Bullets 178
CO Hunt

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSI/248/03

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal (the tribunal) held in Aberdeen on 11 December 2002 is wrong in law. Accordingly, I set it aside and remit the case for rehearing by a differently constituted tribunal. The appeal was made to the Commissioner by the Secretary of State.

The issue

2. In *Perks v. Clark (HM Inspector of Taxes) (and others)* [2001] EWCA Civ 1228 (*Perks*), a decision of the Court of Appeal, Lord Justice Longmore said at paragraph 56:-

> "This case shows that 'watertight definitions do not exist even for ships', see H Meijer, The Nationality of Ships (1967) p. 15."

3. In this appeal, the question arises of the meaning of the phrase "work in ships' engine rooms" in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967) (the regulations). (At page 927 of Vol. 1 of the annotated Social Security Legislation 2003, the prescribed occupation is wrongly given as "work in ship's engine rooms".)

4. The particular context in which the issue arises is the offshore oil industry. Professor Ursell, a mathematician at the University of Manchester, an expert in analysing ship waves, wrote a paper in 1962, "Slender oscillating ships at zero forward speed". In describing embellishments of his theory of wave interactions with floating structures, in the mid 1980s with respect to oil rigs he liked to recount that:-

> "The ship at zero speed has now arrived."

But is an oil rig a ship?

The legislation

5. For the purpose of the regulations, "the Act" means the Social Security Contributions and Benefits Act 1992. The Act sets out the industrial injuries scheme, which includes disablement benefit as a result of a loss of faculty from a "prescribed industrial disease". The regulations set out the necessary conditions to constitute such a disease. Not only is the diagnosis important, but so is the occupation in which the claimant worked. The relevant applicable provisions from the regulations in this appeal are the following:-

> "2. For the purposes of ..... the Act
>
> (a) subject to paragraphs (b) and (c) of this regulation ... each disease or injury set out in the first column of Part I of Schedule I hereto is prescribed in relation to all persons who have been employed on or after 5th July 1948 in employed earner's employment in any occupation set against such disease or injury in the second column of the said Part;
>
> .....
>
> (c) occupational deafness is prescribed in relation to all persons who have been employed in employed earner's employment
>
> (i) at any time on or after the 5th July 1948; and

(ii) for a period or periods (whether before or after 5th July 1948) amounting in the aggregate to not less than 10 years

in one or more of the occupations set out in the second column of paragraph A10 of Part I of Schedule I to these regulations and in the case of a person who during such period as is specified above has been concurrently employed in two or more of the occupations described in sub-paragraphs (a), (b), (d), (e), (f), (g) and (h) of the said paragraph A10 those occupations shall be treated as a single occupation for the purposes of determining whether that person has been employed wholly or mainly in work described in those sub-paragraphs

...

25. (1) ...

(2) ... disablement benefit ... shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years after the latest date, before the date of the claim, on which the claimant worked in employed earner's employment in an occupation prescribed in relation to occupational deafness.

...

SCHEDULE I
PART I

...

Prescribed disease or injury	*Occupation*
...	*Any occupation involving:*
A10. Sensorineural hearing loss amounting to at least 50 dB in each ear, being the average of hearing losses at 1, 2 and 3 kHz frequencies, and being due in the case of at least one ear to occupational noise (occupational deafness).	... (s) work in ships' engine rooms ..."

Background

6. The error of law by the tribunal in this case is that it failed to make adequate findings of fact. Therefore, some of what follows will be subject to clarification by the new tribunal at the reconvened hearing.

7. On 11 April 2001, the claimant made a claim for industrial injuries disablement benefit in respect of prescribed A10, known as occupational deafness. His date of birth is 6 October 1931. He stated that he had driven cranes offshore for many years in noisy

workplaces. (He also detailed use of pneumatic percussive tools. He conceded at the tribunal hearing that his claim did not succeed under this heading and the matter was not further pursued. It has not, therefore, been considered in this appeal, but the claimant is not precluded from opening the matter again at the new hearing.)

8. According to a representative of his last employer (see page 69 of the papers), the claimant worked with them from 27 September 1984 until he retired on 31 October 1996. His last trip was completed 25 October 1996.

9. In the information first supplied by the claimant, he said that he was working as a crane operator on the North Alwyn from October 1986. However, in a statement made on 1 August 2002, the claimant said that "in the five years prior to my retirement I worked in a crane engine room on semis." (By "semis" is meant semi-submersible oil rigs.) **The Secretary of State is directed to clarify with the employer, whose communications all refer to work only on the North Alwyn, on what types of installation the employer says that the claimant worked in the critical period 11 April 1996 to 25 October 1996.**

10. The claim for disablement benefit was refused because the decision maker (DM) held that the claimant does not satisfy the test that he has worked in an occupation prescribed in relation to occupational deafness in the 5 years preceding his claim, i.e. on or after 11 April 1996. This was on the basis that he had worked in that period on the North Alwyn Platform which, it is contended, is an offshore platform not a ship and that, in any event, he was a crane operator and the crane was not located in a ship's engine room.

