OUTER HOUSE, COURT OF SESSION

[2023] CSOH 49

PD199/21

OPINION OF LORD SANDISON

In the cause

VICTORIA ROSE AND OTHERS

Pursuers

against

WNL INVESTMENTS LIMITED

Defender

Pursuers: Milligan KC, Swanney; Thompsons
Defender: Shand KC; BTO Solicitors LLP

26 July 2023

Introduction

[1] Andrew Rose died after falling through a fragile roof at premises owned by the defender at Brechin on 9 June 2018, while carrying out maintenance works there. In this action, brought under the procedure set out in Chapter 43 of the Rules of the Court of Session, his widow Victoria, his children and other members of his family sue for damages in respect of his death. They maintain that Mr Rose should be regarded in law as having been employed by the defender to carry out the works in question. They claim that his death was the result of fault and negligence at common law on the part of the defender, and in particular that it failed to take reasonable care for his safety by not instituting, providing

and maintaining a safe system of work, a safe place of work, and safe working equipment. They refer to certain provisions of the Construction (Design and Management) Regulations 2015, and of the Work at Height Regulations 2005, as illustrative of the standards to be expected of employers in fulfilment of their common law duties of care towards their employees and, more generally, towards those working on their premises and under their direction and control. The defender denies that Mr Rose was its employee, maintaining that he was an independent contractor engaged by it. Amongst other things, it maintains that it was not in breach of any duty of care owed to him, and criticises the specification of the pursuers' claim to the contrary. The action came before the court for debate of the defender's position that the pursuers' averments are irrelevant and lacking in essential specification.

[2] At the outset of the debate I allowed the pursuers' unopposed motion to amend their pleadings so as to refer only to regulations 4(1) to 4(3) of the 2015 Regulations, and regulations 4(1), 6(1), 6(3) to (5), and 9(1) to (2) of the 2005 Regulations, in substitution for a rather longer list of regulations previously put forward. I also allowed the pursuers' opposed motion to strike out an existing admission on their part that Mr Rose had been an independent contractor, taking the view that such an amendment was necessary for the purposes of identifying the real nature of the dispute between the parties and did not prejudice the defender in the presentation of its arguments at debate.

Relevant statutory provisions and regulations

[3] Section 47 of the Health and Safety at Work, etc Act 1974 (as amended by section 69 of the Enterprise and Regulatory Reform Act 2013) provides:

"47.— Civil liability

…

(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).

…

(4) Subsections … (2) and (2A) above are without prejudice to any right of action which exists apart from the provisions of this Act …

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

The Construction (Design and Management) Regulations 2015 (SI 2015/51) provide as follows:

"4.— Client duties in relation to managing projects

(1) A client must make suitable arrangements for managing a project, including the allocation of sufficient time and other resources.

(2) Arrangements are suitable if they ensure that—

(a) the construction work can be carried out, so far as is reasonably practicable, without risks to the health or safety of any person affected by the project; and

(b) the facilities required by Schedule 2 are provided in respect of any person carrying out construction work.

(3) A client must ensure that these arrangements are maintained and reviewed throughout the project."

The Work at Height Regulations 2005 (SI 2005/735) provide as follows:

"4.— Organisation and planning

(1) Every employer shall ensure that work at height is–

(a) properly planned;

(b) appropriately supervised; and

(c) carried out in a manner which is so far as is reasonably practicable safe, and that its planning includes the selection of work equipment in accordance with regulation 7.

…

6.— Avoidance of risks from work at height

(1) In identifying the measures required by this regulation, every employer shall take account of a risk assessment under regulation 3 of the Management Regulations.

…

(3) Where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.

(4) The measures required by paragraph (3) shall include–

(a) his ensuring that the work is carried out–

(i) from an existing place of work; or

(ii) (in the case of obtaining access or egress) using an existing means, which complies with Schedule 1, where it is reasonably practicable to carry it out safely and under appropriate ergonomic conditions; and

(b) where it is not reasonably practicable for the work to be carried out in accordance with sub-paragraph (a), his providing sufficient work equipment for preventing, so far as is reasonably practicable, a fall occurring.

(5) Where the measures taken under paragraph (4) do not eliminate the risk of a fall occurring, every employer shall–

(a) so far as is reasonably practicable, provide sufficient work equipment to minimise–

(i) the distance and consequences; or

(ii) where it is not reasonably practicable to minimise the distance, the consequences,

of a fall; and

(b) without prejudice to the generality of paragraph (3), provide such additional training and instruction or take other additional suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.

…

9.— Fragile surfaces

(1) Every employer shall ensure that no person at work passes across or near, or works on, from or near, a fragile surface where it is reasonably practicable to carry out work safely and under appropriate ergonomic conditions without his doing so.

