Claim No: HQ09X01832

Neutral Citation Number: [2011] EWHC 1302 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2011

Before :

MR JUSTICE KING

- -

Between :

ASTRIT TAFA	**Claimant**
- and -	
(1) MATSIM PROPERTIES LIMITED	**Defendant**
(2) DR CAROLE GILLING-SMITH	
(3) AGORA GYNAECOLOGY AND FERTILITY CENTRE LIMITED	

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Gerard McDermott QC and Mr Daniel Lawson (instructed by **Stewarts Law LLP**) for the **Claimant**
Mr Alan Jeffreys QC (instructed by **Messrs Kennedys**) for the **2nd and 3rd Defendants**

Hearing dates: 19 July 2010 – 23 July 2010
Written Submissions: August 2010, 17 March 2011 - 18 March 2011

- -

Judgment
As Approved by the Court

.....

MR JUSTICE KING

Mr Justice King :

1. This trial has been limited to the issue of liability as against the Second and Third Defendants. The claim against the First Defendant has been discontinued. It concerns an accident at work.

2. The Claimant was born in Kosovo. His date of birth is the 15th of January 1964. His first language is Albanian, although it is clear from the way he gave his evidence before me - which was for the most part given without the aid of the sworn interpreter - that he is able to understand and to communicate in English albeit I accept that he may on occasion find it difficult to understand everything which is said to him and there is the inevitable scope for misinterpretation of what he himself is saying. When asked by Mr Jeffreys QC on behalf of the Defendants whether he could read English his reply was "only a little" and certainly not "legal matters".

3. He first came to this country in 1997 and has been living with his partner Colleen McArdle and her 3 children in Brighton since 1999. His work experience since coming to the United Kingdom has been that of a general labourer. He has had some experience of carpentry and shuttering work, and may well have done some building work in his home country but he certainly had had no experience of working at a height in a roof space, prior to the accident with which this action is concerned.

<u>The circumstances of the accident</u>

4. This claim arises out of the serious personal injuries sustained by the Claimant on Friday the 5th of May 2006 in an accident at work in which when working in the roof void on a timber joisted structure which had been constructed above the third floor suspended ceiling of a building in Hove, he fell through the ceiling to the floor below, a distance of some 2.7 metres. As a result the Claimant is now a T8 paraplegic.

5. This was the first day of the Claimant's work at this building. At the time he was working under the immediate instructions of one Peter McDonald, a sole trader self employed carpenter and general handyman. Initially in the morning Mr McDonald had asked him to do some general labouring work, clearing up building debris and the like, but later on into the day around lunchtime, he had asked him to fix boarding onto the joists within the roof space to provide a walkway means of access from the already purpose built loft hatch entry, to an air conditioning unit which had been installed at the rear. The boards were large MDF boards with a pre-cut tongue and groove on the edges enabling them to be joined together. The boards had to be nailed down onto the central line of the joists running down the length of the building and their edges trimmed with an electric jigsaw. It was while the Claimant was undertaking this work and in particular while he was moving a plank into position so he could stand upon it in order to trim the edges of a board which had just been nailed down, that he lost his balance and fell though the fragile tiles of the suspended ceiling.

6. That which I have just recorded as the immediate circumstances of the accident is based upon the Claimant's own testimony which on this issue I accept. There was no other witness to the accident. The Claimant was alone in the roof void at the time. The Claimant had been working on this job of fixing the floorboards with Mr McDonald's son, Shawn, but it appeared that once they had got as far as nailing down the first board, Shawn had gone off to buy some drinks from a nearby shop leaving the Claimant on his own. Peter McDonald was working elsewhere in the building. The Claimant was discovered after the event on the floor by Mr McDonald and his son.

7. Although there is a dispute as to whether at the time there was a handrail/guardrail in situ (as shown on a video recording taken by the Second Defendant, three days later on Monday the 8th of May 2006) there is no dispute that there were no adequate safety precautions in place at the time of the accident to protect anyone working in that roof space from the obvious risk of falling through the ceiling. In particular nothing had been done to provide edge protection or to provide any scaffold below the area where the Claimant was working or from which he could work, to mitigate the danger of falling. As was said in a letter from the Health and Safety Executive ('HSE') to the Second Defendant (13 February 2007) in a statement which I find was wholly justified "the immediate cause of the accident was that there was neither edge protection nor fall arrest equipment nor fall mitigation arrangements in place or available". On any view the Claimant had not been provided with a safe place of work or a safe method of working.

8. Further, I record my finding at the outset of this judgment that on any view of the evidence this work at height which the Claimant had been asked to undertake, had been neither properly planned, nor was it being appropriately supervised nor had any steps been taken to ensure it was carried out in a safe manner.

The competence of the Claimant to work at height

9. Further, on the evidence, the Claimant himself had neither the training nor experience safely to carry out the work.

The competence of Peter McDonald

10. Moreover, I record at once my finding on the evidence that Peter McDonald could not himself be described as a person with the appropriate training, technical knowledge or experience necessary to reduce the risks of injury to anyone carrying out this work at height, appropriate that is for the purpose of either carrying out this work or supervising anyone carrying it out. Nor was he competent in the organisation, planning or supervision of such work. Based upon that which the Second Defendant and her husband told me, I accept that he did have some experience of doing work at height through having carried out re-roofing work, as well as additional carpentry work, on the Second Defendant's family home. Further, he had been entrusted with the job of constructing/installing the timber joisted structure above the suspended ceiling. However, there is nothing to suggest that he himself had had any technical knowledge, as to for example general health and safety, safe scaffold erection, or knowledge of the material Construction (Health, Safety and Welfare) Regulations or the Work at Height Regulations.

11. When under cross examination it was suggested to him that the written "Risk Assessment" upon himself prepared by the Second Defendant's husband, accurately described under "pre-commencement Assessment" that which he, Peter McDonald, had discussed at the outset of the project referred to below, as regards work from height, (viz *"(5) working from height – most works from below ceiling. If works from above ceiling required boarding edge protection or scaffolding towers to be provided* …"), not only did Peter McDonald disagree and said that this was not discussed ,but I got the very real impression that he did not really appreciate what a "risk assessment" of a given piece of construction work was all about. It is beyond question that before directing the Claimant to do this work, Mr McDonald made no risk assessment of the work which he was asking the Claimant to undertake. He made no assessment of the control measures necessary to enable the Claimant to carry out the work safely. He made no effort to identify the need for edge protection or other means of ensuring the Claimant's safety.

12. Peter McDonald had been engaged on this site since the previous November to carry out various works of carpentry, brickwork and other odd jobs not undertaken by specialist contractors, and to be a general key holder present to let in other contractors and to show them around. He kept the Site Diary. Whether he had the further role of site foreman is in dispute. This was not accepted by him, although contended for by the Defendants. What is clear however, is that before being engaged to work on this site or after his engagement, Mr McDonald had never produced his own risk assessments and method statements. Nor had he ever been asked by anyone to establish his competence by producing any.

13. Peter McDonald certainly had no experience of supervising work at height.

14. One of the issues in this case has been whether proper competence checks were ever carried on Mr McDonald by the Second and/or the Third Defendants for the purposes of entrusting him with work at height. The evidence of the Second Defendant's husband, Stephen Ulph, was that as far as he was concerned, Mr McDonald was used to supervising at height. Having myself seen Peter McDonald in the witness box, I am quite satisfied that there could be no proper basis for such an assessment of Peter McDonald. He himself was adamant (both in his witness statements and under cross examination) that he had never previously had any supervisory role and this I can fully accept. As he said in his witness statement of 12th of May 2010 *"I am a self employed Carpenter and I do not believe I would have told (the Second Defendant's husband Stephen Ulph) that I was used to supervising at height."* It is true that his son, Shawn, had assisted him in the re-roofing at the Second Defendant's home but his role was a limited one. "*Mr S McDonald moved materials and made tea and did not use power saws"* (evidence of Stephen Ulph, 1st witness, para. 4).

15. In other words I am satisfied that there was no proper basis upon which an assessment could be reasonably be made that Peter McDonald had the necessary competence to be in charge of the organisation and supervision of work at height.

<u>The background to the works</u>

16. The building in question, known as the Agora building on Ellen Street, was owned by the First Defendant, Matsim Properties Limited. On the 7th of November 2005 the Third Defendant, a limited company, Agora Gynaecology and Fertility Clinic Ltd,

entered into a 10 year lease with the First Defendant for the Third Floor East Quarter of the building. This was to be used for the purposes of its business as a clinic specialising in infertility and IVF treatment. The demised premises comprised the material part of the third floor with which this claim is concerned although they did not include the roof void as such. The First Defendant in the action against it, was alleged to be the occupier of the roof void. The Second Defendant, a Consultant Obstetrician and Gynaecologist, is and was a director and 50% shareholder in the Third Defendant. The only other director and 50% shareholder was a similarly qualified Mr Hossam Abdalla.

17. The claim against the First Defendant, now discontinued, was linked to the project of works which it had originally undertaken to convert the building into office accommodation and to certain works which it had agreed to carry out to the demised premises under the agreement for the lease, and, as indicated, was on the basis that it remained an occupier of the roof void. Those First Defendant's works to the demised premises were however halted being potentially at variance with the Third Defendant's fit out requirements.

18. The Claimant's case against the remaining Defendants with which this judgment is concerned is that the work upon which he was engaged at the time of his accident was part of a project of works of adaptation and fit-out to the third floor which the Third Defendant acting through the Second Defendant was conducting to make the floor suitable for its clinic. Those works had commenced in November 2005 and remained in progress at the time of his accident. The Defendants do not dispute that such a project of work was being conducted by the Third Defendant.

19. The role of the Second Defendant in the project and her legal responsibility for the same is however keenly disputed. I am however satisfied that it was the Second Defendant who was behind the decision of the Third Defendant to undertake this project and who was the director who on behalf of the Third Defendant took on the initial responsibility for the planning and instigation of the project. Whether she retained this responsibility throughout, is an issue in dispute to which I shall return. There is no suggestion however that she ever involved her co-director, Mr Abdalla, in any processes connected with the works. There is moreover no evidence that the Second Defendant ever delegated any such responsibility to another officer of the company through the exercise of her constitutional powers as director.

20. Further the Defendants do not dispute that work to install a boarded walkway in the roof space above the suspended ceiling to give access to the air conditioning units installed there was work which would have had to have been carried out as part of that project in due course. However their case is that as at the 5th of May 2006 such work was premature and no instructions to Mr McDonald had ever been given by or on behalf of the Third Defendant in respect of that work. In effect they say that in giving the instructions he did to the Claimant, Mr McDonald was acting on a frolic of his own.

21. As to prematurity, the unchallenged evidence of the Second Defendant was that the boarding in the roof void was not required until all the lighting had been installed and such installation was to await the publication of the requirements of the third European Tissue Directive as to air grade quality with which the Clinic had to comply, which as at the date of the accident had not yet been published. Hence as at

that date, the installation of the lighting was still outstanding, and it is said that the laying of the flooring at that time was positively unhelpful to that task. As further evidence of prematurity, the Defendants have relied upon the fact that following the accident electrical contractors were engaged by the Third Defendant "to *take up the flooring in the roof space and to disconnect and reroute cables due to flooring being laid on top of cables*." An invoice has been produced by the Defendants dated the 22 of May 2006 from the electrical contractors expressly describing the works carried out by them in these terms. According to the Second Defendant, the clinic had decided to await the publication of the material Directive before completing the works in the laboratory and treatment room and the plan accordingly had been to open the clinic for consultations only in late summer 2006. In the event the Directive was not published until October 2006 and the lighting and clinical storage units were only installed at that stage. It is said that the air handling was not commissioned until January 2007 and it was then that the boarding in the roof void became required and it was then that it was put in by another set of contractors (Jackson Plumbing and Heating).