11. The claimant has been represented throughout by a firm of solicitors (the solicitor). However, the solicitor has been unable to appear at a hearing on behalf of the claimant because the latter is not eligible for legal aid. Nor could the claimant attend any oral hearing before me because of disability. Nevertheless, written submissions have been lodged by the solicitor and legal authorities cited.

12. The documentation before the tribunal included the information that in 1984 the claimant had a hearing deficit but not one to preclude offshore working. There was also a list supplied by the claimant which described oil rigs on which he had worked as follows:-

"Platforms worked on:	Beatrice Alpha; Beatrice Bravo; Thistle Field, Beryl; Montrose Alpha; North Alwyn
Semi-Subs worked on:	Sinbad Saxon; Ali Baba
Jacks-Ups worked on:	Bay Driller"

The tribunal decision

13. The claimant was present at the tribunal hearing although (as already noted) without a representative. The Secretary of State was not represented, even though this was a difficult case. The lack of a Presenting Officer at a judicial hearing is much to be regretted. In the tribunal's decision notice, it is said that:-

> "[The claimant] gave us a very careful description of how the cranes were placed on the rigs and were equivalent to the engine room on a conventional ship, moving the rig around."

14. The Record of Proceedings amounts to only two manuscript pages, which is somewhat surprising given the matters which required clarifying. The tribunal unanimously allowed the appeal. It held:-

> "... He was employed in a ship's engine room at the relevant time. The five and ten year rules are satisfied and the case is referred back to the decision-maker for consideration of diagnosis and disablement questions."

15. Their relevant findings were these:-

> "2. [The claimant] was in the Merchant Navy then employed as a crane operator/bosun. He retired on 31/10/96 and in the five years before the date of his claim he was employed by McAlpine Humber Oak/Kvaerner. He worked on cranes attached to "jack-ups" and oil rigs such as Beatrice Alpha, Beatrice Bravo, Thistle Field, Beryl, Montrose Alpha and North Alwyn. Some of the rigs on which he worked were platforms but others were semi-submersible oil rigs. In some cases, the cranes provided the power to move the direction of the rigs in a complete circle. He sat in a cabin with a thin metal division between himself and 45 tonne motors, which were extremely noisy and could not wear ear defenders because he would have been unable to hear instructions being issued. He was exposed to loud machinery noise every day during his entire 12-hour work shift and was working in a very confined space. He was involved in this type of work for at least ten years in total and for the five years prior to his claim.
>
> 3. Structures such as semi-submersible oil rigs that can be navigated with or without the aid of tugs come under the definition of "ships" as defined by Section 742 of the Merchant Shipping Act 1894 and this has been accepted by the courts. In addition, in some of the rigs on which he worked the engine driving the rig was attached to the crane and an integral part of the area in which he was working. The engine rooms were driven by steam with steam winches and petrol and diesel, then in later years the engines were electric/hydraulic. It can be said that he worked in a ship's engine room.."

16. The tribunal's reasoning, under its heading "has he worked in a ship's engine room?", was the following:-

> "... Over the years there have been several definitions of 'ship' – some with reference to navigation and the fact that no oars are used and others using the word 'vessel'. The traditional concept of 'ship' has proved inadequate in the modern age of oil rigs and the Secretary of State has powers to make Orders to cover specific situations so that something 'adapted for use at sea' can be designated as a ship. The law recognises that oil rigs can be classified as ships, for example one can arrest an oil rig in the same way as a conventional ship in certain circumstances. In simple terms, the test for whether or not something is a ship is whether it is capable of floating on water and moving. Some rigs are fixed and therefore platforms rather than ships, but others are capable of floating and being 'navigated' and therefore accepted as ships.
>
> Some guidance is to be found in the Stair Encyclopaedia of the Laws of Scotland in the chapter on shipping and in particular at page 60, footnote 14, where it is said,

> ***'Structures such as semi-submersible oil rigs that can be navigated with or without the aid of tugs would appear to come within the definition of 'ship' as defined in s 742 of the Merchant Shipping Act because of the use of the word "vessel" in that definition, even if not within the meaning of 'ship' in the narrow sense. The position of fixed production platforms is more difficult as they are normally incapable of navigation, being required to be made ready for navigation and that only with the assistance of tugs.'***
>
> We accepted [the claimant's] evidence that within the five year period he was employed on several semi-submersible rigs which did float and move under their own power. For the purposes of his exposure to engine noise there seems little difference between [the claimant's] situation and those working in a conventional ships' *[sic]* engine room.
>
> Having questioned the appellant closely we noted that although he worked inside a crane cabin, in many instances the cabin housed the engine, which drove the rig, and on other occasions there was only a thin metal division between the cabin and the engines. The noise came from the steam and diesel engines and steam winches. He wore no ear protectors.
>
> We were satisfied that on the balance of possibilities *[sic]*, he worked in ships' engine rooms for at least 10 years and for the five years prior to his claim. ..."