(2) Where it is not reasonably practicable to carry out work safely and under appropriate ergonomic conditions without passing across or near, or working on, from or near, a fragile surface, every employer shall–

(a) ensure, so far as is reasonably practicable, that suitable and sufficient platforms, coverings, guard rails or similar means of support or protection are provided and used so that any foreseeable loading is supported by such supports or borne by such protection;

(b) where a risk of a person at work falling remains despite the measures taken under the preceding provisions of this regulation, take suitable and sufficient measures to minimise the distances and consequences of his fall."

Defender's submissions

[4] On behalf of the defender, senior counsel sought dismissal of the action. The pursuers' case was irrelevant, in that it did not disclose circumstances apt to create a duty of care on the part of the defender to protect Mr Rose from his own actions, and in that there were no averments that it was reasonably foreseeable that failure on the part of the defender to take whatever steps it was now said it ought to have taken would have resulted in Mr Rose working on the roof in the manner in which he did. Further, the pursuers' case was lacking in essential specification, in that no adequate description had been given of the measures which it was said the defender ought to have taken in discharge of such duties as it had towards Mr Rose, and also because the pursuers' reliance on the content of regulations which did not give rise to civil liability failed to specify how and why that content informed the nature of any duties owed towards Mr Rose by the defender.

[5] The pursuers' pleadings clearly disclosed that Mr Rose was acting as an independent contractor rather than as an employee at the time of the accident. The salient admitted facts of the case included that he had been engaged by the defender to clean and paint the roofs and walls of sheds and other buildings at the defender's various premises throughout Scotland. He was an experienced self-employed contractor with his own employees. He brought his own equipment to the defender's premises. The defender was not a builder or building maintenance contractor. It was accepted by the pursuers that Mr Rose had not been using any fall protection measures, despite knowing that he was working on a fragile roof. In 2017, during an earlier engagement of Mr Rose, the defender had reviewed his risk assessments and method statements and had required their revision in order to make reference to additional safety precautions in the form of personal fall protection measures such as the use of lanyards and safety harnesses, to which Mr Rose had agreed. Thereafter

the defender had identified that one of his employees was operating without a harness or crawler boards when working at height and had taken steps to reinforce to Mr Rose and his employee that the relevant safety precautions required to be followed. That was the essential factual background against which the pursuers brought a case against the defender based on alleged common law negligence.

[6] The case law relied upon by the pursuers did not support the suggestion that Mr Rose might be found, after proof, to have been an employee of the defender. *Lee Ting Sang* v *Chung Chi-Keung* [1990] 2 AC 374 was concerned with the construction of a Hong Kong statutory provision which turned on whether the claimant was employed under a contract of service. The pursuers did not offer to prove facts such as those which were held in *Lee Ting Sang* as indicating that the claimant was employed under a contract of service as opposed to under a contract for services. *Pimlico Plumbers Ltd* v *Smith* [2018] UKSC 29, 2018 ICR 1511 and *Uber BV* v *Aslam* [2021] UKSC 5, [2021] ICR 657 were concerned with the specific issue of whether the individual in question was a "worker" within the meaning of section 230(3) of the Employment Rights Act 1996, a question which turned on matters of no relevance to the present case.

[7] Although it might be the case that the distinction between an employee and an independent contractor could be a fact-sensitive decision, in the present case the pursuers' claim that Mr Rose was an employee and was owed a duty of care as such by the defender was bound to fail as a matter of law on the basis of the material they averred. In such a case the court's duty was to dismiss the action: *Mitchell* v *Glasgow City Council* [2009] UKHL 11, 2009 SC (HL) 21, per Lord Hope at [11] - [12]. That was the case even under Chapter 43 procedure.

