend to harm that is not reasonably foreseeable. Both the First Defendant and the Second Defendant said in their defences and submissions that the presence of the oxygen cylinder, and thus the harm, was not reasonably foreseeable.

72. The First Defendant and the Second Defendant both agreed in cross-examination that it was foreseeable that aircraft would contain dangerous substances. The risk assessment the First Defendant produced specifically identified "items with a potential to explode" as being a risk and that such items "will be removed". The evidence from Mr Walton and Mr Sharpe showed that it was their view that it was clearly foreseeable that an aircraft that is about to be dismantled might contain dangerous substances. The evidence from those experts was that it was also foreseeable that such an aircraft might contain gas cylinders, and specifically oxygen cylinders. That in itself would be enough to establish foreseeability in my view as the type and nature of the risk was foreseeable even if the precise location of that oxygen cylinder was not foreseeable. This follows the line of authorities including *Hughes v Lord Advocate [1963] 1 All ER 705* in which Lord Guest said at p714D that "*it is sufficient if the accident which occurred is of a type which should have been foreseen by a reasonably careful person*". In evidence, Mr Sharpe said that he had never come across an oxygen cylinder in such a place on this type of cargo aircraft before. He then went on to say, however, that in his view this was because the oxygen cylinder was in a perfectly normal, and expected, place in a passenger plane as it was the oxygen for the crew seats used during take-off but it should have been removed when the plane was converted to cargo. It was, in my judgment, therefore specifically foreseeable that this aircraft, which used to be a passenger plane,

might contain oxygen cylinders in places where passenger planes normally contain oxygen cylinders.

73. In relation to the claim against the Second Defendant therefore my findings are:

    i) the Second Defendant had a duty to his employee, the Claimant, to take reasonable steps to provide a reasonably safe place of work, and system of work, so as to protect him, so far as reasonably practicable, from reasonably foreseeable harm;

    ii) the risk of injury from dangerous items on the aircraft was obvious and certainly reasonably foreseeable.

    iii) the specific risk of injury from oxygen on the aircraft was reasonably foreseeable, and indeed the specific risk of injury from an oxygen cylinder behind the panel was reasonably foreseeable; and

    iv) the Second Defendant did not take reasonable steps to provide a safe place of work in relation to those risks as he failed to carry out an adequate safety inspection before starting work which would have located the oxygen cylinder, and that failure caused harm to the Claimant when the oxygen cylinder exploded.

74. Having made that finding I did not need to consider further potential breaches of his duty of care that may also have caused the Accident. Had I done so then I would have found that those breaches in themselves would have been sufficient, taken together, to have put the Second Defendant in breach of his duties to the Claimant. These were in particular:

    a) his failure to provide adequate training to the Claimant even though he knew the Claimant had never worked on an aircraft before;

    b) his instructions to the Claimant to carry out the specific task in a way that was doomed to fail, and his failure to instruct him on an alternative, safe, method; and

    c) his failure to supervise the Claimant or provide any appropriate indirect supervision.

Duty of care of the First Defendant

75. The claim against the First Defendant is a common law claim in negligence against a person who has a degree of control over the workplace. The precise nature of the duty said to be owed by the First Defendant was unfortunately not clearly set out in the particulars of claim nor were the submissions during the trial and authorities to which I was referred as helpful as might have been hoped.

76. I will therefore recap the fundamental principles of the tort of negligence, particularly as the Defendants are not represented and should be able to understand clearly why I have reached the decision I have reached. The neighbourhood principle, stretching all the way back to Lord Atkins in *Donoghue v Stephenson 3[1932] AC 562,* encapsulates the principle that in some circumstances one person may have a duty of care to another.

In other words that person has an obligation to take care not to cause injury to that person. Lord Devlin considered this further in *Hedley Byrne[1964] AC 465 at 524–525* in which he considered the impact of Donoghue v. Stevenson:

> "*What Lord Atkin called a 'general conception of relations giving rise to a duty of care' is now often referred to as the principle of proximity. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question ....*"

77. Although this is a claim in negligence, and not for breach of statutory duty, there was a great deal of argument before me about whether or not the First Defendant had control of the aircraft as defined in s4 HSWA 1974. This was, in essence, because the Claimant says that if a person has control under that section then they are someone who has a duty of care under the common law.

