HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 46

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OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Spencer-Franks (Appellant) *v* Kellogg Brown and Root Limited and others (Respondents) (Scotland)

Appellate Committee

Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance
Lord Neuberger of Abbotsbury

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LORD HOFFMANN

My Lords,

1. In 2003 the pursuer Mr Spencer-Franks was employed as a mechanical technician by Kellogg Brown and Root Ltd ("KBR"), then a subsidiary of Halliburton, the multi-national company based in Texas which, among other things, supplies services to the offshore oil industry. KBR contracted to supply workers to operate the Tartan Alpha platform in the Scottish sector of the North Sea, which was operated by Talisman Energy (UK) Ltd ("Talisman"), a subsidiary of a Canadian oil company. The pursuer was one of the workers which KBR supplied to work on the platform.

2. On 12 October 2003 the closer on the door of the central control room was not working properly and the appellant was asked to inspect and repair it. The closer consists of a spring mechanism attached to the door and connected by a linkage arm to the door frame. According to the pursuer's averments, which must for the purposes of this appeal be taken as true, he decided to remove the closer and take it to the workshop for repair. Before doing so, he tried to assess the level of tension in the linkage arm by backing off by half a turn the screw which held it to the door frame. This should not have disengaged the screw. In fact the screw pulled out and the arm struck the pursuer in the face. He lost four teeth which had to be replaced by implants.

3. The pursuer raised an action against KBR and Talisman in the sheriff court in Aberdeen, claiming that each of them had been in breach of its obligations under the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) ("the equipment regulations"). These regulations replaced the Provision and Use of Work Equipment Regulations (SI 1992/2932) ("the 1992 regulations") and they were both intended to implement Council Directive 89/655/EEC ("the equipment directive").

4. Regulation 3 of the equipment regulations delimits the scope of the duties which they create:

> "(2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.
>
> (3) The requirements imposed by these Regulations on an employer shall also apply…(b)…to a person who has control to any extent of – (i) work equipment…to the extent of his control."

5. The pursuer says, first, that the door closer was "work equipment". This is defined by regulation 2(1) as—

> "any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)"

The pursuer says that the door closer was a piece of machinery or apparatus for use at work. People working on the platform were using it every time they entered or left the control room. Secondly, the pursuer says that the duties imposed on his employer by regulation 3(2) apply to the door closer because it was "used" by an employee at work. Regulation 2(1) defines "use" to include any activity involving work equipment, including "repairing…maintaining, servicing". So it was being used by the pursuer as repairer and by any other KBR employees who went through the door in the course of their work.

6. The relevant substantive duties are in Regulation 4, which provides:

> "(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided….
>
> (4) In this regulation 'suitable' means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person."

7. For the purpose of this regulation, "employer" is defined in article 2(1) to include a person who is not the employer but upon whom duties are imposed by regulation 3(3)(b). There is no dispute that the liability created by this regulation is strict. The employer must "ensure" that the work equipment is suitable. It is not enough to take reasonable steps to do so. The pursuer says that the door closer was work equipment and that it was not suitable for use in a way which would foreseeably affect his safety. It was attached in such a way that the arm would fly off unexpectedly and hit one in the face.

8. That, in summary, is the pursuer's case. The defenders took pleas to the relevancy on the ground that the door closer could not be work equipment within the meaning of the regulations. The sheriff sustained the plea of KBR, the employer, on the ground that although the door closer was "work equipment", the employer had no control over it and the regulations therefore did not impose responsibility upon it. On the other hand, Talisman, the operator, did have control. He therefore repelled their plea to the relevancy and allowed the pursuer's proof.

9. Both the pursuer and Talisman appealed. The Second Division of the Court of Session, took the view that the door closer was not "work equipment" or, even if it was, that the pursuer was not "using" it within the meaning of the regulations. They therefore dismissed the pursuer's appeal and allowed KBR's appeal. The pursuer appeals to your Lordships' House.

10. My Lords, let us first consider the question of whether the door closer was work equipment. The equipment regulations were intended, as I have said, to implement the equipment Directive, although, as the explanatory note points out, the provisions of regulation 3(3) to (5), which place duties upon non-employers having control of work equipment, go beyond what the Directive requires. The definition of work equipment in the Directive is "any machine, apparatus, tool or installation *used* at work." The definition in the equipment regulations, which I have already quoted, uses the words "*for* use at work." I

imagine the change was made to forestall literalist arguments that a defective machine which caused injury while it was not actually being used was not work equipment. The domestic definition requires one to ascertain the purpose of the apparatus etc. What is it for? If it is for use at work, then it is work equipment.

11. If one takes this simple approach, then the answer seems to me to be clear. Everyone using the control room was using it for the purposes of their work. They used the door to enter or leave the control room. And in doing so, they used the closer. Its purpose was for use at work. Giving the definition its ordinary meaning, the closer was work equipment. The question is whether it can be excluded by some implied qualification.

12. One possibility is that the equipment regulations impliedly exclude apparatus which forms part of the premises upon which the work takes place. The state of premises is treated separately from equipment by the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004). In the case of ordinary work premises on land, this might be a good argument. But I do not think it applies to equipment which is attached to an offshore platform. Regulation 5(1) of the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 (SI 1976/1019) provided in general terms that —

> "All parts of every offshore installation and its equipment shall be so maintained as to ensure the safety of the installation and the safety and health of the persons thereon."

13. This made no distinction between the fabric of the installation and the equipment. The duty applied equally to both. And the liability which it creates is strict: *Breslin v Britoil plc* 1992 SLT 414. After the equipment directive came into force, the duties of the owners or operators of offshore installations were divided between two regulations. One is the Offshore Installations and Wells (Design and Construction etc) Regulations 1996 (SI 1996/913), which deals principally with the duty to maintain the "integrity" (defined as "structural soundness and strength, stability and…buoyancy" of the installation) but also has certain "additional requirements" similar to those applicable to workplaces on shore. None of these duties deal with equipment. The other source of duty is the equipment regulations.

14. This seems to me to point to an intention that the equipment regulations were to apply to all equipment on an offshore installation. In the nature of things, a lot of such equipment is going to be bolted or otherwise attached to the platform, but I do not think that this prevents it from being work equipment if it is for use at work. The same may be said of the lift which was (rightly, I think) held to be work equipment in *PRP Architects v* Reid [2004] EWCA Civ 1119; [2007] ICR 78. The Framework Directive 89/391/EEC "on the introduction of measures to encourage improvements in the safety and health of workers at work", which gave rise to individual directives such as the equipment directive, said that the directives were needed "to guarantee a better level of protection of the safety and health of workers". It went on to say:

> "This Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member States being committed, under the Treaty, to encouraging improvements in conditions in this area."

15. Thus the Framework Directive imposed a European ratchet upon levels of protection for workers and it would in my opinion be wrong to construe the 1996 Offshore Installations regulations and the equipment regulations as giving workers on offshore installations any less protection than they had under the 1976 Offshore Installations regulations. It is not suggested that a mechanical defect in the door closer falls within the Offshore Installations regulations and I therefore see no need to limit the ordinary language of the definition of work equipment in the equipment regulations in order to exclude it.

16. An alterative argument, which found favour in the Court of Session, was based upon the decision of the Court of Appeal in *Hammond v Commissioner of Police of the Metropolis* [2004] EWCA Civ 830; [2004] ICR 1467. In that case the claimant was a mechanic employed by the Commissioner of Police. He was working on the wheel of a police dog van when the shearing of a wheel bolt caused him to suffer injury. The question was whether the van was "work equipment" within the meaning of the 1992 regulations, which had its own definition of "work equipment":

> "any machinery, appliance, apparatus or tool and any assembly of components which, in order to achieve a

> common end, are arranged and controlled so that they function as a whole."