22. The Claimant's case is that to the contrary, Peter McDonald had been expressly asked to carry out the work by the Second Defendant and moreover he himself had been brought onto the site by Peter McDonald only after Peter McDonald had sought and obtained authority for the same from the Second Defendant who had expressly agreed with Mr McDonald to pay the Claimant a daily rate of £60. The Claimant avers that as at the date of the accident he was the employee of the Second and/or the Third Defendant.

23. There is however no allegation that Peter McDonald was an employee of either Defendant.

24. No action has been brought against Peter McDonald. This is no doubt because in terms of means he is a man of straw. He had no liability insurance. Indeed subsequent to the accident it was discovered that the Third Defendants itself had no liability insurance cover for the accident. The Second Defendant gave evidence, as did her husband, that their mistaken belief was that Mr McDonald did have insurance because he had told the husband he had. Their further mistaken belief was they could rely upon insurance cover arranged by their landlords, that is to say the First Defendant, as evidenced by a Tenants Bonus Certificate provided by the landlords for which they had been invoiced. Peter McDonald denies ever saying that he had such insurance and that he would never have said he had. Again, having seen Mr McDonald in the witness box, I accept this to be the case.

<u>The basis of the claim</u>

25. The claim against the Second and Third Defendants is pleaded in common law negligence and in breach of statutory duty.

<u>Negligence as against the Second Defendant</u>

26. As regards negligence, the case against the Second Defendant is pleaded in paragraph 31 of the Particulars of Claim in the following terms:

> "the Second Defendant voluntarily assumed the responsibility of acting as project manager at the site, engaged the services of the Claimant to work there and personally directed the works in which he was involved. The Second Defendant owed a duty of care to the Claimant to ensure that he was reasonably safe whilst working at the site. Further in so far as the Third Defendant acted in breach of duty towards the Claimant as hereafter particularised that breach of duty was induced and/or procured and/or authorised by the Second Defendant such that she is liable to the Claimant as a joint tortfeasor"

27. It can thus be seen that the case against the Second Defendant in negligence at common law is pleaded in two distinct ways.

Personal duty of care: voluntary assumption of responsibility

28. One is based on a breach of an alleged duty of care owed personally to the Claimant arising out of a voluntary assumption of responsibility founded on three elements (1) that she acted as project manager at the site; (2) engaged the services of the Claimant to work there and (3) personally directed the works in which the Claimant was engaged.

29. Elsewhere in the Particulars of Claim, averments are to be found to support each of these three elements. Thus:

    i) at paragraph 18: "the Second Defendant took on the role of project manager in relation to the fit-out works. A variety of contractors were on site and their activities were co-ordinated by the Second Defendant. The Second Defendant provided the contractors with their instructions";

    ii) at paragraph 19: "to assist with the fit-out works the Second Defendant engaged the services of a sole trader Peter McDonald who had previously done domestic handyman and/or carpentry work for her. Peter McDonald was required to perform tasks that involved carpentry work such as hanging doors and erecting partitions. He received all of his instructions from the Second Defendant and worked under her direct control ";

    iii) at paragraph 22: " Peter McDonald notified the Second Defendant that the Claimant could come to help with works at the site and that he would expect to be paid £60 per day for his services. The Second Defendant asked Peter McDonald to bring the Claimant onto site and agreed to pay £60 per day for his services";

    iv) at paragraph 23: " In the premises the Second and/or Third Defendant agreed to employ the Claimant as a labourer at the site" ;

    v) at paragraph 24: "On or about 3 or 4 May 2006 the Second Defendant directed Peter McDonald to fix some timber boards to the timber joists in the roof void so as to provide an access route to the air conditioning plant that had been installed above the suspended ceiling".

30. Breaches of this duty particularised against the Second Defendant at paragraph 38 of the Particulars of Claim include:

- at subparagraph (2) "failing to ensure work at height at the site was properly planned, appropriately supervised, and carried out in a manner that was so far as reasonably practicable safe";

- at subparagraph (3) "failing to ensure that only competent persons were involved in the organisation, supervision and performance of work at the site";

- at subparagraph (14) "causing or permitting Peter McDonald to conduct work at height when she had no proper basis for believing that Peter Macdonald had the necessary competence, diligence and training to ensure that the work was performed safely ";

- at subparagraph (15) "failing to carry out any adequate checks as to the competence of Peter Macdonald to conduct the work she directed. Amongst other things the Second Defendant failed to check whether Peter McDonald held suitable public and employer's liability insurance to cover his work on the site. Had a check been made it would have established that Peter McDonald had no such insurance, which in turn would have indicated his lack of competence and professionalism".

31. I agree with the Claimant's submissions that if such a personal duty were owed, the Second Defendant cannot be relieved of any liability for breach of that duty by reason of her status as a director of the Third Defendant. I agree that a director of a company can no more evade personal liability for negligence in organising works etc than can an individual employee or agent of the company if negligent. As was said by Slade LJ in C Evans v. Spritebrand Ltd [1985] 1 WLR 317, 323B:

> "Mr Watson…on behalf of the director did not attempt to submit that a director of a company will escape personal liability to third parties for torts which he has personally committed by his own hand …merely because he committed the tort in the course of carrying out his duties as director of his company. He can escape personal liability for such torts no more than can an employee acting in the course of his employment for a company or an agent acting in the course of his agency for a company"

I emphasise the expression "*personal liability for torts …which he has personally committed"*. See too on this point the observations of Lord Hoffman in Standard Chartered Bank v. Pakistan National Shipping Corporation [2003] 1 AC 959 at paragraph 22 ("*But Mr Mehra was not being sued for the company's tort. He was being sued for his own tort…*")

32. The assertions of fact which I have identified as the basis for this personal duty of care have however been contentious throughout both in the pleadings and in the evidence called on behalf of the Second and Third Defendants. Thus:

i) The Second Defendant both in her pleaded defence and in her evidence denied that she ever took on the role of the project manager or acted as such. She says she did not appoint any contractor or coordinate the activities of the contractors and or at any time provide contractors with instructions. These tasks are said to have been carried out on behalf of the Third Defendant by Stephen Ulph, the Second Defendant's husband, a qualified civil engineer with experience in the construction industry at a management level. It is said (Defence paragraph 12) that it was Stephen Ulph who was "instructed in writing to project manage the building works on behalf of the Third Defendant with effect from 1st November 2005" and that "he continued in that role at the time of the accident." In support is prayed in aid a letter written by the Second Defendant on behalf of the Third Defendant to "Mr S Ulph" dated the 01.11.05 which states simply:

> "Dear Mr Ulph
>
> Re 3rd Floor, East Quarter, the Agora, Ellen Street, Hove
>
> Please take this as our instruction to you to act on our behalf to project manage the building
>
> Works at the above project
>
> Yours sincerely,
>
> Carole Gilling Smith
>
> For and on behalf of Agora Gynaecology and Fertility Centre Ltd".

Stephen Ulph in evidence said this was his role. However, it should be noted that he received no remuneration and apart from the letter of appointment, there was no written contract setting out his obligations, such as specified oversight and planning obligations.

ii) The Second Defendant denies that she as such engaged the services of Peter McDonald. In evidence Stephen Ulph said it was he who had undertaken the contracting of Peter McDonald on behalf of the Clinic. The pleaded case (at paragraph 13 of the Defence) is that it was the Third Defendant who engaged the services of Peter McDonald.

iii) Those services are pleaded as being those of "site foreman, site contact, and to take charge of all carpentry and associated works". As I have already indicated, Mr McDonald himself took a more restricted view of his role. When the words written by Stephen Ulph in the first paragraph of the risk assessment form completed upon him dated 4th of November 2005, viz, "*PM to set up welfare arrangement and be keyholder. To explain - 2 stairs to new people (in case of fire) - location of toilets. General induction etc.- door to be kept locked or secure + no smoking and keep site records"*, were put to him in the witness box, his response was that he did not recall ever having seen this document before, that he did hold the key but " was not sure" about any welfare arrangements. He did not recall what Stephen Ulph had said to him although

he accepted that there would have been a discussion between the two of them at the outset of the project and that he would on occasion point out the stairs and toilets to new people if Mr Ulph were not present. That form in Mr Uplh's handwriting described the works to be undertaken by Mr McDonald as "*Carpentry + site foreman /site contact*." Mr McDonald emphatically denied being a site foreman.

iv) The Second Defendant denies that Peter McDonald received his instructions from her. The defence case is that these would be given by Stephen Ulph on behalf of the Third Defendant. In her pleaded defence the Second Defendant stated (para. 12) "*that on occasion for the purpose of housekeeping she was consulted by Peter McDonald as to whether for example she wished furniture deliveries to be unpacked or where deliveries were to be sited*". In evidence to me both in her written statements and oral testimony she said that in the later stages of the project which would include the month before and after the accident, she would give Peter McDonald sundry instructions but unconnected with any building or construction works as such. These would include the fitting of picture rails and the fitting of splash backs to the clinical sinks "*to make them Healthcare Commission compliant*" (supplementary witness statement paragraph 10). She said that she never issued building instructions to any contractor. These would come from her husband.

v) Stephen Ulph in his evidence both in his written statements and oral testimony supported this position. In respect of Peter McDonald, Stephen Ulph's express evidence was (witness statement paragraph 8) that *"I would speak to Mr P McDonald on most days sometimes a number of times per day depending on the situation or if there were queries. Mr P McDonald did not instigate new works at all and would always seek exact instructions from me"*. Mr Ulph went further and explained how he would expressly involve himself in the way any new works were to be carried out by Mr McDonald. He prayed in aid in support of this testimony the entries subsequently added by him to the Peter McDonald risk assessment form under "*Further Risk Assessment*", in particular those relating to the alteration to the location within the clinic of the disabled WC with which Mr McDonald became involved in the days immediately prior to the accident. The Second Defendant herself said in her supplemental statement (at paragraph 10) when dealing with what she may or may not have said to Elizabeth Smith, employed as one of Her Majesty's Inspectors of Health and Safety and who had been allocated by the HSE Field Operations Directorate of the Health and Safety Executive to investigate the Claimant's accident

"she *asked me if PM would initiate work on his own. I told her PM never initiated work on his own but would follow instructions which were given to him verbally*"

vi) Both Defendants say they had no knowledge of the Claimant or of his presence on the site prior to the accident. The Second Defendant expressly denies ever asking Peter McDonald to bring the Claimant on site or agreeing to engage the Claimant. She denies ever been notified by Peter McDonald of anything to do with the Claimant or of his desire to come on site or the daily rate of pay he would expect. In paragraph 3 of its Defence the Third Defendant avers that it

did not authorise or consent to the Claimant's presence on the site. It is denied that either Defendant agreed to employ the Claimant as a labourer or in any other capacity. They each aver (Defence paragraph 19) that either Peter McDonald was the Claimant's employer or alternatively the Claimant was self employed.

vii) It is expressly denied that either the Second Defendant or the Third Defendant directed Peter McDonald to fix timber joists in the roof void and any work assigned to the Claimant in this regard was without their prior knowledge, authority or consent: "*Neither Stephen Ulph nor any other person on behalf of the Second or Third Defendant had authorised or expected access to be gained to the roof void for any purpose on that day or for the immediately forseeable future. There had been no ladder on site and it appeared to Stephen Ulph that the ladder had been brought from elsewhere"* (Defence paragraph 20). As already explained, their case is that the air conditioning unit was not to be used for some time and no boards should have been put down because lighting had yet to be installed. The case of both Defendants is that although Peter McDonald was on site during the week of the accident to accept deliveries, and general tidying up, this was at a stage when the refurbishment works were more or less completed. The only outstanding construction work of note in respect of which instructions were given to Mr McDonald earlier that week on the Tuesday the 2nd of May, by Stephen Ulph, was to do with the alterations, already referred to, to the rear staircase entry into the clinic. These were required in order to make the disabled WC integral to and incorporated into the clinic premises in accordance with requests made by the Health Care Commission.