[8] Further, the pursuers had not averred facts relevant to instruct a case that a common law duty of care was owed by the defender to an independent contractor such as Mr Rose. Duties owed by an employer to his employee had traditionally not extended to independent contractors. It had been recognised that, at least in general terms, an independent contractor was responsible for his own safety, and those engaging his services would owe him no duty of care, nor have any responsibility at common law for his safety at work. Support for that proposition could be found in *Munkman on Employers Liability* (17th edition) at 4.78, in *Jones* v *Minton Construction Ltd* [1973] 15 KIR 309 at 315, *Ferguson* v *Welsh* [1987] 1 WLR 1553 per Lord Goff of Chieveley at page 1564 A-D, and in *Lane* v *The Shire Roofing Company (Oxford) Limited* [1995] IRLR 493, [1995] PIQR P417, per Henry LJ at P421. Again, the cases relied upon by the pursuers, namely *Makepeace* v *Evans Brothers (Reading)* [2001] ICR 241, *Gray* v *Fire Alarm Fabrication Services Ltd* [2006] EWCA Civ 1496 and *Chadwick* v *R H Ovenden Limited* [2022] EWHC 1701 (QB), [2023] PIQR P9, did not support the proposition that in the present circumstances a common law duty of care was owed to an independent contractor. In *Gray*, the court had held at [17] that a building owner was only obliged to exercise oversight on the activities of an apparently competent contractor where the building owner had some special knowledge, or in other special circumstances. In *Chadwick* the circumstances were also wholly different. The claimant was not an independent contractor; his direct employer and those who had engaged it were found liable for failing to carry out a safety inspection which would have revealed the danger which eventuated. *Lynch* v *Ceva Logistics Ltd* [2011] EWCA Civ 188, [2011] ICR 746, which was relied upon by the pursuers, was a case concerning a failure to coordinate activities of various workers, and its rationale for imposing a duty in such circumstances had no application to the facts of the current case. The pursuers' case amounted to an assertion that the defender ought to have protected

Mr Rose, as an independent contractor, from his own folly. No such duty existed: *Mitchell*, per Lord Hope at [15] and [16].

[9] In relation to the argument that the defender had assumed a responsibility to Mr Rose, the concept of assumption of responsibility as a mode of imposing a duty of care had its origins in cases concerned with economic loss arising out of the performance of professional services, and required not only a positive assumption of responsibility by the defender, but also reliance by the injured party on that. Reference was made to *Michael* v *Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732 at [67], [97], [99] and [100]. The pursuers' pleadings were inept to instruct a case based on the notion of assumption of responsibility as the source of a duty of care towards Mr Rose. At the very least, the necessary element of reliance was absent, whether expressly or implicitly, from their pleadings.

[10] The fact that the pursuers offered to prove that the defender retained control over the work being undertaken by Mr Rose, to the extent that it was able to monitor, supervise, insist upon, and implement measures to prevent him from falling from height, or to minimise the distance and consequences of any such fall, did not assist their case. That the defender had the ability to do these things did not without more entail the existence of a duty of care to Mr Rose. There would require to be some element of actual control over Mr Rose or his work before liability could arise: *Munkman* at paragraph 4.80; *Morris* v *Breaveglen Ltd (t/a Anzac Construction Co)* [1997] 5 WLUK 146 ; *Nelhams* v *Sandells Maintenance Ltd and Gillespie (UK) Ltd* [1996] PIQR P52; and *Kmiecic* v *Isaacs* [2011] EWCA Civ 451.

[11] The pursuers further did not offer to prove that it was reasonably foreseeable to the defender that if it did not fulfil whatever duty was supposed to be incumbent upon it,

Mr Rose would work directly on the roof without using any protection to prevent him falling through. An analogy was drawn with *Robb* v *Dundee District Council* 1980 SLT (Notes) 91.

[12] The pursuers had no averments to instruct a case that had whatever alleged duty or duties on the defender been complied with, the accident to Mr Rose would not have occurred. Comparison could be made with *Lewin* v *Gray* [2023] EWHC 112 (KB) at [66] to [69], [80] and [99] - [100].

[13] Section 47 of the Health and Safety at Work, etc Act 1974, as amended by section 69 of Enterprise and Regulatory Reform Act 2013, made it clear that, as a general rule, a pursuer could not simply rely upon a breach of a statutory duty expressed in a health and safety regulation to found a civil action, but would require to establish negligence on the part of the defender: see, for example, section 13-72 of the 15th edition of *Charlesworth & Percy on Negligence.* The pursuers' case in effect sought to treat the various regulations listed in their pleadings as informing the nature of a common law duty of care owed to Mr Ross without any proper basis for so doing. Not every failure to comply with the regulations would amount to negligence – *Cockerill* v *CXK Ltd* [2018] EWHC 1155 (QB) at [18]; *Lewin* at [85]. It had long been recognised that there was no necessary correspondence between statutory health and safety requirements and the common law duty of care which would apply to the relevant situation. That could be seen, by way of example, in *Edwards* v *National Coal Board* [1949] 1 KB 704 and *Dow* v *Amec Group Ltd* [2017] CSIH 75, 2018 SC 247. The pursuers had averred nothing to instruct the conclusion that any particular obligation or obligations from amongst the several contained within the regulations listed by them was an obligation which, applying common law principles of negligence, was owed to persons such as Mr Rose. The action was fundamentally irrelevant and should be dismissed. The

acceptance by the court in *Gilchrist* v *Asda Stores Ltd* [2015] CSOH 77, 2015 Rep LR 95 that regulations of the kind in issue might be relevant to the existence of a common law duty had been decided without any adequate argument.