17. The scope of the duty was defined by regulation 4(1), which was in similar terms to regulation 3(2) of the 1998 equipment regulations:

> "The requirements imposed by these Regulations on an employer shall apply in respect of work equipment provided for use or used by any of his employees who is at work…"

18. Giving the leading judgment, May LJ said, at pp 1473-1474, para 24:

> "Although the definition of what may be work equipment is to be found in regulation 2, the ambit of the expression 'work equipment' in these Regulations is determined by regulation 4.…This indicates…that the Regulations are concerned with what may loosely be described as the tools of the trade provided by an employer to an employee to enable the employee to carry out his work.…The van might well be work equipment of a policeman driving it, but not of the police mechanic repairing it…"

19. I must respectfully differ. Regulation 2 defines work equipment. Regulation 4(1) tells you which work equipment the regulations apply to. The requirements imposed by the regulations do not apply to all work equipment but only in respect of work equipment "provided for use or used by any of his employees who is at work." But that does not mean that "the ambit of the *expression* 'work equipment' in these Regulations is determined by regulation 4." The effect of regulation 4 is that the regulations apply only to a subset of the category work equipment as defined in regulation 2. You first decide whether some apparatus is work equipment or not and then you decide whether the regulations apply in respect of it.

20. It follows that I cannot accept that something can be work equipment in relation to one person but not to another. If the dog van was "machinery, appliance [or] apparatus" (which I should have thought

it was) under the 1992 definition and "for use at work" under the 1998 definition (which I also think it was), then in my opinion it was work equipment.

21. The Court of Appeal was greatly exercised by the possibility that if a car brought to a garage for repair was regarded as work equipment in relation to a mechanic employed by the garage, his employer would be strictly liable for defects in the car over which he could have no possible control. That would certainly be a strange result. But in my opinion the solution to the difficulty must be found in the provision which delimits the area of the employer's responsibility (regulation 4(1) of the 1992 regulations and 3(2) of the 1998 regulations) rather than by giving an artificial and relativist meaning to the definition of work equipment.

22. If one were simply applying the equipment directive, the garage case posed by the Court of Appeal would cause no difficulty. Article 3.1 says that the general duty of the employer is to —

> "take the measures necessary to ensure that the work equipment made available to workers in the undertaking and/or establishment is suitable for the work to be carried out or properly adapted for that purpose and may be used by workers without impairment to their safety or health.
>
> In selecting the work equipment which he proposes to use, the employer shall pay attention to the specific working conditions and characteristics and to the hazards which exist in the undertaking and/or establishment, in particular at the workplace, for the safety and health of the workers, and/or any additional hazards posed by the use of work equipment in question."

23. In the garage case, it seems to me that although the car brought in for repair may be work equipment, it has not been "made available to workers in the undertaking and/or establishment." The notion of "selection" of the work equipment by the employer does not apply to equipment which his customers bring to be repaired. It is therefore outside the scope of the duty created by the directive.

24. But the directive does not say that work equipment must have been made available to the particular employee who has been injured. It speaks of the equipment being made available to "workers in the undertaking." That, in my view, means all or any of the workers in the undertaking. When one is considering the persons to whom the equipment has been made available, the relevant unit is the undertaking and not the particular worker. So, for example, if an undertaking carrying on a delivery business provides vans for its employees, they will be work equipment made available to workers in the undertaking. If a van driver repairs a puncture and is injured by a defect in the wheel, he will have been using the work equipment. It cannot in my opinion make any difference if the repair is done by a different worker in the same undertaking – for example, a specialised mechanic like Mr Hammond.

25. I therefore think that in the *Hammond* case, the question which should have been asked was not whether the van was work equipment (it clearly was) but whether Mr Hammond was a worker in the undertaking to which it had been supplied. I should have thought he was – the policemen who drove the dog van and Mr Hammond were all employed (or deemed to be employed) by the Commissioner in a single undertaking, the Metropolitan Police. The fact that the van belonged to a separate legal entity, the Metropolitan Police Authority, does not seem to me to be relevant. On the other hand, if a van used by the Royal Mail is taken for repair to an independent garage, the garage mechanic is not a worker in the undertaking, to whose workers the van has been supplied. That undertaking is the Royal Mail and not the garage.

26. The equipment regulations should in my opinion be interpreted to accord with the principle stated in the directive. It should therefore have covered Mr Hammond repairing a defective police car but not a mechanic repairing a third party's car which had not been provided as equipment to the undertaking for which he worked. There is in my opinion no difficulty about construing the regulations to include Mr Hammond. But, if they are read literally, there may be a difficulty about excluding the worker repairing a third party's equipment. That is because, instead of using the term "made available to workers in the undertaking", the equipment regulations (3(2)) say "provided for use *or used* by an employee of his at work". Do the words "or used" create liability for injury caused by any actual use (including repair) of any work equipment, whether provided by the employer or not? This would go far beyond the requirements of the directive. I doubt whether they were intended to have such a wide meaning, especially in view of the imposition of liability by regulation 3(3)(b) on a person who is not the employer but has control of work equipment. That might, in an

appropriate case, make the Royal Mail liable for injury caused to a garage employee by its defective vehicle. But it is hard to see why the garage owner should be liable as well. It may be that the words "or used" were inserted to cover a situation in which, with the employer's consent, the employee uses some work equipment which one would ordinarily expect to have been provided by the employer: say, his own saw or screwdriver. This may be another case in which the draftsman thought he could clarify the meaning of a directive but would have done better to leave its language alone. But for reasons I shall explain, it is not necessary in this case to decide the precise limits of regulation 3(2).

27. In holding that the door closer was not work equipment, the Division followed the *Hammond* case. It led the judges to the conclusion that the door closer was not work equipment and for the reasons I have given, I think that was wrong. The door closer was apparatus for use at work. On the other hand, I have the same difficulty as the sheriff in treating it as having been provided for use by the pursuer's employer KBR. It was provided by Talisman. It was however being used by the pursuer and whether this brings it within the scope of article 3(2) may depend upon whether the arrangements between KBR and Talisman were such that the platform could be regarded as the site of an undertaking by KBR as well as Talisman.

28. On the other hand, I think there can be no doubt that Talisman had control of the door closer as part of the platform. It is therefore responsible under regulation 3(3)(b) and it follows that it will be liable if the closer was not suitable for the purpose of being used or safely repaired. The respondent's conceded that if Talisman were liable, both they and KBR should be held liable. It is for this reason that I do not think it is necessary to decide the precise basis upon which KBR might be liable.

29. I would therefore allow the appeal, recall the interlocutors of the Court of Session and the Sheriff and allow the parties a proof.

LORD RODGER OF EARLSFERRY

My Lords,

30. I had the advantage of reading the speech of my noble and learned friend, Lord Hoffmann, in draft. I agree that, for the reasons he gives, the appeal should be allowed. Because of the importance of the issues, I have thought it right to add some observations of my own. In doing so, I gratefully adopt the account of the facts and issues given by Lord Hoffmann.

31. Article 118a (now article 137(1)(a) and 2(b)) of the EEC Treaty provided for the Council of Ministers to adopt minimum standard directives with the aim of harmonising conditions in the working environment, as regards the health and safety of workers. Acting under that article, in November 1989 the Council adopted Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work. Consonantly with its treaty base, the Directive confined its attention to the health and safety of "workers".