78. I will therefore first of all consider as a matter of fact the degree of control of the First Defendant. There may, of course, be a difference between the degree of control which the First Defendant was entitled to exercise, and indeed should have exercised, and the degree of control they chose actually to exercise.

79. The First Defendant had under the Contract taken on responsibility for the entire dismantling process from start to finish. It had agreed to ensure that all licences and consents were obtained. It had agreed to put in place a method statement to ensure that the work was carried out safely. It had agreed to put in place insurance for these activities. These are all clear indicators of control over the dismantling of the aircraft.

80. I considered if the First Defendant had sub-contracted control to the Second Defendant to such an extent that it had ceased to have control. The First Defendant accepted that it had not sub-contracted all of its obligations under the primary contract. On the other hand, it disputed that it had certain other obligations either (a) because it said those obligations never existed or (b) because it said those obligations had been taken on by others. I set out more detail below but it my judgment it retained (either alone or with the Second Defendant) the following obligations:

    i) the creation of the risk assessment;

    ii) the creation of the method statement;

    iii) ensuring a safety inspection was carried out before any work started;

    iv) ensuring compliance with the Environmental Permit;

    v) ensuring adequate insurance for activities on the site (which they did not do);

    vi) ensuring all necessary licenses and permits were obtained (which they seemed to have done); and

vii) overall control of the dismantling with the right to inspect, direct and control all aspects from the initial de-fuelling until final removal of the final parts.

81. I now deal with the above points, in turn, to the extent not covered above. There was a risk assessment document and a method statement created in relation to the dismantling of these three aircraft. It was accepted that the First Defendant created the risk assessment document. At the trial both Defendants claimed that the method statement had been created by the Second Defendant. Or, to be precise, the Second Defendant said he had created it and the First Defendant said that it had no idea who had created it. This, again, was a new claim that had never been made in the case before that time. The Particulars of Claim explicitly said that the method statement was "prepared by the First Defendant". This was not denied; in the Second Defendant's defence he said the method statement was "a matter for the First Defendant" and the First's Defendant's own defence admitted that the method statement contained certain words and did not deny creating it. The denial at trial was also inconsistent with behaviour at the time of the Accident; the First Defendant provided the method statement to the HSE and did not mention that it was allegedly someone else's work. The HSE report also records that the Second Defendant provided the risk assessment and method statement to the HSE and said that they had been "prepared by Mr Ovenden" (on behalf of the First Defendant) as he had been "working on the project". The evidence shows that as a matter of fact the risk assessment and method statement were both prepared by the First Defendant. This is also consistent with their obligations under the Contract, and again evidences the control they had over the entire project.

82. The risk assessment was described in witness evidence by Mr Ovenden as being "generic" but, in reality, it was a document that contained several very specific details that only related to this specific dismantling, such as the location, type of aircraft, details of aquifers at the airfield and so on. There was no evidence that the risk assessment or method statement was actually used by either Defendant when planning or executing the work to be carried out. I do not need to make a finding in relation to it, but it would be consistent with the way the dismantling was run if it was regarded by the Defendants as a paper exercise they needed to complete, rather than a document that set out duties they were going to undertake.

83. The First Defendant also never sub-contracted the obligation to carry out a full safety inspection before any work commenced. This was because neither the First Defendant nor the Second Defendant intended to do such an inspection before starting the dismantling but would do it later in the project because they believed that was enough, or were reckless as to whether that was enough. If you have a duty to do something, and you have chosen not to do it, or recklessly not done it, you do not lose that duty. Equally, if you have not realised that you have a duty to do something and you have therefore not done it or engaged someone else to do it you do not somehow lose that duty.

84. The First Defendant (or more precisely, a sister company of the First Defendant) obtained the permit from the Environment Agency. The First Defendant held itself out to the Environment Agency and others as being fully responsible for the aircraft, including the safety of it, in relation to matters falling under the Environment Agency permit. They had to do this in order to obtain the permit. They presumably were aware that the Environment Agency would possibly check up that this was being done properly. The First Defendant would also have been aware that the Environment

Agency were not engaged in reviewing tasks that fell outside the waste permit. This, in my judgment, was the reason that the First Defendant exercised what they described to the HSE as "hands off management" in relation to matters not covered by the Environment Agency permit. In other words, the First Defendant knew they had responsibility under the Contract for the entire dismantling of the aircraft but unless the Environment Agency were involved then it seemed the First Defendant were not going to take any active steps to manage the dismantling or what happened on the site.