[14] Further, even if the regulations retained some relevance, at least in principle, there was no explanation as to how the statutory duties they imposed (involving, as they did, duties to "ensure" certain things were achieved, or to achieve certain results, either absolutely or "so far as reasonably practicable") were to be transformed into benchmarks informing the standard of care owed by the defender at common law, which simply involved taking reasonable care for the interests of others in an infinite variety of circumstances. These difficulties had been noted in *Goldscheider* v *Royal Opera House Covent Garden Foundation* v *Association of British Orchestras* [2019] EWCA Civ 711, [2020] ICR 1, [2019] PIQR P15 at [36] and in *Goodwillie* v *B&Q* 2021 Rep LR 22 at [141] - [142]. Further by way of example on the same theme, regulation 4 of the Construction (Design and Management) Regulations 2015, which was referenced by the pursuers, plainly applied only to independent contractor situations, but the pursuers were, at least apparently, seeking to apply it to a case where they claimed, at least as their principal case, that Mr Rose was an employee. The pursuers in effect proceeded as if section 69 of the 2013 Act had not been passed. Statutory provisions which Parliament had decided should not give rise to civil liability were being treated as if they continued to do so.

[15] In these circumstances, the defender did not have fair notice of the case it had to meet. No specification had been provided by the pursuers of the way in which each of the provisions in the regulations relied on by them supplied a measure of the duty of care owed at common law, how any provision was said to have been breached, or how the death of Mr Rose would have been avoided but for the alleged breach. A defender was entitled to be

put in a position to be able to ascertain without undue difficulty the nature of the case against it – *Clifton* v *Hays plc* OH 7th January 2004 (unreported) at [11]; *Dow* at [91], [139] and [180].

Pursuers' submissions

[16] On behalf of the pursuers, senior counsel submitted that the case should be remitted for proof. The pursuers' claim was primarily based on the premise that Mr Rose was acting as an employee rather than an independent contractor at the time of his accident. That was a mixed question of fact and law which could only be resolved once all of the evidence was heard. Moreover, there was no longer a brightline distinction on the one hand between employees working in terms of a conventional employment relationship, and on the other independent contractors working under different arrangements, at least for the purposes of determining the incidence and nature of a duty of care; rather, each case needed to be located on a spectrum having regard to its particular facts and circumstances. Even if Mr Rose was not an employee strictly so called, nor a *de facto* or quasi-employee at the relevant time, it was contended that the defender still owed him a duty of care at common law, essentially on the basis of its control of the site. Again, that was a mixed question of fact and law that could only be resolved after proof.

[17] How the parties to a particular relationship involving the performance of services chose to characterise it was not definitive. In *Pimlico Plumbers and Uber BV*, workers were held not to be independent contractors, despite being explicitly designed as such in the respective contracts. The question of how to distinguish between a contract of service and a contract for services had long troubled the courts and could not be determined on the basis of the pleadings alone. As a matter of law, no clear test had been formulated - *Lee Ting Sang*

per Lord Griffiths at 382 C - D. A number of different tests had been formulated over the years, initially largely based on the degree of control exercised by the person claimed to have been the employer, but more recently emphasising the degree of subordination of the putative employee or independent contractor. In either event, the question was highly fact-sensitive. Of the many cases that had been decided on this issue, none had been determined without inquiry into the facts. In *Lee Ting Sang* the Privy Council had approved the formulation by Cooke J in *Market Investigations Ltd* v *Minister of Social Security* [1969] 2 Q.B. 173, 184 - 185, that the fundamental test to be applied was whether the person who had engaged to perform the services was performing them as a person in business on his own account. Cooke J had acknowledged that no exhaustive list had been or perhaps could be compiled of the considerations which were relevant in determining that question, and that no strict rules could be laid down as to the relative weight which various considerations should carry in particular cases. It had further been observed that control was likely to be an important feature, and other factors might be whether the person performing the services provided his own equipment, whether he hired his own helpers, what degree of financial risk he took, what degree of responsibility for investment and management he had, and whether and how far he had an opportunity of profiting from sound management in the performance of his task. In *Lane*, the Court of Appeal, under reference to *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* [1968] 2 QB 497; *Market Investigations;* and *Ferguson* v *John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213, had observed that there were many factors to be taken into account in answering the question in the particular context of who was responsible for the overall safety of the people doing the work in question, and that all would depend on the facts of each individual case. The court had acknowledged that the element of control (ie who determines what is to be

done, when and how) would be important, as would be who provided the personnel and the material, plant and machinery and tools used. The question might also have to be answered according to economic reality, asking where the financial risk lay and whether there were opportunities to profit from sound management and efficient performance.