33. By the end of the trial the basis for this personal duty of care had changed in the closing submissions on behalf of the Claimant. This was no doubt because of the way the evidence from Mr McDonald had become much more equivocal as to who had instructed him to do the work within the roof void. and as to precisely when and by what method of communication, the Second Defendant had given him authority to bring the Claimant on site.

34. In these closing submissions, this personal duty of care is now said to have arisen "by *virtue of her voluntary assumption of overall responsibility for health and safety on the site*." (written closing submission para. 14), which duty of care did not depend upon her knowledge either that the Claimant was to be brought on site by Mr McDonald to carry out work at height or that the work at height was to be carried out on the particular day so long as work at height was within the type of work which she contemplated would be carried out by Mr McDonald in the course of the project. This latter proposition is said must have been the case, not least because of the risk assessment prepared upon him by the Second Defendant's husband at the beginning of the works which included the reference to working from height in the passage to which I have already referred.

35. The principal evidence relied on to establish this basis of liability has as its starting point the Health and Safety Plan ("the Plan") for the Third Defendant's project of fit out works, dated 24.10.2005, coupled with the contents of the Third Defendant's Health and Safety Policy ("the Policy") signed by the Second Defendant and dated the 5th of October 2005, and which on its face was said the be "*authorised by CGS"* (the

initials of the Second Defendant). The Plan, which on the evidence was drawn up by Mr Ulph, expressly stated that "*this document to be read with AGFL Health and Safety Policy*".

36. Within the Policy under the heading of "General Responsibilities" is stated:

> "1. As Registered Manager, Dr Carole Gilling-Smith has overall responsibility for health and safety."

Under the heading "Specific Responsibilities" appears:

> "1. Overall and final responsibility for health and safety is that of the Registered Manager.
> 2. This includes day to day responsibility for ensuring this policy is put into practice."

Moreover the Second Defendant is included along with her husband in the Plan, under the heading "Quantity Surveyor (Project Manager)". The entry reads: "AGFL-Dr Gilling-Smith & Mr S Ulph (mob 0796 401 704)".

37. Then reliance is put upon the Second Defendant's ultimate acceptance in oral evidence that she wrote the Policy, that she had overall responsibility for health and safety, that the Policy was intended to cover the building phase of the Clinic and any subsequent refurbishments, that she understood construction work was dangerous and understood the importance of good health and safety procedures on construction sites. Although she may have sought to delegate responsibility for health and safety to her husband (to the question what had she done to discharge her responsibility for health and safety as regards the construction works, her answer was that she had appointed her husband as project manager), the Claimant says that she should be found by this court as having retained this overall and final responsibility in respect of the construction works. On the evidence it cannot be said – so the submission goes - that she had entrusted such matters to a truly independent third party professional with clearly specified oversight and planning obligations under a written contract. Her husband was unremunerated and without any such written contract. He accepted in evidence that he was undertaking other works in his professional capacity at the same time.

38. I shall return in due course to the legitimacy of this submission. The essential response of Mr Jeffreys QC on behalf of the Second Defendant is that if the core factors relied upon in the Particulars of Claim for this personal duty of care have not been established on the evidence, then there is no other basis upon which such a duty can be held to have arisen. He has reminded me of what he describes are the legal rigours of the principles now well established at common law for the finding of such a duty, namely the need for (i) forseeability of harm ("a reasonable person in the position of the Defendant must have foreseen the risk of harm) and (ii) proximity as between the parties ("there must be a relationship of proximity or neighbourhood between the Claimant and the Defendant") and in addition (iii) it must in the circumstances be "fair, just and reasonable" to impose a duty of care upon the Defendant (the *Caparo* test, see Caparo Industries Plc v Dickman [1990] 2 AC 605,617 – 8).

Second Defendant as Joint Tortfeasor

39. A quite separate basis of the pleaded claim in common law negligence against the Second Defendant is as a joint tortfeasor with the Third Defendant on the basis that the acts of the Third Defendant which it is alleged amount to a causative breach of its duty of care owed to the Claimant, in other words a tort committed by it against the Claimant, had been "induced and/or procured and/or authorised" by her. That this can be the basis of a director's liability was recognised by the Court of Appeal in *C. Evans Ltd, supra*. Although it was there emphasised that the extent of a director's personal involvement in the company's tort has to be carefully examined and a person who has only facilitated (as opposed to procured) a tort would not be liable as a joint tortfeasor, it was said that if the director had authorised directed or procured the acts complained of, it was not an essential condition of his liability that he knew or was reckless as to whether the acts were tortious, unless the primary tortfeasor's state of mind was an essential ingredient of the tort alleged - not the case of course as regards the tort of negligence.

40. The breaches of duty of care alleged against the Third Defendant in the Particulars of Claim themselves include (by virtue of paragraph 39) those at paragraph 38(2) "*failing to ensure work at height at the site was properly planned, appropriately supervised, and carried out in a manner that was so far as reasonably practicable safe*"; and at paragraph 38 (3) "*failing to ensure that only competent persons were involved in the organisation, supervision and performance of work at the site.*"

41. The way the case is put under this head against the Second Defendant is that on any proper analysis of the evidence it is only through the Second Defendant's own conduct and that of her agents that the Third Defendant can have become liable to the Claimant at common law.

42. The Second Defendant, it is said, had a direct hand in the acceptance of Peter McDonald without good basis as a competent contractor to conduct work at height safely which acceptance is at the root of these principal breaches of common law duty of care alleged against the Third Defendant. To sustain this contention, reliance is again placed upon the initial Risk Assessment prepared upon Peter McDonald, to which I have already referred, where it is stated under the heading "*recommended by (competence check)*": "*GCS and SU*". In other words the Second Defendant was herself vouching for the competence of Peter McDonald. Although in her witness statements and oral evidence, the Second Defendant sought to rely upon her husband's assessment of the competence and trustworthiness of Mr McDonald rather than her own, this personal involvement of the Second Defendant in the selection of Mr McDonald is supported in part by the contents of the Defence of the Second and Third Defendants: at paragraph 13, in support of the averment that the Third Defendant had engaged the services of Peter McDonald, it is pleaded that "*she*" (a reference to the Second Defendant) *had had the opportunity to observe the quality of his work and of those he employed*"; at paragraph 29(6)(7), it is pleaded that "*at the material time Peter McDonald had not been assigned tasks involving work at height but the Third Defendant was satisfied as to his competence to perform such work on the strength of work which he had previously done for the Second Defendant upon her roof at her home*".

43. Reliance is again placed under this basis of liability, upon the acceptance of the Second Defendant in her oral evidence, already referred to, that she had overall responsibility for health and safety and that the Policy was intended to cover the building phase of the clinic and any subsequent refurbishments and that she understood construction work was dangerous and understood the importance of health and safety.

44. The overall submission is made that the Second Defendant had accepted overall responsibility for health and safety from the building phase onwards and had procured and authorised the subsequent set up operated by the Third Defendant which contained the essential failings giving rise to the accident, whereby her husband acted as an unremunerated project manager without any written contract with specified oversight and planning obligations and an incompetent McDonald was engaged with a major role in overseeing the works, in particular works at height.

45. Again I shall return to the legitimacy of this submission.

The Claim in Breach of Statutory Duty: the Construction Regulations; the Work at Height Regulations

46. Breach of Statutory Duty is pleaded against both the Second and the Third Defendants under two sets of Regulations, namely the Construction (Health and Safety and Welfare) Regulations 1996 ("the Construction Regulations") and the Work at Height Regulations 2005 ("the Work at Height Regulations");

47. It is not in dispute that the works upon which the Claimant was engaged were works governed these respective regulations. Nor has it been seriously argued on behalf of the Defendants that the Claimant cannot establish on the evidence at least one causative breach of the requirements of those regulations, even if not all the pleaded breaches are conceded.

48. The dispute has been as to whether either Defendant was under any obligation to ensure compliance with the regulations so as to give rise to a cause of action against the particular Defendant for breach of statutory given each denies being the employer of the Claimant and each denies having had any control over the work the Claimant was undertaking or over the Claimant himself.

49. There is no dispute that a breach will give rise to civil liability by reason of section 47(2) of the Health and Safety Act 1974 ("the 1974 Act"). Both sets of regulations were made pursuant to the 1974 Act as amended, although The Work at Height Regulations were intended to implement the material European Council Directive (2001/45/EC). Section 47(2) of the 1974 Act provides as follows:

> "(2) Breach of a duty imposed by health and safety regulations …shall so far as it causes damage, be actionable except in so far as the regulations provide otherwise"

50. This section does not in terms limit or confine the status of person who can sue. I agree with Mr Lawson who presented the principal submissions on behalf of the Claimant under this head that it must follow that if the Claimant can establish as against any Defendant a breach of obligation under either set of regulations causative

of his injury, then liability must follow regardless of the nature of the Claimant's relationship or lack of relationship to that Defendant, provided always that the Claimant can be said to be within the class of person for whose benefit the regulations were enacted, namely a person carrying out at work the type of work to which the regulations apply, which in my judgment he surely can. The Construction Regulations material to this action "apply to and in relation to construction work carried out by a person at work" (see regulation 3). The Work at Height Regulations self evidently are for the protection of anyone working at height at work. I have found support for the soundness of this reasoning in the judgment of the First Division Court of Session in Donaldson v. Heyes Distribution Services Ltd [2005] CSIH 48; (2005)SLT 733.

51. The significance of this latter principle arises acutely in the context of the Work at Height Regulations where the trigger for becoming under obligation is expressed in terms of control over the person at work rather than control over the work itself. Given the disputes of fact which have arisen in this case, it has become necessary for this court to consider the issue of residual liability in breach of statutory duty, where it is able to find that a given Defendant had control over one of the persons immediately involved in the Claimant's accident and who has played a causative role in the Claimant's accident, namely Peter McDonald himself (the person who gave the instructions to the Claimant to do the work and was purporting to provide the necessary supervision, organisation and planning but who on my findings lamentably failed to do so) whether or not the Defendant had like control over the Claimant himself.

52. Apart from causation, the crucial question arising on the claim based on breach of statutory duty under these regulations has accordingly been whether on the facts either or both Defendants were under any duty to comply with the regulations and the extent of that duty.

The applicable test to trigger the regulatory obligation

53. As already indicated, the test applicable for these purposes under the respective regulations is not identical, although each focus on the concept of "control".

Construction (Health and Safety and Welfare) Regulations 1996

54. The material regulation under the Construction Regulations is that of Regulation 4 and for present purposes as against the two Defendants, paragraphs 4(1) and (2), providing as follows:

> "4. Persons upon whom duties are imposed by these Regulations
>
> (1)…it shall be the duty of every employer whose employees are carrying out construction work and every self employed person carrying out construction work to comply with the provisions of these Regulations insofar as they affect him or any person under his control or relate to matters which are within his control;
>
> (2) It shall be the duty of every person (other than a person having a duty under paragraphs (1) or (3)) who controls the way in which any construction work is carried out by a person

at work to comply with the provisions of these Regulations insofar as they relate to matters which are within his control."

Regulation 4(3) relates to employees carrying out construction work.