85. There was other evidence of the degree to which the First Defendant retained overall control of the dismantling. The Contract related to two other aircraft as well as the DC8 aircraft on which the Accident occurred. The First Defendant acknowledged that one aircraft, a 747, had been entirely dismantled and that they had "control" of, as a minimum, the demolition stage on it. The work on the entire dismantling including the demolition stage had according to the evidence before the court been carried out by the Second Defendant with no change of personnel at any stage in the process. There was no evidence that the First Defendant attended the site during the dismantling or demolition of that aircraft. In other words there was no difference in how the stages were managed or controlled by the First Defendant and if the First Defendant admitted it had "control" during the demolition it is difficult to see any basis on which the degree of "control" they had was different at earlier stages of the dismantling – they were equally absent throughout.

86. There had been an incident on one of those other aircraft when the Second Defendant had carried out work in a way with which the Environment Agency were not happy, and which a third party had reported to the Environment Agency. At that stage the First Defendant stepped in to manage the works that had caused the complaint and to ensure that the work was carried out appropriately by the Second Defendant, This, again, is consistent with the First Defendant retaining control and having the right to direct the Second Defendant if it chose to do so.

87. After the Accident the First Defendant accepted three notices from HSE in relation to the state of the DC8 at the time of the accident. Those notices were given because the First Defendant was in the HSE's view a controller of the aircraft at the time of the Accident. The First Defendant did not dispute the notices; it accepted it was a controller and indeed emailed the HSE to say that they would "get these issues rectified". Several years later when the possible significance of their control of the aircraft became clear, they claimed that they had only accepted the notices to promote good relations with the HSE. There is no evidence to support this claim.

88. Mr Coomber, as the director of the First Defendant, drew my attention to some cases he identified which he said were relevant to the question of "control". He referred me to *Aitchison v Howard Doris 1979 SLT(Notes)22*. That case largely concerned s3 HSWA 1974 as opposed to s4 HSWA 1974. That is a crucial difference as under s3 only one person has "control" of the relevant premises whereas under s4 several people can have control of the same premises at the same time. In any event, in Aitchison the defendant did not have direct control, and was thus not liable under either section. That contrasts with the current case where the First Defendant had, in my judgment, direct control of the safety inspection required and also direct control, if it chose to exercise it, throughout the entire dismantling process. I was also referred to *Kinsley v HSE [2014]EWHC 2474*. That case addressed the question of whether an owner of domestic premises controlled them in relation to construction work by builders on their property.

That is a very different situation to this case where a commercial organisation has agreed to take responsibility for a workplace. Finally, he directed me to *King v RCO Support Services [2000] EWCA Civ 314.* The critical part of the judgment in that case was, however, the conclusion of Kay LJ at paragraph 26 that "*there was no evidence in any way to suggest that the second respondent retained any degree of control*". That is a completely different factual situation to this case. In summary, none of these cases supported the First Defendant's assertion that it did not have control, or that if it did have control then it had no liability.

89. I note for completeness that s4 HSWA 1974 imposes the duty on a person who has control "to any extent". It therefore explicitly contemplates that a person will not have sole control of the place of work. In other words, there will be more than one person in control, and each has a duty under the section. In this case that means that the First Defendant may still have a duty of care to the Claimant even if the Second Defendant also has such a duty.

90. In my judgment the First Defendant had a degree of control over the aircraft, at the very start of dismantling process when they should have carried out the initial safety inspection and during the entire dismantling process, that means they had a duty of care at common law to take reasonable steps to prevent reasonably foreseeable harm to people whose presence on the aircraft was reasonably foreseeable. In this case the Claimant was an employee of the First Defendant's subcontractor, and as such his presence on the aircraft was entirely foreseeable. I have already set out above why the harm caused to him was reasonably foreseeable. The First Defendant did not take reasonable steps to prevent harm as they did not carry out, or ensure a third party carried out, a proper safety inspection and this failure caused the Accident and harm to the Claimant. That is sufficient to establish liability, but had it not been I would have considered whether they also failed to exercise the control they had over the selection and contractual obligations of the Second Defendant, and his working practices, to ensure that the dismantling was carried out safely.