[18] Even if Mr Rose was not an employee of the defender, he might still be owed duties analogous to those owed by an employer to an employee. In *Makepeace*, the Court of Appeal accepted the possibility of common law duties being incumbent on the part of the controller of premises towards persons coming onto a site who were not its employees. In *Gray*, a similar point was made, and it was noted that it was not helpful to compare the facts of one particular case with another. *Chadwick* was to like effect.

[19] These cases might be analysed as having been based on an assumption of responsibility by a defender towards a pursuer: *Munkman* at paragraph 4.78 and *Lynch*, per Jackson LJ at [52]. That might simply be a different way of expressing the point that the borderline between an employee and an independent contractor was seldom clear cut, particularly in the modern workplace, and viewing matters through the prism of assumption of responsibility did not necessarily result in the importation of every aspect of that concept as it operated in the field of delicts causing economic loss. Whether one framed the question in terms of employment status or assumption of responsibility, it was clear that each case would be highly fact-sensitive and could not be determined without inquiry into the individual circumstances of each particular case. The pursuers had substantial averments pointing to a significant degree of control by the defender and the subservience or subordination of the deceased, which merited enquiry.

[20] The pursuers' claims were based on breach of duty at common law. The content of the health and safety regulations relied on, even if those regulations did not themselves

impose civil liability following implementation of the Enterprise and Regulatory Reform Act 2013, could still be helpful in informing and defining the scope of common law duties. The only claim which Chapter 43 procedure required to be advanced in those circumstances was that loss had been caused by the fault and negligence of the defender at common law. As a general rule of pleading, matters of law should not be pled, although historically, there had been an exception for statutory duties in personal injury claims. In the present case the pursuers averred clearly that the regulations they cited no longer imposed direct civil liability, in consequence of section 69 of the 2013 Act, but claimed that they remained relevant as evidence of the standards to be expected of employers in fulfilment of their common law duties. That proposition had been accepted in *Gilchrist*, in *Chadwick* at paras [90] and [92], and in *Cockerill* at [18]. Fair notice of the pursuers' case had been given, and the questions of whether the defenders owed Mr Rose any duty of care, and if so, what the precise content of such a duty might be, should be reserved and determined after proof. At the very least, it could not be said that the regulations were necessarily irrelevant to the existence and content of a common law duty of care at this stage of proceedings.

Decision

Employee or independent contractor?

[21] In *Lee Ting Sang*, Lord Griffiths, speaking for the Judicial Committee of the Privy Council, observed at 382 - 384 that distinguishing between an employee and an independent contractor was "a most elusive question", that in most cases it would be a mixed question of fact and law, and that "despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases." The

Committee approved the observations made by Cooke J in *Market Investigations* at 184 - 185, that:

> "No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

[22] Similar observations were made in *Lane* per Henry LJ at P421 - P422, and in *Chadwick* at [49] - [51]. It is of course true, in the context of Scottish litigation at least, that a pursuer's pleadings, taken *pro veritate*, must at least be capable after proof of furnishing the essential conclusions of fact and law argued for by the pursuer before enquiry will be permitted.

[23] In the present case, many of the admitted features of Mr Rose's engagement are, to put it mildly, not inherently supportive of the suggestion that he should properly be regarded as having been the defender's employee for the purposes of this action. It does not appear to be in dispute that he was, at least generally, a self-employed contractor, engaged his own employees, and brought his own equipment to the defender's premises. However, on what has traditionally been regarded as a key issue, namely that of control, the pursuers do aver that:

> "At all times whilst engaged by the defender, the defender retained control over the work being undertaken by the deceased, to the extent that they were able to monitor, supervise, insist upon and implement measures to prevent the deceased and his employees from falling from height and/or to minimise the distance and consequences of any such fall."

Those averments are supported by others concerning the actual intervention of the defender, both at planning and implementation stages, in relation to Mr Rose's earlier engagement by

it at another of its sites in 2017. Whether that, either in isolation or in combination with whatever other matters of detail may emerge at proof in relation to the other relevant factors set out in the pleadings, will or will not result in a conclusion that Mr Rose falls for the purposes of this litigation to be regarded as having been an employee of the defender in connection with the work that led to his death, is not a question that can be answered in the abstract at this stage of proceedings, standing the authorities already noted. Put shortly and in familiar terms, it cannot be said at this stage that the pursuers are bound to fail on this issue. It follows that their pleadings on the matter cannot be regarded as irrelevant and that proof cannot be refused to them on that account.