Appeal to the Commissioner

Arguments on behalf of the Secretary of State

17. The Secretary of State submits that the evidence establishes on a balance of probabilities that, in the relevant period from 11 April 1996, the claimant worked only on the North Alwyn which, according to the claimant's own evidence supplied at page 67, is a platform. The Secretary of State continues:-

> "It is well established, I submit, that platforms are immobile structures and cannot, therefore be classed as 'ships'"

18. It is contended by the Secretary of State that the tribunal implicitly recognises that a fixed production platform may not fall within the definition of a ship but finds, without further explanation having regard to the documented evidence, (and like me, the Secretary of State is unable to read all of the Record of Proceedings) that:-

> "... within the five year period [the claimant] was employed on several semi-submersible rigs which did float and move under their own power."

19. Therefore, essentially, the Secretary of State's grounds of appeal are that the tribunal made a decision unsupported by the evidence. The tribunal made no findings of fact in relation to the precise dates and type of rigs that the claimant worked on during the period April 1996 up to the date of his retirement in October of that year, nor in relation to the ten year period. The Secretary of State produced a copy of CSI/524/99 (to which I shall refer later in this decision), but distinguishes the oil rig under discussion there as being a "mobile oil rig".

20. A Legal Officer to the Commissioners then requested the Secretary of State to investigate whether the North Alwyn is listed in Lloyd's Register and also to address the implications of *Global Marine Drilling Company v. Triton Holdings Limited (Global Marine),* a decision of the Outer House of the Court of Session 1999 GWD 39-1905 and of the *Perks* case (citation above at my paragraph 2). The Secretary of State submitted a lengthy response to that Direction.

21. The Secretary of State first refers to the report on occupational deafness dated 8 November 1988 by the Industrial Injuries Advisory Council (Cm 817) which preceded the amendment introducing the prescribed occupation in issue under sub-paragraph (s) of paragraph A10 of Schedule 1 to the regulations. There are some errors in the extract provided by the Secretary of State, so I quote from the text of the actual report:-

> **"SHIPS' ENGINE ROOMS**
>
> 59. The aim of our study was to establish values of Leq (8 hr) for engine room staff in as wide a range of ships as possible. There was consultation with the Department of Transport's Marine Directorate, the Hygiene Section of a multinational oil company; marine superintendents of shipping companies gave advice as did the General Council of British Shipping who were also generously helpful in mounting field work. Initial guidance regarding sources of information was given by the National Union of Marine Aviation and Shipping Transport Officers. Studies were done on six vessels ranging from a tug of a Thames towing company to a 27,200 ton cruise liner, a range considered to be representative of the shipping industry as a whole.
>
> 60. After the field work and consultations already described, and taking account of the seafarer's special work routines and the actual time spent at sea compared to in port or on shore, it became clear that the risk for the majority of engineer staff would not warrant prescription at this stage. But, there were other factors to consider. For example, in ships with high speed engines and manned engine rooms, e.g. some small tankers, the risk justifies prescription. There are cases of engineer staff who have suffered the minimum degree of hearing loss required for benefit entitlement. Lastly, we learnt that for engine room staff impaired hearing can lead to the loss of livelihood through medical discharge. We consider that this unusual factor weighs the balance in favour of prescription.
>
> **Recommendation**
>
> 61. We, therefore, recommend that work in ships' engine rooms should be added to the list of prescribed occupations."

22. The Secretary of State then notes that:-

> "After considering the above extract from the report the Commissioner, in decision R(I)2/97, stated 'Manifestly, the context in which consideration was being given to prescribing ships' engine rooms as a relevant occupation was the shipping industry'." (The above quotation is from paragraph 9 of R(I)2/97)

23. The Secretary of State summarises the facts and conclusions in *Global Marine* and in *Perks* in the following way. In *Global Marine*, the Lord Ordinary held that what was described (without further description) as a "mobile offshore drilling unit" could be subject to arrestment under s.48 of the Administration of Justice Act 1956 because the said s.48 states that:-

> " 'Ship' includes any description of vessel used in navigation not propelled by oars."

Moreover, having regard to cases in other jurisdictions:-

> "... that the preponderance of authority is against the view that either self-propulsion or ability to steer is regarded as essential to the concept of a vessel."