55. It can thus be seen that if neither of the Defendants was the employer of the Claimant, then for a duty to be imposed it has to be established that the Defendant was a "*…person who controls the way in which any construction work is carried out by a person at work*". The duty then is to comply with the provisions of the regulations but only "*insofar as they relate to matters which are within his control*".

56. The material matters within the provisions of the regulations with which this claim is concerned, and which are the focus of the dispute as to whether either Defendant had the necessary control, relate to (the emphasis is the emphasis of this court)

i) **the access to and from the Claimant's place of work in the roof void** (the pleaded breach of statutory duty against each Defendant of **regulation 5(1)** being particularised as "*failing to ensure there was suitable safe access to and egress from the Claimant's place of work, that was without risks to health and safety and properly maintained*"; the regulation itself providing; "*There shall so far as reasonably practicable, be suitable and sufficient safe access and egress from every place of work …which egress shall be without risks to health and properly maintained*");

ii) **the Claimant's place of work** (the pleaded breach being of **regulation 5(2)** particularised as "*failing to ensure that the Claimant's place of work was made and kept safe for him*"; the regulation itself providing that "*every place of work shall so far as reasonably practicable, be made and kept safe for, and without risks to health to any person at work there*"; (see also the pleaded breach of regulation 5(5) particularised as "*failing to ensure that the Claimant's place of work had sufficient working space and was so arranged that it was suitable for the Claimant to work there*");

iii) **the prevention of access to a place which did not comply with regulations 5(1) and (2), i.e. access to the roof void** (the pleaded breach being of **regulation 5(3)** particularised as "*failing to take suitable and sufficient steps to ensure the Claimant did not gain access to the place where he was working without additional precautions being taken*"; the regulation itself providing that "*suitable and sufficient steps shall be taken to ensure so far as reasonably practicable, that no person gains access to any place which does not comply with the requirements of paragraphs (1) or (2)*");

iv) **the supervision of the Claimant by a person of appropriate training, knowledge or experience** (the pleaded breach being of **regulation 28** particularised as "f*ailing to ensure that the Claimant was under the supervision of someone with suitable training, knowledge or experience to protect his safety*"; the regulation itself providing that "*Any person who carries out any activity involving construction work where training, technical knowledge or experience is necessary to reduce the risks of injury to any person shall possess such training, knowledge or experience, or be under such degree of supervision by a person having such training, knowledge or*

experience as may be appropriate having regard to the nature of the activity"**);**

Work at Height Regulations 2005

57. Under these Regulations the requirements in each particular regulation are expressly imposed on an *employer* and by regulation 3(2) those requirements apply in relation to work (a) by an employee of his; or (b) by any other person under his control, to the extent of his control; However regulation 3(3) provides that the requirements imposed by these regulations on an employer shall also apply to "(b)…*any person* other than a self employed person, in *relation to work by a person under his control, to the extent of his control*"; (the emphasis is the emphasis of the court).

58. Thus the focus under these regulations as regards those who are not employers is upon the control of *the person carrying out the work* and the extent of the control.

59. The material requirements of the regulations which are said to have been imposed on the both Defendants by virtue of the operation of regulation 3(3)(b) assuming neither is found to have been an employer of the Claimant, include those:

    i) **under reg. 4(1) relating to the organising, planning and supervision of the work** (pleaded as "*failing to ensure that work at height at the site was properly planned, appropriately supervised, and carried out in a manner that was so far as reasonably practicable safe*"; the regulation itself expressing the requirement as one to "*ensure that work at height is (a) properly planned; (b) appropriately supervised; and (c) carried out in a manner which is as far as reasonably practicable safe*");

    ii) **under reg. 5 relating to the competence of those engaging in the organisation, planning and supervision of the work at height** (pleaded as "*failing to ensure that only competent persons were involved in the organisation, planning, supervision and performance of work at height at the site:");*

    iii) **under reg. 6 relating to the avoidance of risks from work at height** (in particular that under **regulation 6(3)** requiring *the taking of suitable and sufficient measures to prevent as far as is reasonably practicable, any person falling a distance liable to cause personal injury*, the breach being pleaded as a failure "*to ensure that suitable and sufficient measures were taken to prevent the Claimant from falling a distance liable to cause personal injury*");

    Other breaches are pleaded relating to the requirements concerning the selection of equipment (reg. 7) and particular equipment (reg. 8) and the need to ensure the Claimant did not work near a fragile surface (reg. 9(1)).

<u>The determination of the issue of control for the purposes of the Regulations</u>

60. Control for the purposes of regulation 4(2) of the Construction Regulations is a question of factual control which focuses on control over the work and not control over the site. This was confirmed by the judgments of the Court of Appeal in <u>McCook v. Aloysius Lobo</u> [2002] EWCA 1760. Judge LJ put the matter thus at paragraph 16:

> "whether the appropriate level of control over the work is or should be exercised by an individual other than an employer so as to create the duty to comply with the obligations under regulation 4(2) is …a question of fact …it is not answered affirmatively by demonstrating that an individual has control over the site in a general sense as an occupier or that as an occupier of the site he was entitled to ask or require a contractor to remove obvious hazards from the site. The required control is related to control over the work of construction".

At paragraph 28, Lady Justice Hale said this:

> "regulation 4(2) …to my mind depends entirely on the question of factual control. Of course if a person has factual control but choose not to exercise it, they cannot therefore escape liability. But there will still be the question of fact whether such control exists. In the circumstances of a client who is contracting with an apparently reputable contractor to conduct construction work in his premises, there is little reason to doubt the straightforward factual finding made by the judge that the client was not in control of the way in which the Claimant was doing his work".

61. As an example of the application of these principles I was referred to the decision of Judge Playford QC in Hood v Mitie Property Services (Midlands) Ltd and (2) Royal Mail Group Plc. There the Royal Mail as occupier of premises had instructed the first defendant with whom it had a maintenance contract, to carry out the necessary repairs to the roof. The Claimant employee of the first defendant had been instructed by his employers to carry out the work in the course of which he suffered injury in an accident in which he fell through a perspex skylight to a concrete floor below. It was held that Royal Mail could not be liable under the 1996 regulations since it had not had control over the way in which the work was carried out. The Judge reviewed the principles emerging from McCook, and considered that although the obligation to perform the duty provided by the regulations could not be avoided by abdicating responsibility, control in fact had to be shown, not the mere power to control.

62. In alleged contrast to the present case, Mr Lawson on behalf of the Claimant sought to stress the strong findings in *Hood* that the Post Office had taken all reasonable steps to satisfy itself that the contractor, Mitie, was competent to do work which included the work in question (see *Hood* at paragraph 8); that in *Hood* a formal written and detailed contract had been entered into which in effect handed over all aspects of health and safety, and in particular required the contractor before conducting the work to appoint a competent person to carry out a risk assessment which was to take into account the hazards likely to be encountered on the roof such as "fragile materials" (see *Hood* paragraph 9); and that there was no evidence in *Hood* that the Post Office had concerned themselves in any way with the way the contractor carried out the work. I note also the reference in McCook in the passage cited from Hale LJ, to a client who is "*contracting with an apparently reputable contractor*".

63. It is also not in dispute that more than one person can be in control at the same time and indeed more than one person can be found liable for breach of the same regulation (see for example Humphreys v. Nedcon UK Ltd [2004] EWHC 1260 (QB); Munkman on Employers Liability 14th ed. at para. 19.27).

64. Although there is no authority on the point, I accept that these same principles on the determination of control should apply to the determination of who has control of a person carrying out the work for the purposes of engaging obligations under the Work at Height Regulations through the application of reg.3 (2)(b) or 3(3)(b).

The Construction (Design and Management) Regulations 1994

65. I turn to the nature of the final basis upon which liability is put in this action, namely under the Construction (Design and Management) Regulations 1994 ("the CDM").

66. These regulations which, given the breaches under the other regulations on which the Claimant relies, might have been thought to have had only peripheral relevance to this claim, have in fact played a significant part in the presentation of the claim.

67. In the first place there is a separate cause of action for breach of statutory duty pleaded by reference to an alleged breach by the Third Defendant of its alleged duty under regulation 10, as a client within the meaning of the Regulations (reg. 2(1)) ("*client is any person for whom a project is carried on*…") to ensure that "*the construction phase of any project does not start unless a health and safety plan complying with reg. 15(4) has been prepared in respect of that project* ".

68. In addition a wider submission is made that although as a matter of law only a breach of regulation 10 can give rise to civil liability (see regulation 21), on the evidence the Second Defendant's husband Stephen Ulph did not have the proper understanding of the overall requirements of the CDM so as to be competent to take on the health and safety role delegated to him from the outset and that even if there was such an understanding, he and the Second Defendant were wholly indifferent to whether the CDM applied and was complied with. This in turn it is submitted should inform the court's general assessment of the credibility of both the Second Defendant and her husband on their claimed understanding of health and safety responsibilities, and the court's assessment of whether, as asserted by the Claimant, no-one took proper or effective responsibility for this project of works.

69. The Defendant denies that regulation 10 applied to these construction works at all because of the exclusionary provisions of reg. 3(2): it does not apply in relation to construction work included in a project where the client has *reasonable grounds for believing* that (a) *the project is not notifiable;* and (b) t*he largest number of persons at work at any one time carrying out construction work* included in the project *will be* or, as the case may be, is, *less than 5*. Under reg. 2(4)(a) a project is notifiable if the construction phase will be longer than 30 days. Even if regulation 10 did apply, the Defendant denies that the plan in fact produced (the Plan already referred to) did not comply with the requirements of the specified regulation 15(4).

70. Regulation 15(4) requires in the round that the *principal contractor* shall take reasonable measures to ensure the plan contains until the end of the construction phase certain features, including *arrangements* for the project (including where

necessary for the management of construction work and monitoring of compliance with the relevant statutory provisions) which will ensure the health and safety of persons at work carrying out the construction work *taking account of the risks involved in the construction work.*

71. In any event the Defendant denies that any breach of this obligation under regulation 10 was *causative* of the Claimant's accident.

72. Again the emphasis in the above paragraphs is that of this court.

The significance of the existence of an obligation under obligations under reg. 10 of the CDM on the question of control for the purposes of Reg 4 (2) of the Construction Regulations

73. These are all issues and submissions to which I will return in my conclusions, but in the light of the emphasis put by the Claimant upon the Third Defendant's obligations under the CDM, I record that in McCook, the court held that any statutory obligation placed on the site owner by virtue of regulation 10 did not on the facts of that case in itself give rise to the requisite control of the work within regulation 4(2) of the Construction Regulations. Judge LJ expressed himself on this question at paragraph 21:

> "Accordingly we must proceed on the basis that that a health and safety plan complying with regulation 10 was not provided by the First Defendant either at the start or indeed at any stage of the project, certainly prior to the Claimant's accident, and this amounted to a breach of regulation 10. In my judgment, Regulation 10 did not create, nor were plans prepared for the purposes of regulation 10 required to create the sort of element of control of the site envisaged by reg. 4(2) …Regulation 4(2) …and regulation 10 of the 1994 regulations are …concerned with different aspects of safety on sites, but they are concerned with distinct aspects of safety …in my judgment a failure to comply Reg 10 …does not of itself create the circumstances of control which are the prerequisite to any duty arising under regulation 4(2)"

My Findings of Fact

74. I turn to my findings on the questions of fact material to this claim in so far as they have not already been made clear.

The knowledge of the Defendants that the Claimant would be brought onto the site; whether the Second Defendant agreed that he should be brought onto the site

75. I find on the balance of probabilities that the Second Defendant, and through her, the Third Defendant, did know in the week preceding the accident, if not before, that Peter McDonald would be bringing the Claimant on site to assist him as a general labourer and had agreed to and had given authority for, his being brought onto the site. I explain below how I have reached this finding.

