Trinity Term
[2010] UKSC 37
On appeal from: 2009 CSIH 92

JUDGMENT

Morrison Sports Limited and others (Respondents) *v* Scottish Power (Appellant) (Scotland)

before

Lord Rodger
Lord Walker
Lady Hale
Lord Collins
Lord Clarke

JUDGMENT GIVEN ON

28 July 2010

Heard on 16 June 2010

Appellant
Richard Keen QC
Jonathan Barne
(Instructed by Shepherd
and Wedderburn LLP)

Respondent
R Gilmour Ivey QC
Philip M Stuart
(Instructed by Andersons
Solicitors LLP)

LORD RODGER (delivering the judgment of the court)

1. In March 1998 Mr Brian Pitchers owned two buildings, at 23 and 25 Moss Street, Paisley. The tenants of the ground floor shop at number 23 were Morrison Sports Ltd ("Morrison Sports"). On 6 March 1998 the building at number 23 was destroyed by fire. The neighbouring building at number 25 was also damaged and had to be demolished. This left the gable wall between numbers 25 and 27 exposed. As a result, the owners of flats at 27 Moss Street had to carry out weatherproofing work to the gable wall.

2. Investigations identified the seat of the fire as an electricity meter cupboard in number 23. Mr Pitchers, Morrison Sports Ltd and the flat owners at 27 Moss Street ("the pursuers") raised three separate actions for damages against Scottish Power UK plc ("Scottish Power") in Glasgow Sheriff Court. The actions were remitted to the Court of Session.

3. All three actions are framed in the same way. The pursuers aver that, in order to improve the fit between the prongs and the fuse-holder, a metal shim had been wrapped around the end of the prongs of the cut-out fuse before it was inserted into the fuse-holder in the ground floor premises at number 23. The pursuers further aver that the presence of the shim caused heating and that this led to arcing which in turn caused the fire. The pursuers allege that the shim was fitted by employees of Scottish Power. Scottish Power largely admit the pursuers' averments as to the cause of the fire, but deny that the shim was fitted by their employees. They believe and aver, rather, that the cut-out fuse had been tampered with by someone acting on behalf of Morrison Sports.

4. On the basis of their factual averments the pursuers seek to hold Scottish Power liable on two bases. First, they allege that Scottish Power are vicariously liable for the negligence of their employees in fitting the shim. Secondly, and separately, in article 6 of condescendence they aver that the fire was caused by Scottish Power's breach of their statutory duty under regulations 17, 24 and 25 of the Electricity Supply Regulations 1988 (SI 1988 no 1057) ("the 1988 Regulations"). The defenders deny the averments of fault and aver that the fire was caused by the sole fault of Morrison Sports.

5. Scottish Power accept that a proof before answer must be allowed in respect of the pursuers' common law case of negligence. But they plead that the pursuers' averments in article 6 of condescendence, relating to the alleged breach of

statutory duty, are irrelevant and should not be admitted to probation. In short, Scottish Power submit that a breach of the relevant provisions of the 1988 Regulations does not give rise to any liability in damages to those who may suffer loss as a result of the breach. The Lord Ordinary (Lord Wheatley) rejected Scottish Power's argument and allowed a proof before answer on the whole case: 2007 CSOH 131; 2007 SLT 1103. Scottish Power reclaimed, but, varying the Lord Ordinary's interlocutor, an Extra Division (Lady Paton, Lady Dorrian and Lord McEwan) repelled Scottish Power's plea to the relevancy insofar as it extends to the pursuers' averments in article 6 of condescendence: 2009 CSIH 92; 2010 SLT 243. In effect, therefore, they allowed a proof of those averments. Before this Court the Dean of Faculty explained that, in pronouncing this particular interlocutor, the Extra Division proceeded on the basis of a concession that, if they rejected Scottish Power's argument that a breach of the regulations did not give rise to civil liability, the averments in article 6 should be treated as being otherwise relevant.