24. In the case of *Perks*, the Court of Appeal was concerned with the tax position of employees working on "jack-up rigs" operating in the North Sea. At the relevant time, there was no definition of "ship" for the purposes of tax law. But if a person worked on a "ship" then they could take advantage of more generous provisions in relation to exemption to income tax for work performed abroad.

25. The Court of Appeal decided that it was right to apply the then definition of "ship" in the Merchant Shipping Act 1894, which was still current in its basic form in 1988 when the relevant tax provisions were introduced, and which read:-

> " 'ship' includes every description of vessel used in navigation not propelled by oars."

(The definition has since been replaced by the Merchant Shipping Act 1995, s.313, which drops the phrase "not propelled by oars".)

26. The Court of Appeal considered that ships and shipping had been governed by the Merchant Shipping Acts for so long and the same definition had been repeated so often in the cases, that it would be unsatisfactory to determine the meaning of the word "ship", in legislation which had no specific definition of that term, without reference to the definition in the Merchant Shipping Acts.

27. Having carefully reviewed the judicial authorities, Carnwath J in effect gave that definition the content (see paragraphs 42 and 43 of his judgement, which are set out in full in the Secretary of State's second submission) that, provided navigation (in the sense of movement across water but without the necessity that such movement is for conveying persons or cargo):-

> "... is a significant part of the function of the structure in question, the mere fact that it is incidental to some more specialised function, such as dredging or the provision of accommodation, does not take it outside the definition. There may be an issue of degree as to the significance of the navigation on the facts of a particular case, but that ... is a question for the fact-finding tribunal." (paragraph 42)

The judge had earlier accepted that "navigation" does not necessarily involve an ability to navigate under the vessel's own power.

28. Furthermore:-

> ".. in most cases the categorisation of the structure, as a ship or not, should be governed by its design and capability, rather than its actual use at any time." (paragraph 43)

29. The Court of Appeal unanimously held that the Tax Commissioners did not err in law in deciding that a jack-up rig was a ship, because each such rig has a floating hull and retractable legs so that it may be towed from time to time to different positions in the North Sea and then jacked-up for drilling purposes.

30. Paragraphs 58 and 59 of the concurring judgement of Longmore LJ are also quoted by the Secretary of State in the further submission. These read:-

> "58. In these circumstances I consider that the Commissioners made no error of law in asking themselves the question whether the oil rigs in question were used in navigation and answering that question in the affirmative. It is true that some of the authorities regard the function and purpose of the structure as important but the critical question is whether the structure is used in navigation. It was open to the Commissioners to find that they were and that must be the end of the matter.
>
> 59. It is not part of the function of this court to provide a definition of a ship, watertight or otherwise. It is, however, part of our function to encourage consistency of approach in fact-finding tribunals. Drilling ships and drilling barges must be ships. Semi-submersible oil rigs in which drilling operations are carried out while the rig is in a floating condition, submersible oil rigs in which drilling is carried out when the rig is resting on the sea bed, and jack-up drilling rigs which, when drilling, have legs resting on the sea bed (and are thus not subject to the heaving motion of the sea, in the same way as semi-submersible oil rigs and drilling ships) are all different forms of structure; it could be said that since the jack-up rigs cannot perform their main function without their legs being on the sea bed, they should be singled out and should not be regarded as ships. It would, however, be unsatisfactory if some forms of oil rigs were ships and others were not. One approach should be that all three forms of oil rig should either be ships or not ships. Mr Michael Summerskill observed in his *Oil Rigs: Law of Insurance* (1979) page 85 that there would be a certain logic in such an approach. I agree and, in any event, I do not consider that the Commissioners' findings or conclusions can be successfully assailed."

31. The Secretary of State does not dispute that the types of oil rigs discussed in *Global Marine* and *Perks* are ships. However, he submits that the North Alwyn (or Alwyn North, as it is sometimes called) is a large immobile structure. He submits further information about the North Alwyn. This is that it sits in 126 m. of water and consists of two platforms linked by a 73 m. long bridge. One platform is the drilling and accommodation platform and the other is the processing and treatment platform. The bridge between the two platforms provides a walkway and, in addition, carries the oil and gas between the drilling and well facilities on one platform and the process facilities on the other. The bridge also carries the links for systems common to both platforms – electric power, fire and gas control, the emergency shutdown system, process control and tele-communications. Oil and gas are transported via pipeline systems to terminals on land.

32. The Secretary of State submits that:-

> "... whilst the structure would, at some point, have been transported to its location, that journey would not meet the test of '"navigation" being a significant part of the function of the structure in question' set out by the Court of Appeal at paragraph 42 of James Edward Perks and others v David Clark and others."