76. The resolution of this question has depended necessarily upon my assessment of Peter McDonald as a witness set against the evidence of the Second Defendant and her husband.

77. Mr McDonald was in many ways a thoroughly unsatisfactory witness. He had prior to giving oral evidence made three witness statements on behalf of the Claimant and had also given a statement signed by him on the 17th of March 2010 (with certain pre-typed paragraphs crossed out by him) to the Defendants upon which he was cross examined with leave of the court.

78. On the question who had given him the instructions to carry out the roof void boarding, although he had been clear in his witness statement of the 18th of March 2009 that he had been instructed in this regard by the Second Defendant, although he could not remember whether this was by a written list of jobs handed to him or whether she had asked him directly, when it came to his oral evidence he was equivocal and said he could not remember who had given the instruction, although he said it had had to have been either the Second Defendant or Stephen Ulph, He maintained this position of not being able to remember even when being given an opportunity to refresh his memory from that March statement.

79. However in relation to his obtaining the Second Defendant's authority to bring someone on site to assist with outstanding labouring tasks, that someone being the Claimant, although his account of the exact words he used to the Second Defendant are not entirely the same throughout this various witness statements (in his first witness statement at para. 16 and 17 he states that "*I went to speak to Carole Gilling-Smith and said I knew a labourer who could come on site and help her get everything ready. I said that Andrea would want £60 per day... Carole Gilling-Smith said that was fine and asked me to bring him on site*"; in his statement to the Defendants he said at paragraph 36: "*on either Tuesday or Wednesday, 2 or 3 May, 2006, I called Carole Gilling-Smith on her mobile telephone, telling her that I needed some assistance with carrying of materials up to the third floor at the Agora and other labouring tasks and I knew of someone who was looking for a job and who would be able to help… She told me that it would be in order to bring him along and that she did not need to meet Mr Tafa first*"), Mr McDonald has always been consistent about the fact the Second Defendant had agreed with him that he could bring the Claimant on site. I say this notwithstanding that when confronted with his own telephone records which do not support such calls as mentioned in the latter statement, and the Second Defendant's evidence that although she was in the clinic on the Thursday ,the day before the accident ,she had been elsewhere on the preceding days of the week, Mr McDonald said that he could not now remember whether he had discussed the Claimant with the Second Defendant directly or by telephone but he was sure this discussion had been before the Thursday ("*although not sure about the roof void work*").

80. I of course have had regard to the contrary evidence on this issue of both the Second Defendant and Stephen Ulph. There is no allegation that Stephen Ulph had authorised the Claimant to be on site. His evidence was that before he would have given any such authority he would have carried out a "risk assessment" upon him as he had at the beginning of the project upon another labourer, one Caven, which is evidenced by a short written assessment dated 4th of November 2005 ("W*orks to be undertaken: Labourer . Recommended by (competence check): GCS and SU; known 1+year); Pre-*

Commencement Risk: "To help Peter McDonald and Sean McDonald. mainly to accept deliveries + move to third floor; hazards identified: as PM – mainly manual handling"). Stephen Ulph's evidence was that during the discussion with Peter McDonald on site on Tuesday the 2nd of May concerning the WC works, Mr McDonald had said that he needed help to move a number of sheets of plasterboard to the top floor and to help with cleaning, that he knew someone who was a really good worker who might be available to help if he could not persuade his son Shawn, who had been away from the site sometime, to return and would let him know he found someone. According to Stephen Ulph, Peter McDonald had not come back to him on this. In his oral evidence Peter McDonald said he could not recall this conversation although in one of his written statements, that of the 12th of May 2010, he did say that he did recall it although he also said "*I confirm once again that I agreed with GCS for Andrea to come on to the site*."

81. I have also had regard to the points made on behalf of the Defendants that there is no evidence that the Second Defendant had ever previously authorised any personnel, that if it were a face to face authorisation that week, it would, on the Second Defendant's evidence, have had to have been on the Thursday yet there are telephone records of Mr McDonald being in contact with Stephen Ulph during that Thursday and again early on the Friday morning without any suggestion that he mentioned the Claimant to him, and notwithstanding the earlier conversation between them of the 2nd of May.

82. Nonetheless what has persuaded me to accept Mr McDonald's evidence to the extent of my being satisfied that the probabilities are that the Second Defendant prior to the accident had agreed to the Claimant coming on site to assist Mr McDonald in his work, albeit she may not have known the exact identity of the Claimant, are the following features of the evidence.

83. First I heard evidence from Elizabeth Smith, the Health and Safety Inspector. She was called with leave of the court on behalf of the Claimant and I am of course mindful that her witness statement was dated the 15th of July 2010, shortly before the commencement of the trial. She had visited the site on the 28th of June 2006 and had spoken to Peter McDonald. She had visited the Claimant in hospital on the 2nd of August 2006 and had taken a statement from him. She then on the 12th of October 2006 had an interview lasting she said about 20 minutes, with the Second Defendant. As a result of these interviews she made short Case Notes Summaries which have been produced. In addition she subsequently made an HSE Investigation Report which includes a "Factual Report" concerning the circumstances of and background to, the accident. In her evidence to the court she confirmed the contents of that Report as correct. Included within the Factual Report is the following:

> "Some weeks prior to the incident, Mr McDonald became aware that the IP was unemployed. He had discussed with Mr Tafa the possibility of Mr Tafa working for Dr Gilling-Smith. Mr McDonald told Mr Tafa that he would have to ask 'his boss' if Mr Tafa could work with him. On the 4th of May Mr McDonald told Mr Tafa that he could start on the 5th of May for Dr Gilling-Smith.

> Dr Gilling-Smith confirmed that Mr McDonald had asked her permission to employ Mr Tafa to work at the clinic. She stated that she agreed."

84. The Second Defendant keenly disputes that she had said anything such thing to Ms Smith and it was fairly put to Ms Smith on her behalf in the course of cross examination that her Report was made some time after their meeting, that the contemporaneous notes made by the Inspector no longer exist, and that the statement that Mr McDonald had sought and obtained her permission as regards the Claimant, does not appear in the case note summaries of the interview with either Mr McDonald or the Second Defendant. Nonetheless, Ms Smith maintained under cross examination that that which she had recorded in her Report concerning the Second Defendant confirming to her that she had agreed to the Claimant working at the clinic, was what the Second Defendant had told her. Overall I found Ms Smith to be an impressive witness and I accept her evidence on this matter. Whatever may be said about the evidence of Peter McDonald who clearly had a vested interest to protect his own position, I am satisfied that Ms Smith was an independent witness with no such interest.

85. Moreover I have found it instructive to examine the contemporaneous statements of the Second Defendant immediately following the accident, first in her communications with the landlord (Andrew Lambor a director of the First Defendant whose insurance cover she said she believed the Clinic, as tenant, would have the benefit of); secondly in the commentary which she superimposed upon the video recording which she made of the accident site on the Monday following the accident on the Friday; thirdly in the contents of the accident investigation report which she commissioned from an entity called the "Quoin Consultancy" (" Quoin"). In none of these is it suggested that the Claimant was a person who had not had any permission from the Clinic to be on site; in none of these is it suggested that the Clinic had no knowledge that the Claimant was to be brought on site.

86. In her email to Mr Lambor of the 11th of May 2006 the Second Defendant wrote this:

> "*I am just writing to confirm our telephone conversation on Monday. Unfortunately a workman had a fall on Friday 5th of May in our unit and had to be taken to hospital, The exact extent of his injuries remains to be confirmed…You agreed to inform the insurance company and I have employed a Health and Safety company to complete a report action. When they inspected the site of the accident on Monday they agreed we had appropriate Health and Safety measures in place should continue with the refurbishment as previously*"

Remarkably, the Second Defendant in oral evidence maintained that she would nonetheless have mentioned this lack of authority for the Claimant to be on site, to Mr Lambor in the telephone call preceding the email, albeit she omitted this from the email. I regard it as wholly implausible that if this had been the case, she would have omitted this matter from the email, given its potential importance on the need for insurance cover and especially as the Second Defendant said she had been checking out the insurance position with her father the previous weekend.

87. I do not set out the entirety of the video commentary. Suffice it to say that nothing in it suggests that the Second Defendant regarded the Claimant as having had no business being on the site or indeed in having no business in carrying out the work in the roof void. Indeed the whole tenor of the commentary is that this was work properly being carried out following an induction process, with proper safety measures in place. Thus:

> "I *am standing now at the top of the ladder...this is where the worker was...when the accident happened. He had a hand-rail...which has been in place all the way through. We're standing on the boarding which is used by the electricians...air conditioning people...he fell through where the four suspended ties are missing shown here and he was given...information during his induction that these were suspended ceilings and should not be….putting weight on them...the area he had to work in was boarded to quite a large area going all the way round and there was certainly plenty of lighting, and he simply required his electric saw to cut down and trim any excess.*"

88. The Second Defendant's evidence was that the information she had set out in the video relating to the Claimant being given an induction, was based upon that which her husband told her Mr McDonald had told him. If – as the Defendants maintain – the set-up was that Mr McDonald would be expected to obtain prior permission before bringing any worker on site to assist him, not least because Mr McDonald would expect the Clinic to pay the invoice in respect of the worker's labour, then it is beyond belief in my judgment that in the course of that commentary the Second Defendant would not have made the point that as far as she and the Clinic were concerned, the Claimant had no business being on the site and no prior permission had been given, if in truth that was the position.

89. A similar observation is to be made about the information given to *Quoin* about the circumstances of the accident as reflected in the history given in their Report, which is devoid of a suggestion that the Claimant was an unauthorised worker. The Second Defendant conceded that she had not told *Quoin* of any such lack of authority.

90. It is clear to me that that it was only much later when the Second Defendant realised that there might be some personal responsibility placed upon her and/or the Third Defendant for the accident, that the Second Defendant began to assert that the Claimant was on site ,and had been engaged by Mr McDonald, without her knowledge. This inevitably in my judgment undermines the credibility of her evidence on this issue.

91. It is also highly unlikely in my judgment that Peter McDonald would unilaterally bring someone on site whose labour he expected the Clinic to pay for, without obtaining prior permission and agreement. The system operated by Mr McDonald when his son Shawn was assisting him at the site, was to produce a weekly invoice under his title which set out the cost of the labour of himself at £125 per day, the cost of the labour of Shawn at £60 per day and the cost of his materials. If he was contemplating bringing the Claimant on site, he would want to know in advance that the Claimant's labour would equally be paid for by the Clinic.

92. There is moreover collateral evidence supporting the proposition that it was the Second Defendant from whom Peter McDonald obtained that permission and agreement in the evidence from the Claimant's partner, Colleen McArdle. She confirmed that which the Claimant had told the court, namely that it was at a social gathering at Bingo, involving herself and the Claimant, together with Mr McDonald and her friend Sheila, his sister, some 2 weeks or 10 days before the accident, that Mr McDonald, upon being told that the Claimant was looking for work, had said he would ask "*his boss*" if "*she*" needed anyone else on site; and that it was on the Thursday before the accident, the 4th of May, that Peter McDonald had telephoned to tell the Claimant that he could start work the very next morning. That of course was the very day that the Second Defendant agrees she was in the clinic that week. Colleen said she phoned Peter McDonald that evening who told her that the Claimant would be paid £60 per day and that he would pick him up the following morning. He had had warned her to tell the Claimant that he should not get too excited about the job because there was only about 10 days or so work available, just in order to help finish off various odd jobs at the time.

93. I have no reason to doubt the evidence of Colleen McArdle on these matters, which evidence is entirely consistent with Peter McDonald having obtained in advance the permission of the Second Defendant to bring the Claimant on site, and to be paid at a daily rate of £60.