6. The 1988 Regulations were made by the Secretary of State by virtue of his powers under section 16 of the Energy Act 1983 ("the 1983 Act"). So far as relevant, section 16 provided:

> "The Secretary of State may make such regulations as he thinks fit for the purpose of -
>
> > (a) securing that supplies of electricity by Electricity Boards or other persons are regular and efficient; and
> >
> > (b) eliminating or reducing the risk of personal injury, or damage to property or interference with its use, arising from the supply of electricity by an Electricity Board or any other person, from the use of electricity so supplied or from the installation, maintenance or use of any electrical plant.
>
> ...
>
> (3) Regulations under this section may provide that any person who contravenes any specified provision of the regulations, or any person who does so in specified circumstances, shall be guilty of an offence under this section.
>
> (4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale."

7. In 1988 section 16 was the latest embodiment of a power to make regulations, for securing the supply of electricity and for preserving the safety of life and property, which has existed in different incarnations since the earliest days

of the public supply of electricity in this country. See, for instance, section 6 of the Electric Lighting Act 1882 and section 60(1) of the Electricity Act 1947.

8. Part I of the 1983 Act, including section 16, was repealed by the Electricity Act 1989 ("the 1989 Act"), but the power to make regulations was maintained in section 29 of the new Act which, so far as relevant, provides:

> "(1) The Secretary of State may make such regulations as he thinks fit for the purpose of -
>
> (a) securing that supplies of electricity are regular and efficient;
> (b) protecting the public from dangers arising from the generation, transmission, distribution or supply of electricity, from the use of electricity interconnectors, from the use of electricity supplied or from the installation, maintenance or use of any electric line or electrical plant; and
> (c) without prejudice to the generality of paragraph (b) above, eliminating or reducing the risks of personal injury, or damage to property or interference with its use, arising as mentioned in that paragraph.
>
> (2) Without prejudice to the generality of subsection (1) above, regulations under this section may—
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> …
>
> (e) make provision requiring compliance with notices given by the Secretary of State specifying action to be taken in relation to any electric line or electrical plant, or any electrical appliance under the control of a consumer, for the purpose of—
>
> (i) preventing or ending a breach of regulations under this section; or
>
> (ii) eliminating or reducing a risk of personal injury or damage to property or interference with its use….
>
> (3) Regulations under this section may provide that any person -
>
> (a) who contravenes any specified provisions of the regulation; or
> (b) who does so in specified circumstances,
>
> shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale; but nothing in the subsection shall affect any liability of any such person to pay compensation in respect of any damage or injury which may have been caused by the contravention."

9. In the Court of Session Scottish Power argued that, even though the 1983 Act had been repealed by the 1989 Act, the court should proceed on the basis that the 1988 Regulations still have effect on the basis that they were made under the 1983 Act. Under reference to para 3(a) of Schedule 17 to the Electricity Act 1989 ("the 1989 Act"), however, the Extra Division rejected that argument and held that the 1988 Regulations have effect as if they were made under section 29 of the 1989 Act. Scottish Power now accept this and so there is no need to examine that particular argument: the 1988 Regulations are to be treated as having effect as if they had been made under section 29(1) of the 1989 Act.

10. The difference between section 16 of the 1983 Act and section 29 of the 1989 Act – and, hence, the point of the dispute in the Court of Session – lies in the concluding words of section 29(3). While both section 16(3) and (4) of the 1983 Act and section 29(3) of the 1989 Act envisage that regulations may provide for a person who contravenes the regulations, or who does so in specified circumstances, being guilty of a criminal offence and liable to a fine not exceeding level 5 on the standard scale, section 29(3) goes on to provide that nothing in subsection (3) "shall affect any liability of any such person to pay compensation in respect of any damage or injury which may have been caused by the contravention."

11. Regulation 39 of the 1988 Regulations does indeed provide that any supplier who fails to comply with any provision of the Regulations shall be guilty of an offence under section 16 of the 1983 Act, now section 29(3) of the 1989 Act. It follows that, if, as the pursuers aver, Scottish Power failed to comply with regulations 17, 24 and 25 of the 1988 Regulations, they would be liable to a fine under section 29(3).