32. So far as Great Britain is concerned, the necessary steps to bring the law into conformity with the Directive were originally taken in The Provision and Use of Work Equipment Regulations 1992 (SI 1992/2932). Those regulations were superseded by The Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) ("the 1998 Regulations"), which made certain drafting changes and also included provisions required by Directive 95/63/EC. The 1998 Regulations are the provisions in play in this appeal. Both sets of regulations were made under section 15 of the Health and Safety at Work etc Act 1974 ("the 1974 Act"), rather than – expressly, at least - under section 2(2)(a) of the European Communities Act 1972. Section 15 contains a wide power to make regulations for the health and safety of people at work and for the protection of other people against risks attributable to equipment being used for the purposes of the undertaking. See sections 1, 15 and 53(1) of the 1974 Act. The Secretary of State was therefore able to give full effect to the proposals of the Health and Safety Commission by making regulations which went further than the minimum requirements of the Directive: for instance, the 1998 Regulations impose requirements on persons other than employers.

33. The 1998 Regulations deal with health and safety requirements relating to work equipment. But those requirements are not to be seen in isolation. In particular, under Regulation 3(1) of The Management of Health and Safety at Work Regulations 1999 (SI 1999/3242), the employer must assess the risks to the health and safety not only of his employees while they are at work but also of persons not in his

employment arising out of, or in connexion with, the conduct by him of his undertaking. This obligation reinforces the general duties on employers under section 2 and section 3(1) and (3) of the 1974 Act. The aim is to identify the measures which the employer needs to take in order to comply with the requirements and prohibitions imposed under statutory provisions such as the 1998 Regulations. Corresponding duties are imposed on self-employed persons (Regulation 3(2)) – again, reinforcing the duty under section 3(2) and (3) of the 1974 Act. Various obligations of co-operation and co-ordination are imposed on two or more employers who share a workplace (Regulation 11) and on an employer who hosts employees from an outside undertaking (Regulation 12). For instance, the host employer must provide the employees' employer with information on the risks to their health and safety and on the measures taken to comply with the relevant statutory requirements relating to the employees (Regulation 12(1)).

34. Civil courts tend to come across health and safety regulations when someone has been injured and is suing by virtue of section 47 of the 1974 Act. Given the strict liability imposed by the 1998 Regulations, it makes good sense for those who have been injured to bring proceedings, wherever possible, for breach of the relevant regulation, rather than to rely on the common law of delict or tort or on the appropriate Occupiers' Liability Act. Nevertheless, when interpreting the 1998 Regulations, it is important to remember that civil liability for injuries is essentially a secondary feature. Their main purpose is not to give those who have been injured a straightforward route to damages, but to prevent them being injured in the first place. If this results in a broad swathe of strict liability in damages, that is simply one consequence of the correspondingly broad scope of the measures adopted to achieve that purpose.

35. The 1998 Regulations replaced a multitude of separate sets of Regulations which used to govern particular pieces of equipment, such as abrasive wheels, or particular industries, such as shipbuilding, and which were familiar to generations of personal injury lawyers. The 1998 Regulations are framed much more generally and work by requiring employers and others to apply their minds to the health and safety risks relating to work equipment. So, in order to think constructively about what goes on, or will go on, in their undertaking and to assess the risks, those who are potentially subject to the requirements must be able to determine what items constitute work equipment and what Regulation 4, for instance, requires them to do. It would be difficult to carry out that kind of exercise if items could slip in

and out of being work equipment, depending on what was being done with them at any given moment.

36. At the hearing of the appeal counsel concentrated on two issues. First, was the door closer "work equipment" in terms of the 1998 Regulations? Secondly, if so, was the pursuer "using" it when he was injured? Clearly, unless the door closer was work equipment, the pursuer's action based on the 1998 Regulations is irrelevant and must be dismissed – as the Second Division held. The question whether the pursuer was "using" the equipment arises because, under Regulation 4(1), for instance, work equipment must be suitable for the purpose for which it is "used". A majority of the Second Division would have held that, since the kind of repair which the pursuer was carrying out did not fall within the definition of "use" in Regulation 2(1), there was no breach of Regulation 4(1) when the pursuer was injured.

37. But use is relevant in another way. As I have mentioned already, the 1998 Regulations go further than the Directive and impose requirements not only on employers but on certain other people as well.

38. So far as employers are concerned, the relevant regulation is 3(2):

> "The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work."

The requirements which are imposed on an employer are to be found in Parts II to IV of the Regulations, the provisions in which all make reference to "every employer". But, an employer, simply qua employer, does not necessarily have any relationship with work equipment. The purpose of Regulation 3(2) is therefore to identify the work equipment to which those requirements apply: they apply to work equipment which is provided for use or is used by an employee of the employer at his work. Therefore, in order to discover whether the requirements in Parts II to IV apply, you must see whether the equipment has been provided for use, or has been used, by an employee of the employer at his work.

39. So far as people other than employers are concerned, the relevant regulation is 3(3) and (4):

"(3) The requirements imposed by these Regulations on an employer shall also apply —

(a) to a self-employed person, in respect of work equipment he uses at work;

(b) subject to paragraph (5), to a person who has control to any extent of —

(i) work equipment;

(ii) a person at work who uses or supervises or manages the use of work equipment; or

(iii) the way in which work equipment is used at work, and to the extent of his control.

(4) Any reference in paragraph (3)(b) to a person having control is a reference to a person having control in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not)."

40. By contrast with Regulation 3(2), Regulation 3(3) has to perform two functions: it must identify the persons, other than employers, on whom the requirements in Parts II to IV are to be imposed, and it must identify the work equipment in respect of which those requirements are to apply. Regulation 3(3)(a) identifies "a self-employed person" as a person to whom the requirements are to "apply" and provides that they are to "apply" to him in respect of work equipment he uses at work. Regulation 3(3)(b), on the other hand, simply identifies people to whom the requirements are to "apply" by reference to the control which they have in relation to work equipment. That control must be in connexion with a trade, etc (Regulation 3(4)).

41. The language of Regulation 3(3) is a little compressed. Although the draftsman refers to the persons, apart from employers, to whom the requirements in Parts II to IV "are to apply", that aspect of Regulation 3(3) really deals with the persons, apart from employers, on whom the requirements in Parts II to IV are *imposed* – to use the language in Regulation 3(2). For present purposes, it is relevant to notice that the requirements are imposed on, inter alios, a person who has control, to any extent, of work equipment, or of the way in which work equipment is used at work, but only "to the extent of his control."

42. The first defenders were the pursuer's employers at the time of the accident. So, under Regulation 3(2), the requirements in Parts II to IV were imposed on them if the door closer was work equipment and was provided for use, or was used, by an employee of theirs at work.

The draftsman of the regulation uses the past participle passive, "provided for use": the regulation does not mention who provided the equipment for use. In particular, it does not say that the equipment was provided by the employer. The form of words is plainly designed to allow for the common situation in this country where contractors supply the workforce, or some part of the workforce, to work with equipment provided by the owner of the workplace. Indeed, most of the workforce on North Sea oil platforms is supplied in that way. Alternatively, some work equipment may be provided by a third party, such as a plant hire company. It matters not: the requirements in Parts II to IV are still imposed on the employer of the employees who use the equipment. In such cases, Regulation 12 of the Management of Health and Safety at Work Regulations 1999, to which I referred in para 33, assists that employer to fulfil those requirements.

43. It is perhaps worth emphasising that the requirements are imposed on an employer if the work equipment is used by "an", ie any, employee of his. So, for instance, in the present case, if the control room door is work equipment, then the relevant requirements of Part II were imposed on the first defenders if any of their employees used the door to go in and out of the control room.

44. Moreover, although the trigger for the requirements being imposed on an employer is the use of the work equipment in question by any of his employees, most of the requirements themselves are not concerned solely with the health and safety of his employees. For instance, under Regulation 4(4) work equipment must be suitable in any respect which it is reasonably foreseeable will affect the health or safety "of any person". A requirement of that width is plainly necessary when work equipment will often be used in situations where not only visitors but employees of a number of other contractors are likely to be present and so to be within range of potential danger.