94. It is for all these reasons, that I find on the balance of probabilities that the Second Defendant, and through her, the Third Defendant, did know in the week preceding the accident, if not before, that Mr McDonald would be bringing the Claimant on site to assist him as a general labourer and had agreed to and given authority for this. I similarly find that absent such agreement and authorisation of the Second Defendant, the Claimant would not have been brought on site.

95. I do not find however that the Second Defendant and hence the Third Defendant had any express prior knowledge that the Claimant would be set the task by Mr McDonald of working at height constructing the walkway.

<u>Whether any express instructions were given to Peter McDonald to construct the walkway</u>

96. This leads onto my consideration of the issue whether Peter McDonald was instructed by the Second Defendant – or anyone else on behalf of the Third Defendant – expressly to carry out the roof void walkway works.

97. I find it impossible to find that Peter McDonald was given the express instruction by the Second Defendant to carry out the works upon which the Claimant was engaged at the time of his accident. His oral evidence on this issue was just too equivocal as already explained. Moreover on this question the Second Defendant undoubtedly consistently told the Health and Safety Inspector, Ms Smith, that no such instructions had been given. Stephen Ulph's evidence was that if such instructions had been given he would have been involved in discussing how the works should be carried out, which he was not.

98. I also find it impossible to accept, as asserted by Peter McDonald, that in the weeks leading up to the accident the only person giving him instructions on construction works was the Second Defendant. Peter McDonald's evidence was that although at

the beginning of the project he had seen a lot of Stephen Ulph in the more recent weeks it was only the Second Defendant who had been on site giving him instructions. In some respects I accept this evidence in so far as he was making the point that in the weeks prior to the accident he was seeing a lot more of the Second Defendant. The Second Defendant herself says that as from the end of April she had been visiting the clinic site twice a week using one of the completed the consultation rooms as an office because of the advance state of the works. It does appear that as at the beginning of May the majority of the construction works had been completed and what principally remained was the sort of incidental sundry works referred to above in which the Second Defendant herself accepts she was directly involved. In her first witness statement the Second Defendant says (paragraph 12) that in the time leading up to the accident the only contractor working regularly at the clinic was Peter McDonald. In her supplementary statement she seeks to explain away the section in the HSE Report saying that she gave Peter McDonald instructions on a day to day basis, by suggesting that the Inspector drew this conclusion from the circumstances prevailing when she visited the clinic to interview Peter McDonald in June 2006 "*since at this time I was the person giving him most of his instructions since he was only carrying out sundry carpentry and odd jobs by then as the refurbishment was complete, e.g. fitting picture rails, fitting splash backs to the clinical sinks to make them Healthcare Commission compliant*."

99. My conclusion is that in all likelihood the Second Defendant was more involved in giving instructions to Peter McDonald in the weeks prior to the accident than she was prepared to concede. On the other hand the evidence is compelling that on more major works of construction it was Stephen Ulph who would get himself involved in discussing the works with Peter McDonald and involving himself in the way the works should be carried out. The most obvious example not long before the accident, concerns the alterations to the location of the disabled WC to which reference has already been made and which is evidenced by the additional entry made by Stephen Ulph in the risk assessment form. As regards the alterations to the WC, Peter McDonald did not really dispute that his discussions had been with Stephen Ulph. The evidence of Mr Perrin, of the air conditioning contractors Air Temp referred to below, was that he had become involved in the design brief for the clinic through Stephen Ulph who was introduced to him as the project manager.

100. On the other hand I cannot accept that Peter McDonald himself unilaterally decided for himself that the boarding of the roof void to make a means of access to the air conditioning units installed there, should be part of the Third Defendant's project of works, not least because, as already explained, the Defendants concede that there was a need and intention to construct such a walkway, albeit not at that particular time. There is compelling evidence that on the 4th of May the Second Defendant herself had been informed by an air conditioning engineer that such a means of access would be required and it is a remarkable coincidence that the next day Peter McDonald embarked upon that work. Ms Smith in her report records the Second Defendant as saying this:

> "Dr Gilling-Smith states that she did not instruct Mr McDonald to undertake the fittings of the floorboards to the ceiling. She states that on the 4th May the Airconditioning Contractors were on site and informed Mr McDonald directly that the

> floorboards needed fitting and Mr McDonald took it upon himself to undertake the job (without consulting her as to the timescales for the work and without agreeing costs etc)."

101. The Second Defendant in her supplementary witness statement concedes that she had told the Inspector that it had occurred to her that the air conditioning contractor who was present at the clinic on 4th May "*might have mentioned something directly to PM about boarding out the loft space* although she says this was pure speculation on her part. ("*I had been at the clinic that day and the contractor had come into my office to say he had finished his checks and mentioned that when the unit at the rear was due for commissioning it would be important to have some boarding in place in the loft to make it accessible. I told her that I had not relayed that conversation to Peter or anyone else before the accident happened. It was however possible that this contractor and PM had spoken to each other, maybe when having a tea break, and the contractor might have mentioned this directly to PM*"). No doubt the Second Defendant was the source of the statement in the Quoin report under "*Brief Description of events leading to the accident*" that "at *the request of services engineers on a previous site visit, it was proposed to extend the timber boarding to an existing walkway within the roof space. This would improve safe access to mechanical plant for future servicing purposes*".

102. I am not in a position to find with any certainty how Peter McDonald came to the understanding that a walkway was required but come to that understanding he clearly did and it cannot have been in my judgment simply an intelligent guess on his part. He says that it was through instructions given by either the Second Defendant or Stephen Ulph but cannot now say who and it is noteworthy in his statement to the Defendants he said "*I do not remember any specific conversation with either Stephen Ulph or Carole Gilling-Smith about the timetable for the works*". He denies being informed of these works by any other contractor and the evidence produced by the Defendants from the various contractors, including Mr Wade, the air conditioning engineer who attended on the 4th of May, does not suggest that he was. Mr Wade says he recalls "*speaking to the clinic's builder who acted as site representative, Peter McDonald… I recall speaking to Peter about the need for a service hatch… (but) I do not recall any conversation with Peter McDonald about the need for access to the other unit to the other unit above the laboratory area… I would have been aware that there was no urgent need for access to this unit which would only need to be inspected at its first service some 6 months after commissioning*". Oddly Mr Wade says he does not believe he spoke to the Second Defendant that day. The only other evidence of note on this issue came from the witness statement of Mr Perrin, a project manager for the company, Airtemp AC Ltd, who had been given the design brief for the air conditioning system at the clinic. As regards the unit in the loft space he said he did "not *recall any specific discussion with our clients about the needs for access to this unit for ...subsequent servicing*" but although the issue was never discussed he accepted "*to assist the service engineer a boarded walkway from the hatch above the central corridor of the Clinic was going to be useful…by the time the first service of the unit was undertaken 6 months or so after the commissioning*".

103. Although I am unable to find that the Second Defendant, or anyone on behalf of the Third Defendant, gave any express instructions to Peter McDonald in relation to the roof void work, I am given the evidence I have rehearsed, nonetheless satisfied that

the Second Defendant, and through her the Third Defendant, was aware at least from the 4th of May that the work would be required at some stage and it was foreseeable to her and hence the Third Defendant that it would be carpentry work to be undertaken at height by Peter McDonald. Moreover in my judgment these were access route works in the roof void across the timber joisted structure which were foreseeable to the Defendants from the outset of the project as a necessary part of the project works, involving as they did the installation of the air conditioning units in the position they were to which access would be required . I do not accept that in deciding to construct the walkway as such, Peter McDonald was on a frolic of his own.

How Peter McDonald came to make the decision to construct the walkway on the day

104. As to how Peter McDonald came to make the decision to carry out the walkway work on the day he did however, there is compelling evidence that this was because his son Shawn had turned up unexpectedly on the day Peter McDonald had brought the Claimant on site to assist him in more menial tasks of moving material to the third floor and general tidying up, and he, Peter McDonald, was put in the position of having to find work for both the Claimant and Shawn to do. Mr McDonald in oral evidence did not really dispute that this had been the reason why he decided that the two of them should set about the construction of the walkway. On the day itself it does appear a spur of the moment decision. The fact remains however that somehow Mr McDonald already had on site the necessary pre-cut tongue and groove boards suggesting some preplanning on his part. This aspect remains a mystery given such invoices as have been located, evidencing purchasing of materials by Peter McDonald on the 26th of April and the 3rd of May, do not support the acquisition of such a quantity of boards on those occasions. The ladder Peter McDonald used to give the Claimant access to the roof void appears to have been borrowed from another contractor, Jacksons.

The status of the Claimant on site

105. I do not however find that the Claimant, although on the site with the agreement and authority of the Second Defendant and therefore of the Third Defendant was there as an employee of the Second Defendant or the Third Defendant. My reasoning is as follows.

106. As I have indicated, Peter McDonald was a self employed sole trader carpenter and there is no allegation that he was an employee of the Defendants. I have already explained that the system operated by Mr McDonald when his son Shawn was assisting him at the site, was to produce a weekly invoice for a total sum made up of the cost of the labour of himself at £125 per day, the cost of the labour of Shawn at £60 per day, and the cost of his materials, which sum if agreed – usually by Stephen Ulph – would then be paid by the Third Defendant. It is true that Peter McDonald did not add any profit margin to the cost of his son's labour and I have of course had regard to the well known principles set out in Lane v. Shire Roofing Company (Oxford) Ltd [1995] IRLR 495 relevant to the determination of whether a worker is an employee or an independent contractor. Peter McDonald himself gave evidence in his third witness statement of March 2010 in the following terms under the heading 'Invoices':

> "37. Andrea (*a reference to the Claimant*) and I never discussed invoicing prior to the first day on the site and he had his accident before anything was discussed. I expected Andrea to be paid by the Clinic. It was never my intention to include him on one of my invoices.
>
> 38. I have never employed anyone in all my time as a carpenter, and only used to include Shawn on my invoices because at the time he did not have a bank account, but I have never employed Shawn. He charged £60 per day for his labour which I would add to my invoices and then give all this money to him. I did not profit from him and he has always been self employed".

107. I have to bear in mind when considering Mr McDonald's evidence on this issue, his self interest to protect his own position and that of the Claimant for whom no doubt he carries the weight of the serious physical consequences to the Claimant arising out the work he asked him to do in the circumstances he did, without the benefit of any insurance cover himself. Similar considerations must apply to the weight to be attached to the *belief* of the Claimant communicated to the Inspector, Elizabeth Smith, in that interview at hospital in August 2006, that he "*was employed by the Agora Clinic*" (see Case Note of interview in the HSE papers) at a time when he had already been visited by Peter McDonald several times.

108. My conclusion is that the Claimant at the material time was an employee of Peter McDonald rather than that of the Defendants. McDonald was the one who set him the tasks to do on the site and he was there to assist McDonald in his work as a self employed trader, albeit with the agreement and authority of the Second Defendant and hence the Third Defendant.

Control by the Defendants: control by the Third Defendant

109. This said, I have no doubt that the Third Defendant, although not an employer, retained and had a factual control over the way works were being carried out by *Peter McDonald* on site for the purposes of reg. 4(2) of the Construction Regulations ("the CR") which would include any work at height in the roof void, and over *Peter McDonald himself* for the purposes of reg. 3(3)(b) of the Work at Height Regulations ("the WHR").

110. Equally I am satisfied that the Third Defendant had like control over *the roof void works being carried out* by *the Claimant* at the time of the accident, given they were still works being carried out by Peter McDonald, albeit through the Claimant, and *over the Claimant himself* for these purposes, given as I have found, the Third Defendant had through the Second Defendant authorised the Claimant to be on site and without which authority he would not have been brought on site.