12. In these circumstances the Extra Division attributed critical importance, for present purposes, to the concluding words of section 29(3). They noted that section 27(5) of the 1989 Act provides for a licence holder to be liable in damages to those suffering loss as a result of a breach of a final or provisional order; similarly, section 39 provides for a public electricity supplier to make compensation to any person affected by a failure to meet a prescribed standard of performance. The Extra Division then said, 2010 SLT 243, 252, paras 43-46:

> "This is not therefore a regulatory scheme conferring no private rights of action for damages. On the contrary, it is a regulatory scheme conferring certain private rights of action for damages. Thus it is a different type of statutory scheme from those being considered by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 when he noted at page 731G-H:

> ‘Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty.’
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> 44. Against that background, while criticisms might be levelled at the style of drafting (in particular the apparent introduction of an important private right of action for damages by reservation in section 29(3) of the 1989 Act), we consider that the plain meaning of section 29(3) is that Parliament intended any member of the public who suffers ‘any damage or injury which may have been caused by the contravention’ of the 1988 Regulations to be entitled to raise an action for damages against the person who contravened the regulations, founding the action upon that breach of statutory duty.
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> 45. We accept that a similar reservation provision relating to compensation did not appear in the 1983 Act. Thus the wording of section 29(3) represents an important innovation. However as was made clear in *Stevens* v *General Steam Navigation Co Ltd* [1903] 1 KB 890, the proper approach to the construction of statutory provisions may change if Parliament directs that the provisions are to be construed in terms of a later, modified, enactment.
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> 46. In the result therefore, when construing the Electricity Supply Regulations 1988 as if they had been made under section 29 of the Electricity Act 1989, Parliament's intention is in our view clear, and it is unnecessary to define a protected class…”.

13. The Extra Division were, of course, right to point out that the scheme of the 1989 Act makes provision in section 27(5) for individuals to recover damages and in section 39 for the payment of compensation to individuals. But, where Parliament has made specific provision of this kind in two sections, the natural inference is that it does not intend there to be a right to damages or compensation for loss or injury caused by other breaches of the statute or of subordinate legislation for which no such specific provision is made.

14. As emerges from para 44 of their judgment, however, the Extra Division thought that, by enacting section 29(3), Parliament had indeed made specific provision for a private right of action of damages for loss caused by breaches of the regulations. They considered that in section 29(3) Parliament had introduced an important private right of action for damages “by reservation”. In other words, although the Division appear to have accepted that, on its face, the relevant words

in section 29(3) merely make a reservation, they nevertheless held that, by using these words, Parliament actually intended to introduce, and did introduce, a new right of action. The Division indicate that the drafting of this provision might be open to criticism for the style of the legislative language used to create the right. Nevertheless, in their view, "the plain meaning" of section 29(3) of the 1989 Act is that Parliament intended any member of the public who suffers any damage or injury due to a contravention of the 1988 Regulations to be entitled to raise an action of damages for loss caused by the contravention.

15. In the hearing before this Court, Mr Ivey QC, who appeared for the pursuers, adopted the reasoning of the Extra Division. Indeed, he expressly conceded that section 29(3) was the only indication in either the 1989 Act or in the 1988 Regulations that a person who contravened a provision of the Regulations would, ipso facto, be liable in damages to anyone who suffered loss as a result.

16. The Extra Division's construction of section 29(3) is untenable. There is no basis whatever for thinking that the drafter of the provision intended to introduce a civil right of action but – somehow – botched that comparatively straightforward task and came up with the words in the subsection which are so singularly ill-suited to the supposed purpose. On the contrary, the main thrust of the subsection is to provide that, where the regulations so stipulate, a person who contravenes a provision is to be guilty of a criminal offence carrying a maximum penalty of a fine not exceeding level 5 on the standard scale. The subsection then goes on, in unmistakable terms, to provide that this criminal liability is not to affect "any liability" of that person to pay compensation in respect of any damage or injury caused by the contravention. So far from itself providing that such a person should be liable to pay compensation, the subsection merely confirms that liability to the criminal penalty is not to affect "any liability" of the offender to pay compensation. By "any liability" Parliament means the offender's liability, "if any", to pay compensation.