45. The second defenders are the platform operators. If they had employees on the platform, then, by virtue of Regulation 3(2), the relevant requirements of Parts II to IV would apply to the work equipment which their employees used. But, in addition, by virtue of Regulation 3(3), the relevant requirements would be imposed on the second defenders in respect of any work equipment of which they had control, to any extent – but only to the extent of their control. So, if they were in control of the control room door, then, by virtue of Regulation 3(3)(b), the relevant requirements of Part II would be imposed on them in respect of the door and its closer – irrespective of whether any

employee of theirs ever used it. Therefore, in terms of Regulation 4, work equipment which the second defenders controlled would have to be suitable in any respect which it was reasonably foreseeable would affect the health of "any person", including the pursuer, even though he was employed by someone else.

46. No party makes any averments about the control of the control room door and the House heard no submissions on the point. Nevertheless, it is easy to see that, in an appropriate case, issues could arise as to who was in control of the equipment in a particular area of the platform – for example, if, from day to day, all the work equipment in the kitchen was in the hands of the catering contractor and its staff. In that situation, the relevant requirements in Part II of the Regulations in respect of the work equipment would be imposed on the contractor, not only as the employer of employees using the equipment, under Regulation 3(2), but also as a person in control of the work equipment, under Regulation 3(3)(b). Of course, equipment may be in the control of more than one person and issues about the extent of the control exercised by each of them could arise.

47. As Lord Hoffmann has explained, Sheriff Tierney sustained the first defenders' plea to the relevancy and dismissed the action so far as directed against the first defenders. In his written case, the pursuer submitted that the sheriff had erred and that the House should allow a proof against both defenders. But, in the event, the House heard no detailed submissions on how Regulation 3(2) and (3) worked in this case. As the sheriff explained in his note, the contract between the defenders contains an indemnity clause in favour of the second defenders. For that reason, the two defenders have not been separately represented in the litigation. In these circumstances Mr MacAulay QC, who appeared for both defenders, was content to proceed on the basis that, if the pursuer's appeal succeeded, the House should allow a proof against both defenders.

48. I turn now to consider whether the control room door closer was "work equipment" in terms of the 1998 Regulations.

49. Precisely because, subject to certain specified exceptions, the 1998 Regulations are intended to cover all kinds of undertakings, Regulation 2(1) defines "work equipment" very broadly as "any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)". So *any* machinery, appliance etc for use

at work counts as "work equipment". A complication arises, however, because, in the same subsection, "use" in relation to work equipment means "any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning." This has prompted the idea – or fear - that something, which would not otherwise be regarded as work equipment, falls to be so regarded merely because it is, say, being repaired or serviced or cleaned, and so is being "used" at work in terms of the definition of work equipment.

50. As is often the case, the definitions in Regulation 2(1) could perhaps have been drafted more clearly. But in my view they create no real difficulty in the circumstances of this case. The definition of "use" in relation to work equipment in Regulation 2(1) applies "unless the context otherwise requires." In the definition of "work equipment" itself, the context does indeed require otherwise.

51. The machinery and apparatus etc of an undertaking are there to perform a useful, practical function in relation to the purposes of that undertaking. Depending on the nature of its business, the undertaking may, for instance, have lathes for cutting metal, axes for chopping wood, a furnace for refining ore, chalk for writing on blackboards, needles for sewing model dresses, hoists for raising loads, fork-lift trucks for carrying the loads from place to place, and, in the case of a courier business, bicycles, vans or aircraft for carrying letters and parcels. All these pieces of equipment would serve a useful function in the employer's business. So they are "for use at work" and fall within the definition of "work equipment". Indeed, many other things may be "for use at work" – for example, clocks to let the employees know the time, radios for them to listen to music while they work, kettles for them to make tea or coffee and water-coolers at which they can drink and gossip. All these will constitute work equipment – as indeed will, say, screwdrivers or radios of their own which employees are allowed to bring in and use at work.

52. By contrast, a business would not have machinery etc simply so that it could be programmed, transported, repaired or cleaned: if that were all that it was there for, the machinery would serve no useful, practical purpose in the undertaking. Rather, programming, transporting, repairing and cleaning are all operations which may have to be carried out on something that is "work equipment" because it serves some practical purpose, is "for use at work". These operations are included within the definition of "use" in relation to work equipment in order to

ensure that the equipment poses no threat to health and safety when any of them is being carried out. In other words, as the very form of the term to be defined ("'use' in relation to work equipment") suggests, you must first determine whether the item in question falls within the scope of the definition of "work equipment" in Regulation 2(1). If it does, the definition of "use" then lists some of the activities which count as "use" in relation to that item for the purposes of the 1998 Regulations.

53. In short, if the walls or floor of a factory, for example, are not to be regarded as "work equipment", they do not become "work equipment" simply because they fall into disrepair and an employee has to repair them; equally, if a drill is an item of "work equipment", it does not cease to be so merely because it breaks down and someone is repairing it. It follows that, where an employee is, say, transporting a drill, which any employee uses at work, from one part of a factory to another on his employer's fork-lift truck, both the drill and the fork-lift truck are "work equipment" in terms of Regulation 2(1). Similarly, if an employee uses a screwdriver to open the casing of a drill which he is in the habit of using, both the screwdriver and the drill are "work equipment".

54. For these reasons, I would reject May LJ's view that the 1998 Regulations "do not extend to that which the employee is working on as distinct from the equipment which he is using to undertake his work": *Hammond v Commissioner of Police of the Metropolis* [2004] ICR 1467, 1474C-D, para 25. He states the position too generally: in each of the examples which I have just given, the drill is "work equipment" which is used by an employee at work. Therefore, the relevant requirements imposed on an employer by Part II of the 1998 Regulations apply to the drill. Regulation 3(2) plays no part in the definition of "work equipment": it simply identifies one situation where the requirements in Parts II to IV apply to something that is "work equipment". Regulation 3(3) gives other such situations. I would accordingly reject the reasoning of the Second Division on this point: their Lordships were, understandably, following the approach of the Court of Appeal to the interpretation of Regulations applying to Great Britain.

55. The broadly formulated terms of Regulation 3(2) work satisfactorily in a case like the present. But it is at least possible that, in very different circumstances, they are capable of producing results which might be regarded as more questionable. In *Hammond v Commissioner of Police of the Metropolis* [2004] ICR 1467, 1474A-B,

para 24, May LJ envisaged a garage owner whose employee repairs a van which is an item of work equipment in a customer's business. Would the requirements imposed on an employer by Part II apply because, in terms of Regulation 3(2), the customer's work equipment was "used" by the garage owner's employee? Lord Hoffmann has highlighted many of the relevant issues, but the point is not for decision in this case and I express no view on it. It is enough to say that, whatever the answer may be, the garage hypothetical does not persuade me that, in the present case, the door closer is not to be regarded as "work equipment" simply because it was being worked upon by the pursuer.

56. I would therefore hold that, if the door closer in the present case was not work equipment when it was operating to close the control room door, it did not suddenly transform itself into work equipment when it stopped working properly and the pursuer was engaged in trying to repair it. Conversely, if the door closer was work equipment when operating to close the door, it did not cease to be work equipment when it broke down and the pursuer was trying to repair it. So the House must decide whether, when performing its normal function, the door closer is to be regarded as "work equipment" in terms of Regulation 2(1). I have put the issue in terms of the door closer, since that was how it was presented by counsel. But, as Mr MacAulay acknowledged, it may be better not to consider the closer in isolation. An employee who repairs a faulty switch or plug on a drill is not simply repairing the switch or plug: he is repairing the drill which is not working properly. Similarly, the pursuer was not simply repairing the closer: he was repairing the control room door which was not closing properly. So the issue to be determined is whether, when in operation, the control room door is "work equipment" for purposes of the 1998 Regulations.