111. Moreover I am satisfied that the Third Defendant had the necessary extent of control for the purposes of being under an obligation to meet the requirements of the specifically pleaded regulations.

My reasoning for these conclusions is as follows.

Control over Peter McDonald and the way the roof void works were carried out

112. The Third Defendant's own case is in effect that it had factual control over the way construction work was done on site. Its own case is that Peter McDonald would be expected to act on instructions and that as regards building works on site it would be expect to be involved in deciding how the work should be carried out – albeit the Second Defendant insists that the Third Defendant would do this through Stephen Ulph as project manager rather than herself. The so called "pre-commencement risk assessment" on Peter McDonald completed by Stephen Ulph contemplated that he would carry out work at height and I have already found that the work to build the walkway in the roof void was work which the Third Defendant through the Second Defendant knew was required to be done at some stage. I repeat in this context my finding that although I am unable to find that the Second Defendant, or anyone on behalf of the Third Defendant, gave any express instructions to Peter McDonald to carry out the particular work on the day he did , nonetheless the Second Defendant, and through her the Third Defendant, was aware prior to the accident that the work would be required at some stage and it was foreseeable to her and hence the Third Defendant that it would be carpentry work to be undertaken at height by Peter McDonald. As was submitted on behalf of the Claimant, this further task was in many ways simply a follow on from what Peter McDonald had already done in constructing the timber joist structure itself. This was moreover, as I have found, from the outset of the project foreseeably necessary work to be carried out at height.

113. The Third Defendant cannot be said in my judgment, even on its own case, as regards any works carried out by Peter McDonald, to be a mere occupier of a site who had by contract handed over all control on how the works on site were to be carried out, and the responsibility for all aspects of safety in relation to them, to an independent third party, i.e. Mr McDonald, such as was the position of the Post Office in *Hood*. This is quite apart from the fact which I have already found, that there was no basis for anyone to conclude that Peter McDonald had the necessary competence to be in charge of the organisation and supervision of work at height.

Control over the Claimant

114. Given as I have found, that the Third Defendant had through the Second Defendant agreed to and authorised the Claimant coming on site to assist Peter McDonald in his works and without which authority he would not have been brought onto the site, I am driven to the like conclusion that the Third Defendant had like factual control over the works being carried out by the Claimant, given they were still works being carried out by Mr McDonald albeit through the Claimant, and over the Claimant himself.

115. Given the awareness and foreseeability of the need for the works prior to the accident which I have found possessed by the Second Defendant and hence by the Third Defendant and the foreseeability of their need from the outset of the project, I regard it as irrelevant for these purposes that she did not know, and hence the Third Defendant did not know, that the roof void works were to be carried out on the day they were or that the Claimant was to be put by Peter McDonald to the particular task of carrying out such particular works on his behalf. Moreover it must be to nothing that Peter McDonald himself also had the requisite control since as already explained more than one person can be in control at the same time.

The necessary extent of control

Extent of control for the purposes of the Construction Regulations

116. As already set out, there can be liability for a breach of any particular regulation under the CR only to the extent that the particular requirements relate to matters within a defendant's control. I have already set out the material regulations and the matters to which they relate in paragraph 56 above. I take each in turn, to explain my conclusion that the necessary control resided in the Third Defendant in respect of each.

117. As regards regulation 28(1) (*the carrying out of the works by a person of appropriate training, knowledge or experience or the supervision of such person by a person with such appropriate training etc*) I agree with the Claimant's submission that it is not open to the Third Defendant to say that ensuring workers engaged on site had suitable competence or were under competent supervision, was not a matter within its control since it is the Defendants' express case that they sought to make (and indeed document) such competence checks and in respect of Peter McDonald in particular.

118. Equally with regard to the requirements of regulation 5 relating to *the Claimant's place of work (5(2))* and *access to and from* (*5(1))*, and *in particular regulation 5(3) relating to the prevention of access to a place of work which does not comply with the requirements of (1) and (2)*, it always remained in my judgment in the Third Defendant's control to prevent access to the roof void. For the reasons I have already given, it had control of the way construction work was done on site, in particular work being carried out by Peter McDonald, and access to those parts of the site in which those works were to be carried out, including the timber joisted structure in the roof void, was patently within the Third Defendant's control, regardless of who was the occupier of the roof void. The regulations themselves contemplate that control of access to the parts of a site in which construction works are to be carried out may relate to the manner in which work is carried out and in my judgment it did so in this case.

119. It again is to nothing in my judgment that the Defendant may have chosen to exercise control through its agent Peter McDonald – on the evidence, McDonald, being a key holder, was used by the Defendant for granting access to the site and locations therein. I agree with the Claimant that control was not lost for the purposes of the regulations simply because the Defendant may have delegated control to Mr McDonald. And moreover it was always open to the Defendant to exercise an independent control, i.e. independent of Mr McDonald.

Control under the Work at Height Regulations;

120. As already set out, in respect of an obligation to comply with provisions of any particular regulation under the WHR, this is only to the extent of the Defendant's control over the person carrying out the work at height. Again I have already set out the material regulations and their individual requirements relied upon by the Claimant in paragraph 59 above.

121. On any view in my judgment the Third Defendant had control over Peter McDonald for the purposes of coming under an obligation to comply with regulation 4(1) (relating *to the proper planning and appropriate supervision, and safe performance of*

work at height) and regulation 5 (relating to the *competence* of those *engaged in the organisation, planning and supervision and performance of the work at height*). Hence I accept that these obligations were triggered and imposed upon the Third Defendant regardless of whether in addition the Defendant had control over the Claimant for the purposes of the WHR.

122. I again make clear that I consider these obligations were triggered in relation to the work being carried out in the roof void on the day of the Claimant's accident even though I have been unable to find that Peter McDonald was expressly directed to carry out that work on that day, given I have also found that this work was work within the contemplation of the Defendants as being required as part of the project works - and foreseeable as such from the outset of the project - and that it was foreseeable to the Defendants that it was carpentry work to be undertaken at height by Peter McDonald. I agree with the Claimant's submission that it was in these circumstances within the extent of the Third Defendant's control over Peter McDonald to ensure, as required by regulation 4(1), that any work at height for which McDonald was responsible, was "*properly planned, properly supervised, and that he used safe working methods*"; Similarly it was within the extent of its control over Peter McDonald, to ensure that the requirements under reg. 5 of the WHR were complied with, that is the requirement to ensure that only *competent* persons were involved in the organisation planning, supervision and performance of work.

123. I do however consider that in addition to having the necessary control over Peter McDonald, the Third Defendant had like control over the Claimant in order to be able to and, hence to be under an obligation to, comply with he requirements of the pleaded WHR regulations, given the express agreement and authority given by the Second Defendant on behalf of the Third Defendant for him to be brought on site to assist Peter McDonald. Again I do not consider it relevant that the Second Defendant did not know that the Claimant was to be used by McDonald for the purposes of the work at height in the roof void. It is sufficient in my judgment in order to trigger the responsibilities under the WHR, that the work the Claimant was undertaking was the work which it was within the contemplation and foresight of the Defendant that Peter McDonald would be carrying out as part of the works of construction.

<u>Control by the Defendants: control by the Second Defendant</u>

124. I have come to the conclusion that the Claimant is correct in submitting that on the evidence it was the Second Defendant through whom the Third Defendant exercised this factual control over both Peter McDonald and the work being carried out by him and over the Claimant and the works he was carrying out, and it was the Second Defendant through whom the Third Defendant had the necessary extent of control for the purposes of the obligations imposed by both sets of Regulations. There is in reality in my judgment no other candidate through whom it can be properly said on the evidence that the Third Defendant exercised that control.

125. Moreover I find that the Second Defendant had *personal* control for the purposes of coming under *personal obligation* under both sets of Regulations. It is in this context noteworthy that under reg. 4(2) of the CR, the duty is upon "*every person*" who controls the way construction work is carried out by a person at work insofar as they (the requirements of the regulations) relate to matters which are within his control;

and under reg. 3(3)(b) of the WHR the duty is imposed upon "*any person*" in relation to work by a person under his control to the extent of his control".

126. My reasoning for both conclusions is as follows.

127. I have already found that the Second Defendant personally authorised Peter McDonald to bring the Claimant upon the site. This action however goes beyond merely facilitating any breaches of statutory duty on the part of the Third Defendant. I accept the validity of the submission that as the person who on her own admission had overall responsibility within the Third Defendant for the health and safety including in relation to the building phase of the project (see again the evidence as summarised at paragraphs above at paragraphs 35 to 37 with reference to the Plan and the Policy and the oral evidence of the Second Defendant), she was the person within the Third Defendant who had the control to ensure whether the works were done in a safe or unsafe way and she retained that personal responsibility and control for the safe completion of the construction project throughout the time of the works.

128. The Second Defendant may have sought to delegate that responsibility for the control of the works to her unremunerated husband Stephen Ulph whom she purported to appoint as project manager but again I do not consider that this could be regarded as a handing over of control to a truly independent third party professional with clearly specified contractual oversight and planning obligations, sufficient to divest herself of that control. I have already highlighted the inadequacy of the appointment arrangements relating to Stephen Ulph. As was said by Hale LJ in McCook, a person with factual control who chooses not to exercise it, cannot therefore escape liability. As was said in Hood, the obligation to perform any duty provided by the regulations, cannot be avoided by abdicating responsibility.

129. In any case at best any delegation to her husband, was only in my judgment a "part" delegation. I accept that the evidence (see again paragraph 42 above) does establish that the Second Defendant had a direct hand in the acceptance of Peter McDonald without good basis as a competent contractor to conduct work at height and I observe that she was quite content for the Plan to describe her along with her husband as project manager.

130. This analysis must equally apply to any suggestion that the Second Defendant divested herself of any material control, as regards any works being carried out by the Claimant, by delegation to Peter McDonald. For the reasons I have already given Peter McDonald was not truly independent of either Defendant. As was put in argument Mr McDonald was simply an agent, a person to whom retained control had been at most been abdicated. I say "at most "since the Defendants were also keen to stress McDonald was also a person over whom they purported to exercise control.

General findings on the Defendants' approach to health and safety and the planning and organisation of the project

131. Before turning to my conclusions on liability, I record that I have sympathy with the overall submission made on behalf of the Claimant that that this was not a well run project and had it been otherwise and been well organised it is unlikely then that an accident such as that which the Claimant suffered, involving a lapse of basic precautions, would have occurred. As an overview, I find that no one took effective

responsibility for health and safety on site. I agree with the Claimant's submission that apart from some very basic risk assessments of contractors which were not risk assessments in relation to tasks rather than individuals, very little was done even if on occasion those assessments were added to in a very summary way in respect of particular jobs, such as the alteration of the rear WC

132. Certainly nothing was done to ensure that all necessary works in the roof void were properly planned out and would be conducted by contractors who could be relied upon to use safe working methods. As already set out, Peter McDonald was never required to provide any form of risk assessment, method statements or safety plan for the work he was assigned. It is symptomatic of their lackadaisical approach to safety that the Defendants never caused any proper check to be made on whether Peter McDonald had any public/employer's liability insurance. It is true that the Health and Safety Plan stated "*Risk assessments/method statements – to be carried out prior to each contractor commencing and updated as the need arises*" and continued "*Safety is of the utmost priority and therefore only competent contractors should carry out works and risk assessments/competence checks will be made on each contractor and these are to be updated as the works proceed*" but I agree with the Claimant's submission that in relation to Peter McDonald these were hollow words. There was never ever any proper competence check on Mr McDonald in my judgment. Moreover there was a lack of clarity in the arrangements entered into with Peter McDonald. The Defendants assert he was appointed Site Foreman and Site Contact. Mr McDonald in evidence just about accepted being 'Site Contact'. He vehemently denied being Site Foreman.