17. Since section 29(3) cannot be construed as introducing a private right of action, it is, strictly speaking, unnecessary for present purposes to determine its precise scope. One feature which stands out, however, is the reference to liability to pay "compensation". As the Extra Division held, this cannot be a reference to the compensation which may be payable under section 27(5) or section 39(3) of the 1989 Act, since section 29(3) is dealing with contraventions of regulations made under section 29(1). The industry of junior counsel for Scottish Power has, however, cast some light on the language of the subsection, which can be seen to reflect language used in earlier regulations.

18. As already noted, section 6 of the Electric Light Act 1882 gave the Board of Trade power to make such regulations as they might think expedient for securing

the safety of the public from personal injury or from fire or otherwise. Section 2 of the Electricity (Supply) Act 1919 made provision for Electricity Commissioners to exercise that power. The Commissioners proceeded to do so. Regulation 35 of the (A) Regulations for Securing the Safety of the Public made by the Electricity Commissioners under the Electricity (Supply) Acts 1882 to 1922 provided for undertakers who failed to comply with any of the regulations to be liable to a criminal penalty. Regulation 35 added: "The recovery of a penalty under these regulations shall not affect the liability of the undertakers to make compensation of any damage or injury which may be caused by reason of the default."

19. In *Stevens v Aldershot Gas, Water and District Lighting Co* (1932) LJKB 12 the plaintiff alleged that she had suffered damage to electrical apparatus and loss of profits because the defendants had failed to supply electric current at the voltage at which they had said that they would. Macnaghten J explained that the question was "whether, if they have failed in that obligation, the plaintiff has a remedy at common law or is she limited to penalties in a court of summary jurisdiction?" His Lordship held that the plaintiff was limited to the penalties. In the course of what appears to have been an extempore judgment, Macnaghten J noted that the (B) Regulations which he had to apply, and which related to ensuring a proper supply, did not contain an equivalent of regulation 35. This may suggest that he took the inclusion of regulation 35 in the regulations for securing the safety of the public to be some kind of an indication that an undertaker would be civilly liable for a breach of those regulations. But the remark was obiter and he did not explore the point.

20. In December 1936 the Commissioners made a new set of Regulations, the Electricity Supply Regulations 1937. Regulation 39 again made provision for a criminal penalty to be imposed for non-compliance with the Regulations, but provided that "The recovery of a penalty under these Regulations shall not affect the liability (if any) of the Undertakers to make compensation in respect of any damage or injury which may have been caused by reason of the default." Note that "the liability (if any) of the Undertakers" replaces the reference to "the liability of the undertakers" in the old regulation 35.

21. Regulation 39 of the 1937 Regulations was considered by the Court of Appeal (Morton, Tucker and Somervell LJJ) in *Heard v Brymbo Steel Company Ltd* [1947] KB 692. The plaintiff was injured in an explosion at the factory in which he worked. It was held that the explosion had been due to a short-circuit which had occurred because of breaches by the second defendants, the North Wales Power Co Ltd, of regulations 24 and 25 of the Electricity Supply Regulations 1937. It was accepted that the Electric Lighting (Clauses) Act 1899 applied to the power company. Paragraph 77 of the schedule to that Act provided for undertakers to be answerable for all accidents, damages and injuries happening through their act or "default" – "default" being a word that was to be found in

regulation 39. In these circumstances the Court of Appeal held the power company liable in damages for the plaintiff's injuries. Somervell LJ explained, at p 699, that the default, which was a breach of regulations 24 and 25, and which might cause damage or injury under regulation 39, was a default for which undertakers were answerable under para 77 of the schedule to the 1899 Act. In other words, the power company were held liable to pay damages, not because the breaches of regulations 24 and 25 of the 1937 Regulations per se gave rise to civil liability, but because the default which constituted the breach of those regulations was also a "default" which made the company liable to pay damages under para 77 of the schedule to the 1899 Act. The 1899 Act was repealed by the 1989 Act.