57. To some extent, this is a matter of impression. Like Lord Hoffmann, however, I have come to the view that, on the pursuer's averments, the door, including the door closer, is to be regarded as "work equipment" in terms of the definition in Regulation 2(1). According to the pursuer, the door is used all the time by employees going in and out of the control room. Since a closer is fitted, it must be thought that the door should be kept closed when not in use – whether to prevent noise from disturbing those working in the control room or for some other purpose relating to what they do there. There is, therefore, nothing artificial in describing the door, including the closer, as an apparatus for use by employees at work. I find support for that conclusion in *Beck v United Closures & Plastics PLC* 2002 SLT 1299 where Lord McEwan held that two heavy doors, which employees had

to use many times a day to enter a room to gain access to machinery, constituted work equipment in terms of the 1998 Regulations.

58. The rival view might be that the door to the control room was not work equipment because it formed part of the fabric of the structure. But I doubt whether it would be wise to draw too sharp a division between work equipment and fabric. If an employer provides a clock for the use of his employees, it surely qualifies as "work equipment", whether it is free-standing or built into the walls. Moreover, for the reasons given by Lord Hoffmann, I find nothing in the other regulations to which the House was referred which would displace the conclusion that the door to the control room, including the closer, was "work equipment" in terms of the 1998 Regulations.

59. If, then, the door, including the closer, was "work equipment", was the pursuer "using" it when he was injured while easing a screw, in order to detach the closer and take it to the workshop to try to repair it? The Lord Justice Clerk (Gill) thought not - since the pursuer was "using" the equipment with which he was effecting the repair, but not the equipment that he was repairing: 2007 SC 469, 471, para 8. That conclusion is based on May LJ's reasoning in *Hammond v Commissioner of Police of the Metropolis* [2004] ICR 1467, which I have already rejected. Lord Johnston and Lord Marnoch went further, however. They held that, even if – contrary to their view - the door closer was work equipment, the pursuer had not been "repairing" it, in terms of the definition of "use" in Regulation 2(1) of the 1998 Regulations.

60. While recognising that "use" in Regulation 2(1) includes "repairing", Lord Johnston said this, 2007 SC 469, 479-480, para 46:

> "However in this context it is again important to place the context of reg 4 against the definitions in reg 2, since at all times the purpose I consider of the application of the phrase 'work equipment' is to protect the workman using such equipment. This might embrace routine maintenance or cleaning or even minor repairing while the machine is operating (cf *English v North Lanarkshire Council* 1999 SCLR 310). What in my opinion it could never embrace is a situation where work is being carried out of a major repair nature designed to return the equipment to a workable and safe state. This is what I consider the word

> 'suitable' must be construed to mean in reg 4, otherwise a circular situation is reached whereby the breakdown of machinery which requires to be repaired still renders the employer exposed to the terms of the relevant safety regulations as regards equipment being repaired. It is plain that reg 5 is designed to embrace an obligation to maintain and repair at a time when the machine in question is not otherwise in use. By definition in seeking to remove the door closer mechanism, which is what the pursuer was doing at the time of the accident, he cannot be said to be using it for a purpose connected with work as understood by the definition of 'use'. He is effecting an action of repair which is entirely removed from the normal working of the machine."

Lord Marnoch explained his view in this way, 2007 SC 469, 481, para 55:

> "In my opinion, however, when the Regulations are looked at in their entirety and reg 2 is read in its overall context, it becomes clear that, while reg 4 can certainly encompass 'use' by 'repairing, modifying, maintaining, servicing and cleaning', the intention is that this is only where such use can be seen as routine, such as where the ordinary employee is expected to do these things as ancillary or incidental to the main day-to-day use of the 'work equipment'. That, it seems to me, is quite distinct from the specialised repair (involving dismantling) in the present case which, on his own averments, the appellant was carrying out in his capacity as a 'mechanical technician'. In that situation, and on the present hypothesis, I am of opinion that the first defenders, as the appellant's employers, were doing no more and no less than attempting to comply with reg 5(1), namely to 'ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair'. In so far as the appellant's pleadings rely on reg 4 and reg 5(1) they are accordingly, in my opinion, on any view irrelevant."

61. I would respectfully reject the idea that the term "repairing" in the definition of "use" in Regulation 2(1) should be construed narrowly in this way. So far as the language and structure of the definition are concerned, there is absolutely nothing to indicate that "repairing" should

be given anything other than its "ordinary" meaning. More importantly, the kind of distinction favoured by Lord Johnston and Lord Marnoch - between routine, minor repairs and more serious repairs - makes no sense from the standpoint of ensuring health and safety. For instance, when selecting work equipment, a person who is subject to the requirement in Regulation 4(2) must have regard to the working conditions and to the risks to the health and safety of persons in the premises or undertaking in which it is to be used, and to any additional risk posed by the use of that work equipment. Their Lordships apparently accepted that, when selecting work equipment, an oil platform operator, for example, would need to have regard to any risks there might be to people on the platform when minor, routine repairs to the work equipment were being carried out. But, on their approach, the platform operator would not require to have regard to the (perhaps, far greater) risks to people on the platform when a piece of work equipment had to be taken out of service in order to undergo a major repair. So, in selecting, say, a gas compressor for use on the platform, the platform operator would have to consider the risks involved in the straightforward procedure of replacing a faulty external switch, but not the risks involved in shutting the compressor down and opening it up to replace some faulty internal component – with the possibility of volatile gas escaping into the atmosphere and causing an explosion if the equipment were not constructed so that the gas could be vented safely for the purposes of repairing the equipment. Such an interpretation would blow a hole in the protection afforded by the legislation. It simply cannot be right.

62. On the contrary, when selecting any item of work equipment, under Regulation 4(2) the platform operator would indeed have to consider whether a major repair could be carried out without imperilling the safety of the platform and everyone on it. Indeed, that is just common sense - not only for oil platforms but for any factory or workplace where major repairs to equipment may have to be carried out. In my view, the word "repairing" in Regulation 2(1) should therefore be given its "ordinary" meaning. In terms of that ordinary meaning, on his averments, the pursuer was engaged in "repairing", and so "using", the door, or door closer, when the arm of the closer sprang out and injured him.

63. For these reasons, I would allow the appeal and make the order proposed by Lord Hoffmann.

LORD CARSWELL

My Lords,

64. The appellant Peter Spencer-Franks, the pursuer in the action, sustained an injury to his mouth on 12 October 2003 when working in the course of his employment as a mechanical technician. He was employed by the first respondent Kellogg Brown & Root Ltd to carry out work on the Tartan Alpha oil rig in the Scottish sector of the North Sea, of which the second respondent Talisman Energy (UK) Ltd was the owner and operator. Whether he is entitled to recover on the averments made by him on the pleadings depends on the construction to be placed on the Provision and Use of Work Equipment Regulations 1998.

65. The appeal before the House is brought against an interlocutor of the Second Division of the Inner House of the Court of Session, whereby the appellant's appeal was refused and the second respondent's cross appeal was allowed, with the result that the appellant's action for reparation which he had brought in Aberdeen Sheriff Court was dismissed.

66. The matter was decided in the Sheriff Court as a preliminary issue upon assumed facts, which are to be taken *pro veritate* for the purposes of this appeal. The narrative is set out in paragraph 5 of the Statement of Facts and Issues as follows:

> " … [H]e was to inspect and repair the door closer on the central control room door on said installation. The closer was not closing the door properly. He stood on a portable stool to reach the door closer. He tried to prise off the linkage arm with a screwdriver but there was either an above normal amount of tension on the arm or it was seized in position. In order to assess what type of tool he required to remove the linkage arm he had to assess the tension on the linkage arm of the door closer. He applied pressure to the arm with his left hand whilst backing off a screw half a turn with his right hand so that he could assess the tension. The screw became completely disengaged and the linkage arm struck him on the face and he was injured. There were four or five washers under the screw."