33. The Secretary of State further submits that, in the information which he supplies (all of which is now available to the new tribunal and was available to the claimant before I made this decision), it is pointed out that a platform can be built from concrete or steel and that most platforms are massive compared to other types of installations. Details are also included on other types of oil rig, for example, semi-submersibles, jack ups, flotels, drill ships and floating production and storage units. The Secretary of State submits that the North Alwyn is a large platform, which is immobile apart from its initial journey to its location and a return journey at some later stage. This does not amount to a ship within the definition given by the Court of Appeal in *Perks*, and therefore does not amount to a ship for the purposes of prescribed disease A10.

34. The Secretary of State lodges copies of the relevant pages to show that there is no entry relating to either Alwyn North or North Alwyn in the 2003/2004 Lloyds Register of Shipping. However, it is listed in the Lloyds Maritime Directory (2001) under the INMARSAT Ship Directory Section. The INMARSAT is a global satellite communications system, originally maritime focused but now serving a broad range of markets.

35. The submission concludes:-

> "The evidence shows the North Alwyn to be a static platform, not having any of the characteristics of structures accepted as 'ships' within the accepted definitions of that word ..."

Arguments on behalf of the claimant

36. In response, the solicitor submits a case before the Special Commissioners in December 1999, *Lavery v. Macleod (HM Inspector of Taxes) (Lavery)*. This involved the same point at issue between the parties as in the *Perks* case. Again, the tax payer was employed in various capacities on "a mobile offshore drilling unit, known as a 'Jack-up Rig'". The case contains further valuable information about jack-up drilling rigs, semi-submersible drilling rigs and drillships.

37. It is stated that "ocean towage of jack-ups and semi-submersibles for their re-location from one drilling site to another is commonplace." Jack-ups are described as "... basically barges fitted out for offshore drilling, with legs which enable them to 'stand' on the sea bed. ... Drillships have the appearance of conventional ships, but with a large derrick standing in the centre of the vessel. Semi-submersible drilling rigs are rectangular in shape and supported by six, or sometimes eight, pontoons which are able to maintain the deck of the unit at a suitable height above the surface of the water."

38. Although it "does not have the appearance of a ship, it cannot propel itself through the water and it does not even possess a rudder," the Special Commissioners held that the "jack-up rig" was a ship. They were particularly impressed by the length of the voyages the unit in fact undertook. They did, however, note that:-

> "In considering the long list of authorities which have been placed before us it seems to us that each of them turns upon its own special facts."

As the Inland Revenue had accepted a semi-submersible unit as a ship, the Special Commissioners believed that status should be accorded also to the particular jack-up rig with which it was concerned, but concluded:-

> "... The world of offshore drilling is developing fast and it is possible that other units may come into existence, or already exist, which may, or may not satisfy the courts as to their status as ships."

39. The solicitor points out that the tribunal confirmed that:-

> "In simple terms the test for whether or not something is a ship is whether it is capable of floating on water and moving."

40. The solicitor further submits that the Secretary of State in the written submission dated 28 September 2003 accepts that the North Alwyn would have to be transported to its location and then require a return journey at a later stage. As such, the solicitor contends that the North Alwyn is capable of both floating and moving.

41. Moreover, in *Perks* at paragraph 59, it is stated:-

> "It would, however, be unsatisfactory if some forms of oil rigs were ships and others were not."

Consistency and equity is required. It can never have been intended that some workers would be entitled to disablement benefit in the event of noise exposure working in the offshore oil industry while others doing identical jobs would be ineligible purely because they worked on a different design of oil rig.

42. The tribunal found that the appellant worked inside a crane cabin which, in many instances, housed the engine which drove the rig. Those findings were the result of close questioning. No appeal lies to the Commissioner in respect of errors of fact.

43. The solicitor submits that it is likely that the North Alwyn has sophisticated navigational equipment together with provision of life rafts on board. It is not necessary for a vessel to be able to navigate under its own power. It is suggested that the Secretary of State has sought to focus attention purely on the North Alwyn. But the tribunal's finding that, in the five years before the date of claim the appellant worked on cranes attached to jack-ups and to semi-submersible oil rigs as well as on platforms, cannot be touched in an appeal only for error of law.

My conclusion and reasons

Adequacy of facts supported by evidence

44. The tribunal is to be congratulated on its research into the law, but its fact finding was insufficient and without adequate explanation of the evidence supporting it.

45. Standing the previous information supplied by the claimant, which was that he had worked from October 1986 as a crane operator on the North Alwyn, (later modified, see page 75 of the documents, to a statement that in the five years prior to retirement he had worked on semi-submersibles), the tribunal required to make precise findings about the oil rigs on which he had worked in the period 11 April 1996 to 25 October 1996, for the purposes of regulation 25(2) of the regulations. The onus of proof lies on the claimant to establish that in that period his employment involved work, which was not merely negligible, in ships' engine rooms. (If he satisfied on this point, the application of the ten-year rule then arose. On that, his assertions about earlier work with pneumatic percussive tools might be relevant.)