22. It is unnecessary to trace the subsequent course of the legislation governing the supply of electricity before the 1983 Act. Enough has been said to suggest that, when Parliamentary counsel came to draft section 29(3) of the 1989 Act, the choice of language was influenced by the language which had been used in the old regulations. Hence, in particular, the use of the term "compensation". On the other hand there is nothing to show why the tailpiece was omitted from section 16(4) of the 1983 Act but inserted in section 29(3) of the 1989 Act.

23. The fact that the language of section 29(3) can be traced back at least as far as the earlier of the two sets of regulations made by the Electricity Commissioners does, however, undermine part of the reasoning of Mr Peregrine Simon QC, Deputy High Court Judge, in *A E Beckett & Sons (Lyndons) Ltd v Midland Electricity Plc* 2000 WL 664506. The claimants alleged that they had suffered loss as a result of the defendants' breach of regulation 25(1) of the 1988 Regulations. Having referred to the indicators of liability for breach of a statutory provision in the speech of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, the Deputy High Court Judge continued at para 31:

> "It is arguable that the claimants fell within a class which was intended to be protected by regulations introduced under the powers conferred by section 29(1)(c): namely, those affected by the risks of damage to property. However, in my judgment, the claimants fail at the second stage of the analysis in that it is clear that Parliament did not intend to confer a private right to claim damages for a breach of the statutory duty. First, the sanction of the criminal law for breach of the Regulations provides a clear method of securing the protection that the statute was intended to confer and militates against the intention to create private rights of action. Secondly, by section 29(4), the power to bring criminal proceedings is confined to the Secretary of State and the DPP. This suggests that Parliament did not intend a breach of the regulations to be widely invoked. Thirdly, the claimants rely on the reference to compensation in section 29(3) as showing that the Act contemplated a civil action for breach of the

> [regulations]. However, the reference to compensation in section 29(3) is, in its context, clearly a reference to a claim for compensation under section 35 of the Powers of Criminal Courts Act 1973 and not to a civil action."

Although the decision was reversed on appeal, [2001] 1 WLR 281, this part of the reasoning was not affected.

24. The equivalent of section 35 of the Powers of Criminal Courts Act 1973 in Scots Law is to be found in section 249 of the Criminal Procedure (Scotland) Act 1980, which derives from section 58 of the Criminal Justice (Scotland) Act 1980.

25. Since, as has been seen, the term "compensation" was being used in the present context long before Parliament made provision for criminal courts to make compensation orders, it is implausible to confine the reference in section 29(3) to that kind of compensation. We would therefore reject the construction adopted in *A E Beckett & Sons (Lyndons) Ltd v Midland Electricity Plc*.

26. It is apparent that, in *Heard v Brymbo Steel Company Ltd* [1947] KB 692, the Court of Appeal considered that the reference to "compensation" in regulation 35 of the then current regulations was apt to cover a liability to pay damages for a default in complying with regulations which also constituted a default for purposes of para 77 of the schedule to the 1899 Act.

27. Be that as it may, section 29(3) obviously envisages a situation where a person may contravene a provision of regulations made under the section and be liable to pay compensation for damage or injury which he has thereby caused. But it does not follow that Parliament is saying that someone who contravenes any provision of any regulations made under the section is automatically liable to pay compensation for any resulting damage or injury. Rather, it will all depend on the terms of the regulations which the Secretary of State decides to make. And, of course, the drafter of section 29(3) did not know what regulations the Secretary of State might choose to make in the years to come. So section 29(3) simply provides that, if in terms of any regulations made under the section a person is to be liable to pay compensation for damage or injury caused by a contravention of some provision of the regulations, then the person's liability to pay that compensation is not affected by his liability to pay a fine for the selfsame contravention. So it all depends on what the regulations made by the Secretary of State provide.

28. There is, of course, nothing in the 1988 Regulations which makes express provision for a person who contravenes them to be liable to pay compensation for

damage or injury. In that situation, it is common ground that the well-known authorities, as to whether a breach of a statute or subordinate legislation gives rise to a private law statutory right of action, are conveniently summarised in the speech of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. Having separated out a number of different types of case, he dealt with breaches of statutory duty simpliciter, at pp 731-732:

> "This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.
>
> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398; *Lonrho Ltd v Shell Petroleum Co. Ltd. (No 2)* [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v Wimborne (Lord)* [1898] 2 QB 402.
>
> Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory

> system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, i e bookmakers and prisoners: see *Cutler's* case [1949] AC 398; *Reg v Deputy Governor of Parkhurst Prison Ex parte Hague* [1992] 1 AC 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions."