Further averments are set out in paragraph 6:

> "6. The pursuer avers that the door was a busy door with people going in and out of the door all the time. He avers that when screwed fully home the screw should require three to four complete turns to disengage it. He avers that the screw had not been put in properly."

67. The outcome of this appeal turns on the construction to be placed on the 1998 Regulations and in particular the meaning of the phrase "work equipment" and whether the door closer constituted work equipment within the meaning of the regulations. As a matter of first impression I thought that there was much to be said for the view that the Directive and Regulations were intended to extend only to tools and machinery with which work is actively carried out, as distinct from more static items such as the door in question, but after careful consideration of the applicable provisions and their objective and of the arguments presented orally and in writing to the House, I have come to the conclusion that the appeal should be allowed, for the reasons I shall give.

68. The Provision and Use of Work Equipment Regulations 1998 (known generally for convenience as "PUWER 1998") were made under the powers conferred by the Health and Safety at Work etc Act 1974 and are the successors to the 1992 regulations, from which they vary slightly. They were made in compliance with the Council Directive 89/655/EEC (the Work Equipment Directive) and the objective of incorporating the requirements of the Directive has to be borne in mind in interpreting the regulations. As my noble and learned friend Lord Rodger of Earlsferry has pointed out in para 6 of his opinion, these sets of regulations replaced and amended a multitude of specific statutory provisions and regulations relating to particular trades and activities, including the sections of the Factories Act 1961 relating to machinery and such long familiar regulations as those governing woodworking, shipbuilding, power presses and abrasive wheels. They are accordingly generalised obligations governing a wide variety of activities and trades and require a construction which bears in mind the need to protect workers in such a wide range.

69. The definition of work equipment in Regulation 2(1) of PUWER 1998 is simple and broadly expressed:

> "'Work equipment' means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)".

It may be noted that this definition varied from that contained in the 1992 regulations, the most significant extra word being "installation". "Use" in relation to work equipment is defined as

> "any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning."

These definitions reflect those contained in the Directive, which by article 2 are to have the following meanings:

> "(a) 'work equipment': any machine, apparatus, tool or installation used at work.
>
> (b) 'use of work equipment': any activity involving work equipment such as starting or stopping the equipment, its use, transport, repair, modification, maintenance and servicing, including, in particular, cleaning."

70. The Annex to the Directive contains a series of provisions specifying requirements with which work equipment provided to workers after 31 December 1992 must comply. Most of these relate by their nature to machinery or power tools and might form the foundation for the suggestion that the definition of work equipment in the Directive was intended to cover only such items and not to extend more widely.

71. That is not, however, the way in which the courts have interpreted the regulations. Motor vehicles and their components and bicycles have been held to fall within the definition of work equipment. In *Mackie v Dundee City Council* [2001] Rep LR 62 a dining hall table being moved by a caretaker was held to be work equipment, as was a steel storage cabinet in *Duncanson v South Ayrshire Council* 1999 SLT 519. In *Beck v United Closures and Plastics plc* 2002 SLT 1299 heavy doors which had to be closed to enable machinery to be started up were held to be work equipment. In *Robb v Salamis (M & I) Ltd*, [2006] UKHL 56, 2007 SC (HL) 71 it was conceded, and so did not form the subject of argument before the House of Lords, that a step ladder used

by an employee on an oil rig to reach his bunk was work equipment, and in *PRP Architects v Reid* [2006] EWCA Civ 1119, [2007] ICR 78 a lift used by an employee in the common part of a building when leaving work was so classified: see generally the list of examples in *Munkman on Employer's Liability*, 14th ed (2006), paras 20.09 to 20.11 and *Charlesworth & Percy on Negligence*, 11th ed (2006), para 11-170.

72. The pattern of case-law was consistent until the decision of the Court of Appeal in *Hammond v Commissioner of Police of the Metropolis* [2004] EWCA Civ 830, [2004] ICR 1467. The claimant in that case was a police mechanic, who was repairing a police car when the wheel bolt which he was undoing sheared, causing him to sustain injury. The police car was owned by the second defendant the Metropolitan Police Authority, which was found not to be liable under the provisions then applying under PUWER 1992. The Court of Appeal allowed an appeal from the decision of the lower court in which the judge had held both defendants liable for breach of statutory duty. The court's basic reason stemmed from concern that such a decision would impose liability for an injury sustained by a mechanic working on a customer's car over whose defective condition his employer could have no control. In giving the leading judgment May LJ expressed the further opinion, which influenced the findings of the Court of Session in the present case, that the phrase "work equipment" does not cover a workpiece, an object provided by others on which the employee is working in the course of his employment. He stated his view in para 24 of his judgment that

> "the Regulations are concerned with what may loosely be described as the tools of the trade provided by an employer to an employee to enable the employee to carry out his work."

He qualified this remark by saying that his use of the expression "tools of the trade" was intended to be illustrative and not definitive, but the remark was picked up by Lord Johnston in para 43 of his judgment and formed the basis of his conclusion.

73. I do not think that that conclusion can be supported, attractive as the arguments in its favour may be. It seems to me inescapable that the Directive and regulations were intended to cover a wide range of objects used in the course of work and that once it is established that such an object is work equipment liability will attach if is defective in one of the

respects specified in the regulations, although the claimant may have been in the course of repairing it when injured.

74. The definition of work equipment in Regulation 2(1) is very broad indeed, and one should not restrict that breadth unnecessarily if the intention of the regulations and Directive to provide comprehensive protection to workers is to be fulfilled. Everything which comes within the description of "machinery, appliance, apparatus, tool or installation" is within the definition of the phrase "work equipment" if it is for use at work. The word "use" is in turn defined broadly and includes repair. Then under Regulation 3(2) the employer is liable if the equipment is "provided for use *or used* by an employee of his at work", when there is a breach of the requirements. One therefore has to ask first if the item in question is work equipment, then if it is provided for use or used by the claimant at his work. There may be difficulties in particular cases, as Lord Rodger has noted, in distinguishing work equipment from things which constitute part of the workplace, but I agree with him that it may not be wise to draw too sharp a distinction, and I would prefer to leave to a future case decisions on where the boundary may lie.

75. Application of the tests contained in these provisions gives a different answer from that reached by the Court of Session in the present case. In my opinion the door to the control room can properly be regarded, on the assumed facts, as work equipment. The door closer forms part of the door and I think that the door, which is a heavy door giving access to the control room, comes within the definition. It can be brought within it as being an installation, or possibly apparatus, for use at work.

76. The work equipment was "used" at his work by the pursuer, who was occupied in repairing it, and that engages the employer's liability under Regulation 3(2). I am unable to agree with the view expressed by Lord Johnston and Lord Marnoch in the Court of Session that "repairing" extends only to routine repairs and does not cover major repairs designed to return the equipment to a safe and workable state. In my opinion repairing means what it says, carrying out repairs to the equipment, and I can see no sufficient ground for a distinction between major and minor repairs. The respondents were jointly represented, because of the existence of an indemnity clause, but it seems to me that the second respondent operator of the oil rig would be jointly liable under Regulation 3(3)(b) as a person who has control to some extent of work equipment. If liability had to be decided in the absence of an indemnity agreement, the employer and the occupier would be jointly

liable to the pursuer and the court could apportion liability between them as it saw fit, taking account of their respective degrees of fault.

77. I accordingly would hold, in agreement with your Lordships, that on the assumed facts the door closer is capable of constituting work equipment being used by the appellant at the time of his injury and the action should not be dismissed. I would therefore allow the appeal and make the order proposed by my noble and learned friend Lord Hoffmann.