91. Having established that on the facts the First Defendant had a common law duty of care, due to the control they had, I do not need to consider the question implicitly raised in submissions as to whether the common law duty of care for non-employers is identical to the duty set out in s4 HSWA 1974. Had I been required to do so I would have found that the duties set out in s4 have, at a minimum, a very significant degree of overlap with the common law duties to a third party of a person who has control of premises. In particular I note that the section only requires the taking of measures that are reasonable. It does not set out an absolute obligation. The foreseeability of the risk and the persons who might foreseeably be exposed to the risk is explicit in the common law and implicit in that section as considered in *Austin Rover Group Ltd v Her Majesty's Inspector of Factories [1990] 1 AC 619*. Thus, the duties are very closely aligned, if not identical.

92. In this case there was general comment about health and safety regulations but I was not taken in submissions to any specific HSE regulations which set out more detailed health and safety duties. It seems to me that in general the scope of the duty at common law, and whether a person has complied with that duty, are likely still to be informed by HSE law and regulations as they may, for example, give insight into what measures, or omissions, are reasonable, but in the present case I did not to consider this further.

Contributory negligence / causation

93. I turn finally to the defence that the Claimant was contributorily negligent in causing the Accident, or indeed so grossly negligent as to break the chain of causation. Both Defendants argued that if the Claimant had carried out the task in the way that the Second Defendant had instructed then the Claimant would never have been injured. In other words, if he had only used the 4" sander to remove the panel then the explosion would not have occurred. That is true. It is, however, completely missing the point. The Second Defendant had instructed the Claimant to remove the panel. The purpose of removing the panel was to gain access to the void behind it to remove the avionics system for on-sale or to be passed on to the aircraft owners. The purpose was not to remove the panel itself for resale as a panel. In other words, the removal of the panel was a necessary first step to gain access to the valuable parts behind it, and it did not matter what state the panel was in afterwards. The 4" grinder that the Second Defendant asked the Claimant to use was not appropriate for the task. It ground the heads of the rivets off, but the panel stayed in place. The evidence from Mr Walton was that this was inevitable – the panel simply could not be removed in this way and any aircraft engineer would have known this. The panel would probably have been bonded on and thus not removable at all in this way, or even if it was not bonded on then the pins underneath the rivets that held the panel in place would remain in place even if the rivet head was removed. It is further evidence that the Second Defendant did not have the expertise or experience to manage the tasks he was asking his employees to carry out.

94. As the Second Defendant had asked the Claimant to remove the panel, and the suggested method did not work, it was inevitable that the Claimant would try another method. The evidence is that the Second Defendant generally expected his employees to take this approach – when cross examining the Claimant, the Second Defendant said words to the Claimant to the effect that it was "ordinarily good for him to use his initiative...thinking on your feet in a lot of circumstances is good ...normally it worked...but this time it didn't". There is no evidence that the Second Defendant checked on the progress his workers were making during the day after he had handed out tasks in the morning or lunchtime briefings. None of the witnesses talked of a culture where the Second Defendant expected to be asked throughout the day for guidance on how to do things. The workers were basically given tasks to do, some initial suggestions on how to do them, and then given access to the tool shed and left to it. At no point did the Second Defendant suggest that it would be wrong, let alone possibly dangerous, to cut through the panel to gain access to the void, nor did the Second Defendant ask the Claimant to come back to him if the initial method failed to work. The only argument raised by the First Defendant or the Second Defendant was that the Claimant should not have cut into the panel but there was no explanation from the First Defendant or the Second Defendant as to what the Claimant should have done as an alternative, bearing in mind the instruction he had been given to remove it, and that the Second Defendant was not present on the aircraft or indeed available or accustomed to answering such questions. There was no evidence at all that the Second Defendant had even considered this possibility or provided a fallback suggestion method of working.

95. The HSE Report from the time of the Accident gives a clear view of how health and safety was addressed by the First Defendant and the Second Defendant. There was a litany of cut corners and unsafe practices. The HSE visited the site the day after the Accident and issued notices to both the First Defendant and the Second Defendant for

multiple HSE breaches that were so serious that work had to stop immediately. These breaches were unrelated to the danger from the oxygen cylinder. They related to dangers on the DC8 to workers falling from heights in the aircraft due to a lack of protection, to cargo doors being wedged open, to unprotected and unsafe electrical wiring throughout the working area, and to unprotected cabs in large mechanical excavators. Work would also have been prohibited on the other aircraft at the airfield for safety reasons as the entire back half of the fuselage of the aircraft had been removed, leaving anyone working in the plane exposed to a fall from a large height. It was only because the Second Defendant claimed there was no current work ongoing that a prohibition notice was not issued.