46. As the adverse decision founded on employment on an offshore platform, the tribunal was obliged to make findings on approximate dates within the relevant five year period when the claimant was employed on the different types of rigs he describes at document 67. When the tribunal states that it:-

> " ... accepted [the claimant's] evidence that within the five year period he was employed on several semi-submersible rigs which did float and move under their own power",

it is not clear whether it is referring to his written statement of 1 August 2002, which refers to a different five year period, or to evidence he gave at the hearing. As noted, the record of proceedings is partly illegible and it is not easy to pinpoint the passage in which the claimant stated that he was employed on a semi-submersible rig in the six months before he retired. In any event, the tribunal ought to have explained why it preferred such evidence to the documentary evidence which had not earlier been contested by the claimant.

47. Relevant matters which require clarification with respect to the North Alwyn include the precise nature of what his work was on that platform, the latter's size and materials used in its construction, how the platform rests on the seabed, where it is located and in what depth of water, what part of the structure was moved out from land and how much, if any, was built *in situ*, how permanent is the pipeline system, has the platform ever been moved after its initial journey to its present location and how was the structure first transported? Are there some platforms which are relocatable and others which are not? Are the latter used where it is considered that the same spot will provide oil or gas for several years and is in sufficiently shallow water such that a permanent platform may be built? All these are matters which will now be clarified by the new tribunal. The tribunal erred in law because it made insufficient findings to underpin its application of the legal tests.

48. One finding which, on the face of it, seems curious is the tribunal's finding that:-

> " ... the cranes provided the power to move the direction of the rigs in a complete circle."

This is unlikely to be the case with the North Alwyn but that is for investigation by the new tribunal. However, the matter requires clarification, even with respect to semi-submersible oil rigs. The jib of a crane presumably turns a complete circle, but it is difficult to conceive how a rig turns to this degree because, when drilling, would it not have securing lines?

49. Accordingly, I accept the submission by the Secretary of State that the tribunal did not make any sufficient findings of fact in relation to the dates when, and type of rigs on which, the claimant worked during the period April 1996 up to the date of his retirement in

October 1996. Furthermore, its findings are ambiguous and inadequately explained having regard to all the evidence before the tribunal. As the tribunal erred in law, its decision must be set aside and I must now address the points raised by the parties on the definition of:-

> "work in ships' engine rooms".

The meaning of "ship"

50. There is no uniform national or international definition of "ship". Defining a structure as a ship has legal consequences for many different purposes. Issues of jurisdiction may arise, of health and safety, tax and employment, broadcasting, pollution, disposal of waste. Inevitably, some regulatory regimes will contain definitions.

51. For example, in the domestic arena, besides the Merchant Shipping Acts, the Control of Pollution (Landed Ships' Waste) (Amendment) Regulations 1989 (SI 1989/65) amend 1987 regulations of the same name so that (see regulation 2(c)):-

> " 'Ship' means a vessel of any type whatsoever operating in the marine environment including submersible craft, floating craft and any structure which is a fixed or floating platform."

52. By contrast, s.8(5) of the Merchant Shipping (Salvage and Pollution) Act 1994 states:-

> " 'marine pollution' means pollution caused by ships, offshore installations or submarine pipelines affecting or likely to affect the United Kingdom or United Kingdom waters or controlled waters;
>
> 'offshore installations' means any installation which is maintained for underwater exploitation or exploration to which the Mineral Working (Offshore Installations) Act 1971 applies."

Thus, a distinction is made between a "ship" and an "offshore installation".

53. The Health and Safety at Work etc. Act 1974 by s.53(1) (the interpretation section) defines "premises" as including:-

> "(a) any vehicle, vessel, aircraft or hovercraft,
> (b) any installation on land (including the foreshore and other land intermittently covered by water), any offshore installation, and any other installation (whether floating, or resting on the seabed or the subsoil thereof, or resting on other land covered with water or the subsoil thereof) ..."

54. This again, by implication, separates the concept of a ship from an offshore installation, although the word "ship" is not itself mentioned in the 1974 Act. However, many regulations made under it as the enabling Act, do expressly exclude ships from its scope. But offshore installations are not similarly excepted. The usual definition of "offshore installation" is that in the Mineral Workings (Offshore Installations) Act 1971 which provides, by s.1(3)(b):-

> " 'offshore installation' means any installation which is maintained, or is intended to be established, for underwater exploitation or exploration to which this Act applies."

The preceding text in s.1(3) reads:-

> "...'underwater exploitation' or 'underwater exploration' means exploitation or exploration from or by means of any floating or other installation which is maintained in the water ... and is not connected with dry land by a permanent structure providing access at all times and for all purposes;"

55. The Income and Corporation Taxes Act 1988 has been amended since the assessment years in issue in *Perks* (by the Finance Act 1998) so that, by s.192A(3), a ship does not include:-

> "(a) any offshore installation within the meaning of the Mineral Workings (Offshore Installations) Act 1971."