LORD MANCE

My Lords,

78. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Hoffmann, Lord Rodger of Earlsferry and Lord Carswell. The known facts are sparse. The appellant's request to the House is, indeed, for no more than for a "proof before answer" reserving the question of the applicability of the Provision and Use of Work Equipment Regulations 1998 SI 1998/2306 ("the 1998 Regulations") against both respondents for answer once the facts have been determined. But it is known that the pursuer was working on the Tartan Alpha platform operated by the second respondent, Talisman Energy (UK) Ltd. ("Talisman"), and that he was doing this as an employee of the first respondent, Kellogg Brown and Root Ltd. ("KBR") who were contracted, quite probably by Talisman, to provide maintenance services there. Whatever arrangements there were between the respondents seem to have included an indemnity clause in favour of KBR, and the two are represented by common counsel, who has indicated that, if the appeal succeeds against either, there is no objection to it succeeding against both.

79. The appellant's pleaded case relies exclusively on the 1998 Regulations. The recital to these Regulations records that they were made by the Secretary of State under inter alia s.15(1) of the Health and Safety at Work etc. Act 1974 and "for the purpose of giving effect without modifications to proposals submitted to him by the Health and Safety Commission ["HSC"] under section 11(2)(d) of the 1974 Act".

80. S.15(1) of the 1974 Act gives power to make regulations for any of the general purposes of that Act. S.1 of that Act provides that Part 1 of the Act (which includes s.15) "shall have effect with a view to (a) securing the health, safety and welfare of persons at work; (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work …". S.52(1) provides that (a) "work" for the purposes of Part 1 means "work as an employee or as a self-employed person, and (b) "an employee is at work throughout the time when he is in the course of his employment, but not otherwise".

81. The HSC proposals state (paragraph 25) that

> "In putting forward these proposals the HSC has been guided by the need to implement the European Directive [viz. the Use of Work Equipment Directive 89/655/EEC, itself made pursuant to Framework Directive 89/391/EEC] in full and on time, while ensuring the levels of safety are maintained and that we do not go beyond the Directive unless there are good grounds for doing so".

One area in which the Regulations go further than the Directive is reflected in the Explanatory Note to the 1998 Regulations, which records that the 1998 Regulations "also place ….. duties (not required by the Directive) on others, who now include (regulation 3(3) to (5)) certain persons having control of work equipment, of persons at work who use or supervise or manage its use or of the way it is used, to the extent of their control". Paragraph 44 of the HSC proposals explains this more fully:

> "The requirements on dutyholders in PUWER [The Provision and Use of Work Equipment Regulations] 1992 currently apply to employers, the self-employed and persons with control of non-domestic premises made available to persons as a place of work …. However, regulation 3(3)(b) has been drafted to reflect the way that work equipment is now used in industry where there may not necessarily be a direct "employment" relationship between the user and:
>
> (a) the persons who control the use of work equipment e.g. where a sub-contractor could carry out work on

another person's premises with work equipment provided by that person or a third party; or

(b) persons who control the equipment but not its use e.g. a plant hire company."

82. In Council Directive 89/655/EEC, "work equipment" is defined as "any machine, apparatus, tool or installation used at work". The Directive is focused on work equipment "selected" by an employer and "made available to workers in the undertaking and/or establishment" and on its suitability for such use "by workers without impairment to their safety or health" (article 3(1)). The 1998 Regulations define "work equipment" in regulation 2(1) as meaning "any machinery, appliance, apparatus, took or installation for use at work (whether exclusively or not)". The word "installation" was introduced in the 1998 Regulations, in order to reflect the language of the Directive: see paragraph 43 of the HSC proposals, which goes on to say:

> "…. "installation" covers e.g. a series of machines connected together, such as a paper-making line or an enclosure for providing sound insulation. "Installation" would not include an offshore installation but would include any equipment attached or connected to it."

This intention (which seems to me accurately to reflect that of the Directive) was duly repeated in the HSC Approved Code of Practice and Guidance issued under s.16(1) of the Health and Safety at Work etc Act 1974.

83. The definition of "work equipment" in regulation 2(1) is therefore to be understood as referring to equipment for use at work by an employee or by a self-employed person. This fits with regulation 3(2) and 3(3)(a), as well as with regulation 3(3)(b) which is on this basis directed to persons having a degree of control over such work equipment, or over persons using, supervising or managing the use of such work equipment, or over the way in which such work equipment is used.

84. The definition of "work equipment" embraces items for use at work "whether exclusively or not", and so recognises that it is possible, and in some contexts common, for an item to be for use at work at one time, but not at another. Take the company car used for an entirely private journey, quite possibly not even by the employee. Or take the

tools of an employed or self-employed builder's trade, which he uses at home to repair his own sink. On the other hand, an item does not cease to be "for use at work" merely because it is not actually being used at a particular moment in time, though standing by in a work context with a view to such use: see *Given v. James Watt College* [2006] CSOH 189; 2007 SLT 39.

85. The concept of "use" is defined in regulation 2(1) in very broad terms, as meaning "any activity involving work equipment and include[ing] starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning". If read literally in conjunction with the definition of "work equipment", this could lead to a conclusion that a private customer's personal item (not work equipment in his or her hands), entrusted to an undertaking for repair, became work equipment in the hands of an employee of that undertaking. No-one suggests that that would be a correct understanding of the 1998 Regulations. The appellant seeks to avoid it by reference to a distinction between items worked on and items with which work is done, and cited in his written case (para. 36) *Hammond v. Commissioner of Police of the Metropolis* [2004] EWCA Civ 830; [2004] ICR 1467 and *Haigh v. Charles W Ireland Ltd* 1974 SC (HL) 1, 37-38 per Lord Diplock. This is however a difficult distinction to draw in this connection in the light of, inter alia, the decision and reasoning of the House in *Knowles v. Liverpool City Council* [1994] ICR 243, where a flagstone being laid by a council employee was held to be "equipment provided by his employer for the purposes of the employer's business" under the Employer's Liability (Defective Equipment) Act 1969 in the context of which Lord Diplock's dictum under the Factories Act 1961in *Haigh* was found unhelpful by the House (see per Lord Jauncey of Tullichettle at p. 249B-F). The 1969 Act is still in force, though the protection which it affords overlaps to some extent with that provided by the 1998 Regulations.

86. A more persuasive reason why a private customer's private item, submitted for repair, could not be "work equipment" is advanced by my noble and learned friend Lord Rodger in his paragraphs 50 to 53. He suggests that, for the purposes of identifying something as work equipment, one should consider whether it is for use, in the sense that it performs a useful, practical function within and in relation to the purposes of the business. A lathe used in a repair workshop does this. But a customer's item being repaired there is the merely passive object of the purposes of the repair workshop. The flagstone being laid in *Knowles v. Liverpool City Council* could be regarded as fulfilling a

positive function in the Council's business, since it was being laid to improve the Council's public facilities.

87. What then is the position where an item which constitutes "work equipment" when being used for the purposes of business A is sent to business B for repair? My noble and learned friend Lord Hoffmann considers that the operator of business B would not be strictly liable under the Directive, because he would not have selected or made available the item for use in his business (para. 23), and doubts whether the Regulations would have any contrary effect (para. 26). My noble and learned friend Lord Rodger leaves the point entirely open (para.55). If one applies Lord Rodger's test which I have identified in the previous paragraph of this speech, there is a case for saying that the items never had any useful, practical function within and in relation to the purposes of business B, that it was never more than the merely passive object of the purposes of business B's repair workshop, and that the Directive and Regulations were not intended to impose strict liability in such a case.