29. As Lord Browne-Wilkinson explains, if a statute provides some means, other than a private law action for damages, of enforcing any duty which it imposes, that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action. In *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 408, Lord Simonds observed that, where the statutory remedy was by way of criminal proceedings for a penalty, it could be argued that the criminal sanction emphasises that the statutory obligation is imposed for the public benefit and, hence, that the breach of it is a public rather than a private wrong. This is indeed one of the arguments advanced against private law liability for breach of the 1988 Regulations in *Beckett & Sons (Lyndons) Ltd v Midland Electricity Plc* 2000 WL 664506. But, in the case of regulations made under section 29 of the 1989 Act, that argument is really neutralised by the terms of section 29(3): the mere fact that there was criminal liability for a contravention would plainly not be inconsistent with there being civil liability to pay compensation for the same contravention.

30. On the other hand, section 29(2)(e) of the 1989 Act envisages regulations being made to give the Secretary of State power to take enforcement action "in relation to any electric line or electrical plant, or any electrical appliance under the control of a consumer" for the purpose of preventing or ending a breach of the regulations or eliminating or reducing a risk of personal injury or damage to property or interference with its use. And regulation 38 of the 1988 Regulations does indeed contain a regulation with precisely that effect.

31. Section 30 of the 1989 Act provides for the Secretary of State to appoint inspectors to carry out various checks of electric lines and electrical plant, including lines and plant on consumers' premises, with a view to determining, inter alia, whether any requirement imposed by or under Part I of the Act has been complied with. Regulation 33 of the 1988 Regulations provides for inspections by people authorised by the Secretary of State to ascertain whether a breach of the Regulations has occurred.

32. These provisions point strongly to the conclusion that the regulations are to be enforced by the Secretary of State and those appointed to act on his behalf, rather than by individuals raising private actions. Indeed, a private right of action to require, say, a supplier to comply with a regulation would be basically inconsistent with this scheme for enforcement by the Secretary of State and his representatives. Presumably for that reason, Mr Ivey felt obliged to argue that the only right of action arising out of the 1989 Act and the 1988 Regulations was a right to damages, not, say, to interdict or to an action to require compliance with a duty. Of course, in theory, Parliament could provide for a limited right of this kind. But, if it had been its intention to do so, it would surely have said so in express terms.

33. There are further indications that the 1989 Act, as it applied in 1998, envisaged that the legislation would be enforced by means other than private action. Section 1 provided for the appointment of a Director General of Electricity Supply. By section 45 it was his duty to investigate any matter which appeared to him to be an enforcement matter. While the range of such matters was prescribed by section 25 of the Act, section 46 also provided for consumers' committees to investigate certain other relevant matters.

34. The Dean of Faculty drew attention to two other factors which tend to point against a private right of action for contraventions of the 1988 Regulations.

35. First, regulation 27(1) envisages that a consumer may use his electrical installation in a way that may give rise to danger or cause undue interference with the supplier's system or with the supply to others. Regulation 28 then contains an elaborate scheme under which the supplier can discontinue supply to the consumer's installation. In addition, where the Secretary of State is satisfied that the supplier's works are being used otherwise than in accordance with the Regulations, he may serve notice on the consumer requiring him to take various steps to deal with the situation. These regulations therefore envisage situations where a consumer may be in breach of a requirement of the Regulations and where that breach may give rise to a risk of danger to others. While some consumers of electricity will, of course, be large businesses, others will be individuals. If the pursuers' argument were correct, the Regulations would confer a right of action

against them for any failure to comply with a requirement made under these provisions. Again, it seems unlikely that Parliament intended the legislation to operate in that way and more likely that it intended any such failures to be dealt with in accordance with the specific mechanisms in the legislation.