96. There were some statements from the three men who worked at the airfield called as witnesses by the Second Defendant. They asserted that when the Second Defendant was on the site he was a conscientious and safe supervisor. There were few specific details of how he demonstrated this beyond statements that he told them what tasks to do, and made sure they all had the right PPE. There was no comparison to other, less safe, managers with whom they had worked. There was also no evidence that he gave training, or guidance, or would prioritise safety and caution over getting the job done. I placed little weight on this evidence as showing that the Second Defendant was a safe and conscientious employer generally, and even less on this being evidence that the aircraft was safe.

97. There was direct evidence from the Claimant who said that he had concerns prior to the Accident about the health and safety of the aircraft, but that as this was his only job he did not want to make too much of a fuss. His wife confirmed that the Claimant had said this to her. Although this seemed sincere and credible, I note that this was evidence given many years after the events and so I cautiously did not attach a great deal of weight to it. I placed much more significant weight on the expert evidence about the specific issues, and drew inferences from the HSE report about the general, and poor, state of affairs.

98. This evidence was all consistent with the dismantling being managed by someone with no detailed knowledge or expertise, cutting corners and with no real insight as to how to provide a safe working environment on a potentially dangerous aircraft. In other words, someone who either knowingly or recklessly took risks with the health and safety of his workers.

99. The Claimant was an employee. He was a casual labourer with no experience of dismantling aircraft. He was entitled to rely on his employer and other persons having control of the aircraft to ensure that his place of work was safe. He was entitled to rely on his employer to provide the appropriate tools for the tasks he was given and to give him appropriate training. He was also entitled to rely on his employer to allocate tasks appropriate to his level of experience and training. In assessing whether an employee has been contributorily negligent one has to be especially mindful of the power imbalance in the relationship between employer and employee, and the reality of how much autonomy the Claimant had in deciding what to do and how to do it.

100. It is a high barrier to overcome before an employer can pass the blame for an injury to their employee when the employer has negligently failed to provide a safe place of work. It is even harder if the employer fails to train, properly to instruct or properly to supervise their employee. The only thing that the Claimant did was use a cutting tool

to remove a panel he had been told to remove when the tool with which he had been provided was inadequate. He had received no training, no supervision and been given no indication of any possible danger behind the panel. His employer was completely unaware of the danger because he had chosen to delay carrying out a safety inspection by a qualified engineer. In my judgment, in this case the Second Defendant did not come close to demonstrating that the Claimant was the author of his own misfortune, even in part. For the same reasons, the First Defendant cannot blame the Claimant for the failure to ensure the aircraft was safe. I do not find that the Claimant negligently contributed to his own injuries or broke the chain of causation in relation to the Accident.

Conclusion

101. I have concluded that the First Defendant had a duty of care to the Claimant as it had control over the aircraft. The Second Defendant had a duty of care to the Claimant as he was his employer. I have found that it was foreseeable that the Claimant would be present and working on the aircraft, and that it was foreseeable that harm would be caused to the Claimant by dangerous items on the aircraft, and in particular the oxygen in the cylinders. I have found that the First Defendant and the Second Defendant both failed to take reasonable steps to prevent that harm being caused to the Claimant, and harm was caused to the Claimant as a consequence. It therefore follows that both the First Defendant and the Second Defendant are liable to the Claimant in negligence.

102. There was no application before me to assess the relative proportions of liability between the Defendants. The claim will now proceed to a trial on quantum. I will order that there will be a directions hearing before the assigned master on the first available date after 13 July 2022 with a time estimate of 2 hours. I will also direct that if the Claimant wishes to make submissions on costs then it shall do so in writing on or before 4pm on Wednesday 6 July, to be served on all parties and the court. If the Claimant does so then the Defendants shall have until 4pm on the seventh day after the date of receipt of those submissions to make written submissions in response, to be served on all parties and the court. I will then consider any submissions made and make an appropriate order as to costs.

30 June 2022