88. In the present case, the door closer had not been sent anywhere. It was under examination in situ with a view to repair. Even so, if one applies Lord Rodger's test, I doubt whether it can be regarded as work equipment in the context of the relationship between the appellant and KBR as his employers. The door closer was not fulfilling any useful, practical function within and in relation to the purposes of KBR's business, other than as the object of repair. The appellant argues that the United Kingdom cannot by transposition into domestic law of the Directive have intended to diminish the protection previously available to workers under the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976 SI No. 1019 (which were replaced in two stages by the Provision and Use of Work Equipment Regulations 1992 SI no. 2932 and the Offshore Installations and Wells (Design and Construction, etc.) Regulations 1996 SI No. 913). But the 1976 Regulations were concerned not with employer-employee relations, but with the imposition of maintenance and other safety duties on the operators of offshore installations. Thus in *Breslin v. Britoil plc* 1992 SLT 414, cited by the appellant, it was only the platform operators who were held liable under the 1976 Regulations, while the employers were held liable at common law only.

89. However, there is a strong case for regarding the door closer as equipment for use at work in relation to any employees using it in the ordinary course of the platform's productive operations, whether employed by Talisman or not. As Lord Rodger points out in his

paragraph 57, there was presumably a purpose in keeping the door closed (the appellant has suggested that they would on proof intend to show that the purpose included maintaining positive pressure within the control room as so avoiding the escape of potentially flammable gases in the event of a leak there). Any employees of the platform operator or any other undertaking operating the platform so used the door closer for and during access to and egress from the control room. The door closer was certainly not working properly, and it is pleaded that it was not suitable for the purpose for which it was provided because the screw which secured its arm was not properly in place (contrary to regulation 4(1)). It is also pleaded that (contrary to regulation 5(1)) it was not "maintained an efficient state, in efficient working order and in good repair", for the same reason. On this basis and in the absence of any submissions to the contrary, Talisman, either as employer if they had employees using the door or as a person in control of the door closer being used by the employees of any other undertaking operating the platform, would be strictly liable under the 1998 Regulations for any injury caused to any such employees using the door closer at work.

90. That leaves only the question whether the same strict liability exists towards the appellant, who was not using the door for or during access to or egress from the control room and not using the door closer to close the door. He was trying to repair the door closer. Nonetheless, he was undertaking the repair in the course of work. It was a repair which might well, in other circumstances, have been undertaken by an employee of the platform operator, in which case the combination of the definition of "use" in Regulation 2(1) and of Regulations 4(1) and/or 5(1) would have made Talisman as employer and/or controller of the door closer strictly liable for its suitability for repair. Even if the employee was a specialist employee not otherwise engaged in the day-by-day use of the door closer, the Regulations would then still have imposed strict liability on Talisman: see Regulation 7(1). It would be curious if a platform operator's strict responsibility under the Regulations for the safety of work equipment for repair should depend upon whether it chose to employ the repairers itself or to employ outside contractors to undertake them. So I agree that the appeal should succeed in relation to Talisman as platform operator.

91. Nonetheless, I believe that the difficult exercise of identifying the outer parameters of the Regulations' application requires further thought and more detailed submissions on another occasion. A persuasive case can be made for saying that the Regulations do not supersede the ordinary principles governing liability to third parties, merely because a third party suffers injury due to a defect in work equipment. The HSC

endorsed this in its proposals, to which the Regulations were intended to give effect "without modifications", when the HSC said in paragraph 47:

> "At present, PUWER does not apply to persons who provide work equipment as part of a work activity for use by members of the public e.g. an air line on a garage forecourt or lifts provided for use by members of the public in a shopping mall, we propose to retain this position in PUWER II. This is a grey area where consumer legislation and health and safety legislation overlap so it is not proposed to apply PUWER to work equipment provided primarily for use by members of the public. Members of the public will continue to be protected by the requirements of [the Health and Safety at Work Act], primarily sections 3 and 4."

In *Donaldson v. Hays Distribution Services Ltd.* 2005 CSIH 48; 2005 SC (Vol. 1) 523, the First Division adopted a similar distinction, when holding that a visitor who was crushed between a lorry and a loading bay while collecting her purchases at a shopping centre did not have a strict liability claim under the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004) against the lorry driver's employers or the controllers of the bay. However, it is unnecessary in my view to consider such problems further in circumstances where the injured appellant was a contractor at work repairing work equipment controlled by the platform operator against whom the claim is brought.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

92. Having read in draft the opinions of my noble and learned friends, Lord Hoffmann, Lord Rodger of Earlsferry, Lord Carswell and Lord Mance, I can be brief in explaining why, in agreement with them, I consider that this appeal should be allowed.

93. Interpreting the 1998 Regulations is not an easy task, at least judging by the problems posed by the issues raised on this appeal. The first issue is whether the door closer in this case was "work equipment"

within regulation 2(1) For the reasons given by Lord Hoffmann in paras 10 and 11, by Lord Rodger at para 49, Lord Carswell at paras 73 and 74, and by Lord Mance in para 89, and as a matter of ordinary language, I consider that the door closer was an "appliance …. or installation for use at work".

94. I also agree with the reasons of Lord Hoffmann, in paras 12 to 14, and of Lord Rodger, in para 58, for rejecting the argument that, because the door closer might be regarded as part of the premises to which it was attached, it cannot be "work equipment". There may well be cases where it could be difficult to decide whether an item should be treated as work equipment or as part of the fabric of work premises, but this is not such a case. I also agree with Lord Rodger at para 56, where he says that the door closer did not cease to be work equipment because it had broken down or was being repaired.

95. Accordingly, the door closer was work equipment for which Talisman was responsible under the 1998 Regulations to its regular workers on the Tartan Alpha platform as they "used" it. The second issue is whether Talisman has a similar responsibility to the appellant, who was in the process of repairing the door closer as an employee of KBR, to whom the repair of the door closer appears to have been contracted.

96. Once a particular item is "work equipment", at least from the perspective of a particular employer, it seems to me that it cannot cease to be work equipment (save perhaps in cases such as that of the company car when used for an entirely private journey, as mentioned by Lord Mance at the beginning of para 84). Accordingly, in this case, given that the door closer was "work equipment", it did not cease to become so simply because it was being repaired, rather than used as a door closer. In this connection, I agree with your Lordships that the reasoning of the Court of Appeal in *Hammond v The Commissioner of Police of the Metropolis* [2004] ICR 1467 (which could be said to be a weaker case than this for the employer, as the claimant in that case was his employee) cannot be supported.

97. Like Lord Mance in para 86, I find the reasoning of Lord Rodger in paras 50 to 54 persuasive, and it seems to me that, in practice, the reasoning of Lord Hoffmann in para 23 will, at least normally, amount to the same thing.

98. The limits of the scope of the duty imposed by the 1998 Regulations so far as third parties are concerned need not be decided in this case. There is much to be said for the view that there is no limit to the class of persons to whom the duty is owed, as is implied by what Lord Hoffmann says in paras 19 and 20. Thus, at least as at present advised, there seems to me to be nothing in the express terms of the 1998 Regulations to suggest that the duties they impose are to be limited to full-time employees, or any other limited class of persons.

99. Having said that, for the reasons given by Lord Mance in para 90, I consider that Talisman's duties under the 1998 Regulations in relation to the door closer did extend to the appellant, although I share the concerns as expressed in the following paragraph. I also agree that, for the reasons given by Lord Rodger, at paras 59 to 63, the appellant was "using" the door closer when he was repairing it, in the light of the very wide definition of "use of work equipment" in regulation 2(1).

100. The final issue is, given that the appellant's appeal should be allowed in relation to Talisman, whether it should also be allowed in relation to KBR. On that issue, as Lord Hoffmann has explained in para 28, it has been conceded by counsel representing both respondents that, if Talisman is liable to the appellant for the damages that he claims, KBR should also be so liable. Accordingly, while I share Lord Mance's concerns in this connection as expressed in para 88, it is unnecessary to consider that aspect any further.