Potential duties owed to independent contractors

[24] Moreover, even if ultimately the conclusion reached at proof is that Mr Rose was an independent contractor rather than an employee, it is no longer as clear as once it may have been that in such circumstances the defender would owe him no duty of care, although that in effect remains the default conclusion (see *Lane*, per Henry LJ at P421, *Ferguson* v *Welsh* at 1564 and *Gray* at [36]). *Munkman* at 4.78 notes that:

> "under the general law of negligence, duties perhaps similar to those owed to employees have in certain circumstances been found to be owed by an undertaking to persons not in its employment. The cases have often been viewed as exceptions. Yet they increasingly illustrate the readiness of the law to award damages where one person has assumed a responsibility for another – whether through contract or through the factual nature of their relationship … But much uncertainty remains."

[25] One set of circumstances identified in *Munkman* as apt to infer the existence of a duty of care towards persons other than employees is where a worker is subject to the control of someone who is not their employer. It is suggested at 4.89 that the nature of such a duty will vary with the circumstances, and may include failures in organisation and in the adoption of

a safe overall system of work. These observations find some support in *Lynch*, where Jackson LJ noted generally at [52] that:

> "Every employer owes a duty of care to its own employees to provide a safe system of work. The employer also owes a more limited duty of care to the employees of other organisations who operate in the workplace which that employer controls."

In *Makepeace*, Mantell LJ at [9] similarly contemplated the possibility of:

> "occasions when the main contractor or occupier will owe a duty of care to the employees of others who come upon the premises distinct from the duty which exists in relation to the state of the premises themselves"

and noted that the occasions on which such a duty of care had to date been recognised could not be regarded as representing the only occasions on which it might in future be recognised. In *Gray*, Gage LJ at [34] and [36] was to like effect, adding that it was "unnecessary and unhelpful to attempt to formulate any specific test for deciding when such a duty arises". With the law in that state, while it is true that none of the cases so far decided in favour of the existence of a duty of care was concerned with a factual situation exactly on point with the present, that cannot mean - particularly given the pursuers' averments in relation to the degree of control at least capable of being exerted by the defender over Mr Rose's work - that the pursuers would be bound to fail in establishing the existence of a duty of care in the present case even if it were to be concluded that he was an independent contractor to the defender rather than an employee. Again, the matter must proceed to probation.

Relevance of Health and Safety Regulations

[26] In relation to the relevance of the pursuers' averments concerning the Construction (Design and Management) Regulations 2015 and the Work at Height Regulations 2005, the

general effect of section 69 of the Enterprise and Regulatory Reform Act 2013 on this area of law is not in doubt. As it was put by Collins Rice J (as she now is) in *Cockerill* at [18]:

> "… 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."

The judge further recorded at [17] that it was not disputed 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".

[27] In *Cunningham* v *Rochdale Metropolitan Borough Council* [2021] EWCA Civ 1719, the Court of Appeal noted at [24] that the Management of Health and Safety at Work Regulations 1999 had been relied upon:

> "as evidence of the standards of care applicable to a reasonable, prudent and competent [duty holder]. This was because the incident post-dated the entry into force of section 69 of the Enterprise and Regulatory Reform Act 2013".

[28] *Cockerill* was referred to with approbation in *Carr* v *Brands Transport Ltd* [2022] EWHC 3167 (KB) by Julian Knowles J, who added at [27] and [253] that it was a matter of agreement in that case that health and safety regulations remained relevant in defining the scope of the common law duty of care and indicating what steps a reasonable and conscientious employer could have been expected to take in circumstances covered by them.

[29] In *Chadwick*, Simon Tinkler, sitting as a deputy High Court judge, set out the background to the issue along the lines already canvassed, adding at [92] that:

> "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 [require] to consider this further."

[30] Other cases in the English courts have taken a similar approach. Turning to the principal Scottish cases on the point, the *Cockerill* analysis was adopted by Sheriff R.B. Weir QC (as he then was) in *Birch* v *George McPhie & Son Ltd* 2020 SLT (Sh Ct) 93 at [22]. In *Gilchrist* the Lord Ordinary at [15] simply accepted the argument for the pursuer, "no contrary submission being made". The pursuer's argument appears to have been that: "employers remain under a statutory duty to comply with health and safety regulations, as the duties set out in statutory instruments made prior to the 2013 Act inform and may define the scope of duties at common law", that "an employer who breached a regulation and was thereby committing an offence could hardly argue that he was acting reasonably", and that "the existence of a regulation demonstrates that harm is foreseeable". Essentially the same arguments were made, and again accepted without any contrary view having been argued, by Sheriff Reith QC in *Dehenes* v *T Bourne and Son* 2019 SLT (Sh Ct) 219 at [10] and [24].