56. The Noise at Work Regulations 1989 (SI 1989/1790) implemented the European Council's Directive on the subject. Regulation 2 categorises levels of noise exposure. However, by regulation 3:-

> "The duties imposed by these Regulations shall not extend to –
>
> (a) the master or crew of a sea-going ship or to the employer of such persons, in relation to the normal ship-board activities of a ship's crew under the direction of the master."

57. A ship is not defined in those regulations nor in the regulations with which I am concerned. Given the concession by the Secretary of State and the acceptance by the Court of Appeal in *Perks* that, for the sake of consistency, the Merchant Shipping Act definition should apply, I adopt that premise. Although the context of the regulations is also a relevant factor, that context bites in this case when considering the meaning of the whole phrase "ships' engine rooms". I therefore accept for the present purpose the value of generally applying the Merchant Shipping Act definition of a ship (" 'ship' includes every description of vessel used in navigation") and how that definition was interpreted in *Perks*.

58. The fact finding tribunal must therefore ask itself what is the design and capability of any particular structure and whether "navigation" in the sense of "movement across water" (and not requiring "conveying persons and cargo from place to place") *is a significant part of the function of the structure in question.* The significance of the navigation is an issue of degree on the facts of a particular case and can be overturned by an appellate court only if the conclusions are perverse.

59. As Carnwath J noted in *Perks*, the test has enabled the courts to include structures of very specialised kinds within the scope of the definition of "ship", and to exclude cases where it was considered that the function of "moving across the seas" was minimal or non-existent.

60. Thus, in the "*Von Rocks*" (a decision of the Supreme Court of Ireland) reported at [1998] 2 Lloyd's Rep 198, a maritime dredger, primarily used in harbours, channels or estuaries to deepen the waters at such locations, was held to be a ship, although it had no bow, no stern, no anchors, no rudder nor any means of steering and no means of self-propulsion.

When not in operation, it was a floating platform comprising ten individual pontoons bolted together. When in use, it was held in position on the seabed by three legs which were capable of being hydraulically lowered and raised.

61. Similarly, in *Addison v. Denholm Ship Management (UK) Ltd.* ([1997] ICR 770, a decision of the Employment Appeal Tribunal in Scotland), a mobile offshore accommodation-vessel known as a "flotel", which comprised a platform attached by legs or columns to pontoons which enabled them to float and which was taken to the location of an installation, possibly under its own power but usually under tow, was held to be a "ship" for the purpose of the Transfer of Undertakings (Protection of Employment) Regulations 1981.

62. Conversely, in *Wells v. The Owners of the Gas Float Whitton No. 2* [1897] AC 337, (also cited in *Lavery*) the House of Lords held that a gas float moored in tidal waters to give light to vessels was not a ship, albeit shaped like a boat, because it was never used, nor intended to be used, for the purpose of being navigated as a vessel.

63. A similar result was reached by the Court of Appeal with respect to a pontoon crane in *Merchants Marine Insurance Co. Ltd. v. North of England Protecting and Indemnity Association* (1926) 26 LL.L. Rep 201. This is because (per Banks J at page 202):-

> "It is undoubtedly capable of being moved, but it is obviously so unseaworthy that it can only be moved short distances ..."

64. Therefore, the tribunal utilised too narrow a test for "ship" in requiring only that a structure could float and move on water, without consideration of whether such navigation was a significant part of its function, albeit incidental to a more specialised one.

65. The new tribunal, having first found on what type of structures, and when, the claimant worked during the relevant period, must then consider with respect to each whether "movement across water" was a significant part of its particular function. If the claimant worked only on the North Alwyn, and it is, as the Secretary of State suggests, a huge, fixed platform once set up in its location, it must be doubtful if this would constitute a ship. However, as always, everything depends on the facts found having regard to the evidence. The claimant is free to introduce whatsoever evidence he wishes on the questions in issue.

Ships' engine rooms

66. Even if a claimant establishes that he worked on a ship, this is insufficient to constitute the necessary work in a prescribed occupation.

67. The phrase "ships' engine rooms" must be read as a whole and having regard to its objective and context. In R(I)2/97, Mr Commissioner Rice held that the occupation prescribed in paragraph A10 (s) does not extend to work in an engine room on land, even if the engines were of a type also used to power ships. At paragraph 7 he noted:-

> "What is envisaged is engine rooms, as distinct from any other sort of rooms, and these are further limited by the qualifying word 'ships''.