36. Secondly, the Dean referred to section 21(b) of the 1989 Act under which a supplier of electricity under section 16(1) of the Act may require any person who requires a supply of electricity to accept any terms restricting any liability of the supplier for economic loss resulting from negligence which it is reasonable in all the circumstances for that person to be required to accept. If it really were the case that a supplier could be held liable in damages for a contravention of any regulations made under section 29, then the protection afforded by section 21(b) would be ineffective in the not uncommon situation where the supplier's negligence constituted a contravention of the regulations.

37. Looked at as a whole, therefore, the scheme of the legislation, with its carefully worked-out provisions for various forms of enforcement on behalf of the public, points against individuals having a private right of action for damages for contraventions of regulations made under it.

38. That argument is reinforced by the fact that it is difficult to identify any limited class of the public for whose protection the 1988 Regulations were enacted and on whom Parliament intended to confer a private right of action for breach of the provisions of the Regulations. In *A E Beckett & Sons (Lyndons) Ltd v Midland Electricity Plc* 2000 WL 664506 Mr Simon QC thought that it was arguable that regulations introduced under the powers conferred by section 29(1)(c) were intended to protect a class comprising "those affected by the risks of damage to property". The Extra Division were much bolder: assuming that a class required to be identified, they considered that Parliament intended to confer rights upon all members of the public within the United Kingdom: 2010 SLT 252, para 46.

39. In so holding, the Division relied on a dictum of Atkin LJ in *Phillips v Britannia Hygienic Laundry* [1923] 2 KB 832, 841. But, as Neuberger J, speaking for the Court of Appeal, recognised in *Todd v Adams and Chope (The "Margaretha Maria"*) [2002] 2 Lloyd's LR 293, 298, para 20, that dictum is inconsistent with the approach which was authoritatively laid down by the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and three other cases. The Division also referred to *Roe v Sheffield City Council* [2004] QB 653, 672-673. But in that case Pill LJ did actually identify a limited class, albeit one as broad as "road users".

40. The potentially far-reaching effects of the Extra Division's approach are well illustrated by the claim of the owners of the flats at number 27 for the costs of weatherproofing their gable wall. After all, their property suffered no damage in the explosion: their claim arose out of the effects of the demolition of the intervening property at number 25. On one view, they can simply be regarded as members of the public who are averred to have suffered loss as a result of Scottish Power's breach of the 1988 Regulations. It seems extremely unlikely, however, that Parliament would ever have intended persons in that position to have a right of action for damages for breach of the 1988 Regulations. These are the kinds of considerations which have led the courts to hold that one of the necessary preconditions of the existence of a private law cause of action is that the statutory duty in question was imposed for the protection of a limited class of the public.

41. As support for their view that the Regulations gave rise to a private right of action, the Extra Division attached some weight to the fact that the aim of some of the 1988 Regulations is to reduce the risk of personal injury or damage to property: 2010 SLT 243, 252, para 47. Even if that is a consideration which can, in an appropriate case, point to an intention on the part of the legislator to create a private right of action, the mixed aims of the 1988 Regulations weaken any argument of that kind in respect of them. In any event, the fact that legislation is designed to reduce the risk of personal injury or damage to property is by no means an infallible indication that Parliament intended to give individuals a private right of action for breach of its provisions. It is simply one factor to be taken into account. See, for example, *Weir v East of Scotland Water Authority* 2001 SLT 1205, 1210, para 10, where Lord McCluskey considered that, although the water authority was under a statutory duty to supply wholesome water, it was not a duty that was owed to a defined limited class of the public. The duty was accordingly enforceable in various ways, but not by a private right of action.

42. For these reasons we are satisfied that contraventions of regulations 17, 24 and 25 of the 1988 Regulations do not give rise to a private right of action. The appeal must accordingly be allowed, and the interlocutors of the Extra Division and the Lord Ordinary recalled. The Court will sustain the first plea-in-law for the defenders in each of the actions to the extent of excluding article 6 of condescendence from probation. Quoad ultra the Court will allow the parties a proof before answer.