[31] In *Goodwillie*, a case in which the pursuer sought to establish that "the applicable common law standard of care [was] wholly derived from certain statutory regulations" [131], Sheriff McGowan at [137] to [139] referred again to the argument that, if it was a criminal offence to fail to comply with a statutory duty created by a health and safety regulation, it would be difficult to see how the employer could argue that it was reasonable to breach the duty, and noted observations in *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6, 2016 SC (UKSC) 59 at [110] to the effect that a requirement for risk assessment could arise either in terms of regulations or at common law, which was said to

be consistent with the existence of a statutory duty being regarded as potentially illustrative of the state of knowledge of a reasonable employer in relation to particular risks. The Sheriff went on to say the following:

> "[141] Therefore, I accept, as a matter of general principle, that the regulations relied on by the pursuer in this case are relevant to an assessment of the specific obligations (i.e. steps to be taken) which may be incumbent upon an employer in discharging its general duty to exercise reasonable care towards its employees. But the precise impact of that in any given case will depend on (a) the factual circumstances prevailing and (b) the precise way in which the statutory duty relied upon is formulated and/or has been interpreted.
> [142] I suggest that it may work in the following way. If a duty identified in a regulation can reasonably be said to fall within the duty of reasonable care incumbent on an employer (i.e. in the same way as certain elements have been held at common law to form part of that general duty, (e.g. to provide and maintain proper machinery …), then it should be treated as creating such a duty. Moreover, where a regulation provides specific, concrete steps to be taken in the fulfilment thereof, they may also form part of the duty to take reasonable care. However, where the element which is subsumed into the common law duty of care in that way has as its source a regulation which otherwise creates an absolute or strict standard of care, the new element must be moderated to the standard of reasonable care."

[32] In *McDonald* v *Indigo Sun Retail Ltd* 2021 SCLR 269, Sheriff Mundy observed at [57] that:

> "while breaches of health and safety regulations are no longer actionable in their own right such regulations remain a source of statutory duties with which an employer must comply and they remain relevant as evidence of standards expected of employers in civil cases …"

[33] Finally, in the course of the passage of the Enterprise and Regulatory Reform Bill through Parliament, and as alluded to inspecifically in *Galbraith*, the responsible Minister (Viscount Younger of Leckie) stated in Grand Committee on 14 January 2013 that:

> "The noble Baroness, Lady Turner of Camden, brought up the concern that the law would go backwards, which I think was her expression, and the employer would hold all the cards. I would like to assure her and all noble Lords that the provision will affect only a small number of duties that are unqualified. In any claim for negligence, the existing regulatory requirements on employers will remain relevant, as the courts will look to the statutory duties, approved codes of practice and established guidance to inform them about what risks a reasonable employer should be aware of and the steps they would be expected to take to manage those risks.

> I stress again that this change will only assist responsible employers who have done what is required of them and can demonstrate this."

At a subsequent stage of proceedings, the Minister on 6 March 2013 further stated the following:

> "However, unlike in the days before the Health and Safety at Work etc. Act, there is now a codified framework for health and safety at work and a great deal of evidence and guidance in the public domain about hazards in the workplace. Employers are expected to take account of this in carrying out their risk assessments, and this body of information will form an important part of the evidence in this aspect of a claim. This means that injured employees are in a very different and much better position to obtain information about their employer's actions than they were when the right to sue for breach of statutory duty was first established in the 19th century. I hope that this answers the question raised by my noble friend Lord Phillips in this respect."

[34] Neither ministerial statement qualifies as a guide to the proper construction of section 69 of the 2013 Act in terms of the rule in *Pepper* v *Hart* [1993] AC 593, since they do not assist in the resolution of any ambiguity in the provision. There is no such ambiguity. Rather, they are simply expressions of opinion as to what material courts would be likely in future to have regard to in determining the incidence and nature of a common law duty of care.

[35] In virtually all of the decided cases in which the question of the continuing role of health and safety regulations in informing the nature of common law duties of care has been raised, there has been consensus between the parties to the litigation as to how the question should be answered. That seems to have resulted in something of a lack of searching judicial analysis of precisely why, and thus how, the content of any regulations which might previously have engaged with the situation under consideration continues to have a role in assisting the court to determine the incidence and nature of a common law duty of care in that situation. In consequence, certain of the Scottish cases, most notably *Goodwillie*, appear to have departed from the course which the law requires.