68. At paragraph 9, having set out the text of paragraphs 59 and 60 of the report by the Industrial Injuries Advisory Council on Occupational Deafness, presented to the Secretary of State on 8 November 1988 (as also set out above in my paragraph 21), and observing that the

"manifest context" in which consideration was being given to prescribing ships' engine rooms as a relevant occupation was the shipping industry, Mr Commissioner Rice continued:-

> "Moreover the position is reinforced by the fact that, later in the report under a separate sub-heading, consideration was given to the possibility of prescribing power stations, and it is significant that the engine room in which the claimant worked operated to provide power. On the possibility of prescribing power stations, the Advisory Council said as follows:-
>
> > 'POWER STATIONS
> > 67. On the basis of information on levels of noise exposure and pain [*sic* –the word used in the report is actually 'obtained'] from the CEGB and observations made by the special adviser on a visit to a coal-fired power station we do not consider that any occupation involved in the running of power stations should be added to the list of prescribed occupations at the present time.'"

69. At paragraph 11, Mr Commissioner Rice acknowledged the argument made by the claimant with whom he was concerned that (see paragraph 11 of R(I)2/97:-

> "... it was unfair and unreasonable that if, as he maintained, he was made deaf by the noise of the diesel engines in the room where he worked, he should, nevertheless, be denied benefit, whereas if he had been working on a ship and rendered deaf by those same machines, he would have succeeded. I see the force of the claimant's contention, but a claim for deafness cannot succeed irrespective of the occupation giving rise to the deafness. The occupation has to be specifically prescribed in the regulations, and deafness arising out of any occupation not so prescribed will not suffice. Unfortunately for the claimant, his employment lay outside the occupation prescribed under paragraph (s)."

70. It is undisputed in the present case that the claimant has worked as a crane operator on oil rigs. It may be that he worked in a cab operating the crane which can be described as an "engine room" because it provided the power to the crane. Whether the crane did more than normal haulage and actually "drove the rig" (as the tribunal found) is a matter to be reconsidered by the new tribunal. That he works in an engine room providing power is insufficient, he must work in a *ship's* engine room.

71. In CSI/524/99 there are few details about the nature of the structure in issue, but it was presumably capable of self-propulsion because Mr Commissioner Walker QC (at paragraph 6) noted that:-

> "... when in movement or on station in difficult weather conditions the propellers were required to operate ... when under way all the diesel generators would be running."

72. In the same paragraph of CSI/524/99 is noted the Secretary of State's first concession, that the vessel in question was a "ship" for the purposes of the regulations because it was included in Lloyds Register. Without discussion of what was meant by "a ship's engine room", Mr Commissioner Walker then accepted the further concession of the Secretary of State that the space occupied by diesel generators in the particular case "fell to be regarded as that ship's 'engine room' or at least part of an engine room":-

> "The claimant's normal place of work was in an area occupied by the four main diesel engines driving generators which provided electric power for the ship. There were other items of machinery in the same area. Off it was an engineer's workshop, an electrician's workshop and a control room with switchgear. Something like 70% of the claimant's working time was spent in the enclosed space containing the diesel engines. ... From time to time he would have to go to a much lower level to another compartment containing electric motors which, when required, drove the ship's propellers. ... The propellers' motors were driven by power generated in the way described above. As I understood it, when under way all the diesel generators would be running. Otherwise one would usually be out of action for maintenance."

73. In the above case, it seems that the generators provided electrical power for the ship, which therefore drove the motors for the propellers, which in turn provided the ship's propulsion. Had a definition of "ship" been accepted which requires navigation under the vessel's own power as essential, I would have concluded that "ships' engine rooms" were those rooms containing the engines which drove the ships forward. The study by the Industrial Injuries Advisory Council appears to have been restricted to vessels of self-propulsion and the highest risk factor appeared to be in ships with high speed engines.

74. However, as a ship is not inevitably self-propelled, then, having regard to the underlying purpose for prescribing the occupation set out in paragraph A(10), it seems inevitable that to constitute a ship's engine room rather than *any* engine room, the engine room in question must provide power *for the ship*. It is insufficient that a claimant works in an engine room, even if integrated with the ship, where the engine of the structure on which he works provides power to that particular structure only, rather than to the ship.

75. So the question here is whether the claimant works in an engine room of a crane, such a crane being located on a ship, which in no substantial way differs from the engine room of a land crane; alternatively, does his engine room on the crane provide power beyond the crane and for the ship?

Summary

76. The appeal is therefore remitted to a new tribunal to begin again. It is emphasised that there will be a complete rehearing on the basis of the evidence and arguments available to the new tribunal but in accordance with the legal guidance above, and the determination of the claimant's case on the merits is entirely for them. Although the claimant has been successful in his appeal limited to issues of law, the decision on the facts in his case remains open.

(signed)
L T PARKER
Commissioner
Date:5 December 2003