[36] The starting point for an analysis of these matters must be the indubitable fact that section 69 of the 2013 Act was intended "to make a perceptible change in the legal relationship between employer and employees", as it was put in *Cockerill* at [18]. It is the duty of the courts to give effect to that change, rather than to undermine it or to arrive at conclusions by routes which in practical terms ignore it. It is not correct as a matter of law to suggest that any health and safety regulation falling within the scope of the general rule in section 69 may, directly or indirectly, be the source or origin of a common law duty of care, whether with or without adaptation of some sort. Regulations are not generally promulgated in an attempt to restate the common law. In situations where they may have been intended to restate or clarify the common law, they may not have succeeded in doing so. Recognition of the existence and content of common law duties of care remains, as always, the sole prerogative of the judiciary.

[37] The fact that an employer or other duty holder remains under a statutory duty in certain situations to do particular things or achieve a specific result is not in itself relevant to inform the existence of any common law duty in those situations. That there may be criminal liability for breach of a health and safety regulation in no way involves or infers a conclusion that a common law duty of care exists in the situation at hand, or what the content of any duty which may exist might be. That is most obvious in cases where such regulations create strict liability, but the principle is not restricted to such cases. Criminal liability for breach of health and safety regulations and common law duties of care operate on entirely different legal planes; any other approach impermissibly undermines section 69.

[38] None of that is to say that health and safety regulations have no potential relevance in assisting the court to come to its own conclusions about the incidence and nature of a common law duty of care. However, that potential relevance is limited in scope. The

existence and content of such regulations may inform the court about what risks have been generally recognised as inherent in a particular situation or activity and what steps have been similarly recognised as apt to mitigate or eliminate those risks. Reference to health and safety regulations is properly aimed at providing a factual basis, or factual support, for those kinds of proposition, rather than at claiming any residual legal effect said to inhere in the regulation for the purposes of informing common law duties of care, for no such effect exists. There is no greater role for the content of health and safety regulations or guidance in the determination of common law duties than that.

[39] In most cases, the utility of reference to such regulations and guidance will be extremely limited, because the regulation or guidance will at best simply confirm conclusions that are amply capable of being arrived at by the court without such reference. There may be circumstances, however, in particular in cases involving rather specialised areas of activity, where they are capable of making a greater contribution to the conclusions which require to be drawn as to the demands of the common law.

[40] In the present case, reference to the regulations set out above is said in the pursuers' pleadings to be:

> "relevant as evidence of the standards to be expected of employers in fulfilment of their common law duties. The regulations provide an established benchmark informing the standard of care owed by the defender to those working in their premises, and under their direction and control, such as the deceased, in the exercise of their incumbent common law duties of reasonable care."

So long as those claims are seen as propositions of fact rather than law, they are unobjectionable in light of the preceding analysis of the law. Whether they will in fact be made out as valid propositions of fact, and if so whether they will add anything to the process to be gone through by the judge considering what the common law requires in the

precise situation which proof reveals to have pertained, remains to be seen. There is, however, no proper ground upon which they may be refused probation at this stage.

Further issues concerning the existence and nature of a duty of care

[41] Turning to the more minor points relied upon by the defender in relation to its irrelevancy and lack of specification claims, issues of what was or was not reasonably foreseeable in all of the circumstances are also best dealt with after proof, when the detail of those circumstances has been ascertained. It is plainly implicit in the pursuers' case that they maintain that it was reasonably foreseeable that the failures on the part of the defender of which they complain might result in Mr Rose adopting a course of action that could cause him serious harm. There is no merit, certainly in Chapter 43 procedure, in requiring them to state that in so many words upon pain of dismissal for irrelevancy. The facts that the pursuers' claim is based on alleged negligent omissions on the part of the defender, rather than on things positively done by it, and that it was Mr Rose's own actions which directly precipitated his own death, are relevant matters which can and will be taken into account in the ultimate determination of the nature and extent of any duty of care incumbent on the defender; they are not features of the case which can be said in the abstract to exclude the existence of any such duty. Finally, although reliance is an element necessary to create liability in the context of an assumption of responsibility said to have called forth a duty of care to prevent or mitigate economic loss, it is far less clear on the law as it exists and so far as it has now developed that it has a part to play in the borrowed context of the creation of a duty of care in relation to independent contractors on the part of a main contractor or site controller, where its role may well be regarded as being supplanted by the actual control exerted over the person to whom the duty of care is owed. It is certainly not possible to say

in the abstract that the pursuers' case in this regard is bound to fail for want of an averment that Mr Rose relied on the defender in any particular regard.

Conclusion

[42] The case will now proceed to disposal by way of proof, without excision of any of the pursuers' pleadings.