133. I might add also that I also accept Ms Smith's assessment of the Second Defendant as a result of her interview that she "*did not have a clear understanding of what her responsibilities were under the Health and Safety at Work etc. Act 1974. Dr Gilling-Smith did not appear to understand her legal responsibilities for anyone on her site*". The Notes made by the Second Defendant herself as a result of that interview (including "*Work at Height Check competent contractors. Risk Assessment/Method Statement: ask contractor*") suggest she was at that date on a learning curve as regards heath and safety, an impression which I have to say I also formed when listening to her give oral evidence. It is a general reflection on her lack of understanding of what was required in this regard that she claims not to have realised that the Third Defendant had no employer's liability insurance as required by law. Her reliance (and indeed that of her husband) on the Bonus Tenant's certificate issued by the landlord's insurers was always misplaced not least because its inception was as from 1st January 2006 when the construction works began in November 2005 and on any view could not cover those works. I am also doubtful whether she herself or her husband ever saw this certificate prior to the Claimant's accident.

134. Further in this context, although as will be seen I have concluded that the claim against the Third Defendant based on regulation 10 of the CDM regulations has not in itself been made out, what I have extracted from the evidence relating to this part of the claim, and in particular in relation to the Plan upon which the Defendants relied as complying with the material regulation, Reg. 15(4), and in relation to the F10 Notice (the notice to the HSE in respect of a notifiable project) is that again the Second Defendant, and indeed her husband, had little understanding of Health and Safety responsibilities. The F10 Notice produced in this case which refers only *external*

refurbishment works with the *client* being named as *Matsim Properties Ltd*, could not by any stretch of the imagination be a Notice in respect of the *internal* refurbishment works being carried out by the *Clinic* despite the efforts of Mr Ulph to persuade the court otherwise. The Plan relied on, lacks the essential appointment of a *principal contractor* and *planning supervisor* appropriate to these *internal* works being carried out by the *Clinic* if the requirements of regulation 15(4) were to be met (see again regulation 15(4) and regulation 15(1)). The reference in the Plan to *Matsim Properties/Lambor Associates* (the landlord) as the *principal contractor* for these purposes makes no sense although again neither the Second Defendant nor her husband appeared to understand this in the course of their evidence.

Conclusions on Liability

135. With these findings in mind, I turn to my conclusions on liability.

Breach of Statutory Duty: the Construction Regulations and the Work at Height Regulations

136. To succeed in breach of statutory duty it is of course sufficient for the Claimant to succeed in his claim against any particular Defendant if he can establish any causative – causative of his accident - breach of the material Regulations as against that Defendant.

137. I have already found that the Third Defendant and the Second Defendant each had the requisite control over the works being carried out by the Claimant at the time of his accident and over both Peter Macdonald and the Claimant himself, for the purposes of liability under the pleaded regulations of both the Construction Regulations and the Work at Height Regulations.

138. The Second Defendant's potential liability is both as a joint tortfeasor as being the person on my findings who procured and authorised any breach of the regulations by Third Defendant and as a person under a personal obligation under the pleaded regulations, given her own personal control these purposes.

139. It has also to be remembered throughout that (i) it is not in dispute in this case that the Claimant had not been provided with a safe place of work or a safe method of working from a height – in particular there were no adequate safety precautions in place to protect anyone working in the roof space from the obvious risk of falling though the ceiling; there was no edge protection; nor fall arrest equipment; nor any fall mitigation arrangements in place. There was no scaffold for example below the area where the Claimant was working or from which he could work; (ii) I have already found that (a) the work at height which the Claimant was undertaking had been neither properly planned nor organised and nor was it was being properly supervised (b) the Claimant himself had neither the training nor experience safely to carry out the work (c) Peter McDonald was not himself a person with appropriate training, technical knowledge or experience necessary to reduce the risks of injury to anyone carrying out this work at height; he did not have the requisite competence to be in charge of the organisation and supervision of work at height (d) no proper check had ever been made upon these competencies of Peter McDonald.

140. I have also found that it was within the means of control of both the Third and Second Defendants to prevent the Claimant's access to the roof void until adequate precautions had been taken for his safety. There was for example no evidence that Peter McDonald was ever issued with an instruction that no one should be permitted to enter the roof void unless they had been subjected to specified checks or unless further authority were provided.

141. It was also within their control of each Defendant to plan the works so that from the outset foreseeably necessary access routes across the timber joisted structure were constructed in an organised fashion.

142. With these findings in mind I find the following causative breaches of the respective regulations have been established against both the Third and Second Defendant:

143. Of the Construction Regulations :

- regulation 28(1): failing to ensure that that the Claimant was under the supervision of someone with suitable training, knowledge or experience to protect his safety;

- regulation 5(1), regulation 5(2) and regulation 5(3) – failing to take suitable and sufficient steps to ensure the Claimant did not gain access to the place where he was working while it did not comply with the safety requirements of reg. 5(1) (access and egress) and (2) (safe place of work); or put another away, as pleaded, failing to take such steps to ensure that the Claimant did not gain access to the place where he was working without additional precautions being taken.

144. It is to be remembered in this context that the obligation under these regulations is (in respect of reg. 5(3)) to ensure that the "*no person*" gains access to an unsafe place of work, and the obligations under regs. 5(2) and 28(1) are in respect of "*any person*" who carries out any activity involving construction work. The Claimant in my judgment is entitled to rely on these breaches regardless of his particular relationship to the Defendants, once the court finds – as it has – in addition to having control over the way the work was carried out, that the Defendant had the of control of his access, and of the appointment of Peter McDonald. I agree with the submission made on behalf of the Claimant that in engaging McDonald without the requisite competencies to either carry out or supervise the work, the Defendants brought about a breach of regulation 28(1) causative of the Claimant's accident. They ensured any one working under Mr McDonald's supervision would not be under the supervision of a suitably qualified person. But of course there is an additional factor in this case that the Second Defendant, and through her the Third Defendant, knew that the Claimant was being brought on site and had agreed and authorised the same.

145. Of the Work at Height Regulations, I find the following causative breaches, again committed by each Defendant:

- regulation 4(1) – failing to ensure that the work at height in the roof void was properly planned, appropriately supervised and carried out in a manner that was as far as reasonably practicable safe;

- regulation 5 – failing to ensure only competent persons were involved in the organisation, planning, supervision and performance of work at height on the site;

I find it unnecessary in the circumstances to consider breaches of the other pleaded regulations.

146. As I have explained, in my judgment the Defendants had the requisite control for the purposes of these regulations both over Peter McDonald and the Claimant. But even if I were wrong on this, they undoubtedly had the requisite control over Peter McDonald to ensure that work at height was properly planned, organised and supervised and this they failed to do in breach of both regulations 4 and 5. They had the means of control to ensure that the work in the roof void was properly planned out, scheduled in advance, with method statements in place and/or a written programme communicated to the contractors.

147. Although I have not found that Mr McDonald had been given any express instructions directed to carry out the work on the particular day, I have also found that it was within the knowledge of the Defendants that the work was required and that it was foreseeable to them that it would be carpentry work to be undertaken at height by Peter McDonald. Even if it be the case that the work was to be postponed for the reasons relied on by the Defendants, I am satisfied that McDonald can only have gone about the job because it had not been properly communicated to him that no further works were to be done above the laboratory and no one had worked out in advance how and when necessary walkways above thin the roof void would be constructed.

148. I accept the submission of the Claimant that on the ground of these breaches of the WHR arising out of their control of Peter McDonald alone, the Defendants are liable to the Claimant in breach of statutory duty, given the breach was undoubtedly causative of his accident and given, regardless of his relationship to the Defendants, the Claimant was a worker on site within the category of persons entitled to the protection of the Regulations. See again the legal analysis at paragraphs 49 to 51 above.

Common law negligence

As against the Third Defendant

149. Given the findings I have already made as to the extent of the retained control of the Third Defendant in relation to the way in which the works on site were being carried out and its knowledge of the Claimant being brought on site to assist in the works being carried out by Peter MacDonald which forseeably included working at height, in particular in the roof void, a common law duty of care in my judgment must have been owed by the Third Defendant to the Claimant to take all reasonable care for his safety and to protect him from foreseeable risks of injury while on the site at least to the extent of that control – applying the principles identified by Mr Jeffreys set out at paragraph 38 above. That control undoubtedly extended to the matters complained of in the particulars of negligence pleaded against the Third Defendant at paragraphs 39 and 38(2) (“*failing to ensure work at height at the site was properly planned, appropriately supervised and carried out in a manner that was as far as practicable safe”*) and 38(3) (“*failing to ensure that only competent persons were involved in the organisation, supervision and performance of work at the site*”) for the reasons I have explained when considering like allegations as particulars of breach of the WHR regulations. For the purposes of the imposition of a duty of care at common law, - essentially coextensive with those particular statutory duties - the principles of

foreseeability of harm and proximity are in my judgment satisfied and I see nothing unfair or unjust or unreasonable in these circumstances in imposing such a duty on the Third Defendant. On my findings there was patently a causative breach of that duty of care by the Third Defendant in the respects so pleaded in paragraphs 38(2) and (3) of the Particulars of claim (as incorporated in the case in negligence against the Third Defendant by virtue of paragraph 39 thereof). Hence on this basis I find the Third Defendant liable to the Claimant in negligence.

Common law negligence: the Second Defendant

150. Given my findings as to the retained control which the Second Defendant personally had over the works to the extent indicated for the purposes of the breaches of the regulations governing access to the Claimant's place of work in the roof void and the planning and organisation and supervision of the works and the competence of those involved in the same, and her retained personal responsibility for health and safety during the building phase of the refurbishment works, coupled with her knowledge that the Claimant was to be brought onto the site to work there with her agreement and authority to assist the carpenter Peter McDonald, and her own personal foresight of the carpentry works which were required in the roof void, I find the Second Defendant liable in negligence to like extent as the particulars of negligence I have found against the Third Defendant ("*failing to ensure work at height at the site was properly planned, appropriately supervised and carried out in a manner that was as far as practicable safe*") and 38(3) ("*failing to ensure that only competent persons were involved in the organisation, supervision and performance of work at the site*") to which must be added the particulars pleaded against the Second Defendant at paragraph 38 (14) of the Particulars of Claim (…*permitting Peter McDonald to conduct work at height when she had no proper basis for believing that (he) had the competence, diligence and training to ensure that work was performed safely*). As already indicated she had a personal hand in the selection and acceptance without good basis of Peter McDonald as a competent contractor to conduct work at height safely.

151. I make this finding of liability in negligence on the basis of the Second Defendant owing a personal duty of care to the Claimant as a person known by her to be coming on site to work to assist Peter McDonald, to take all reasonable care for his safety to protect him from foreseeable risks of personal injury arising from the project works, at least to the extent of the matters set out in those particulars. I see nothing unfair, unjust or unreasonable in imposing such a duty in the circumstances I have set out above. The tests of foreseeability of harm and proximity of relationship are undoubtedly satisfied in my judgment. At the root of this duty of care is, I accept, a voluntary assumption by the Second Defendant of overall responsibility for health and safety at the site including during the building phase of the refurbishment works. Although I accept that this is a basis of personal liability not expressly pleaded against her and the pleaded basis includes matters not made out on the evidence (in particular that she personally directed the works in which the Claimant was involved) I can see no prejudice suffered by the Second Defendant arising out of such omission. The conduct of her defence in this regard did not suffer any such prejudice, in my judgment

152. But even if I were wrong to impose personal liability upon the Second Defendant arising out of a personal duty of care owed to the Claimant, I in any event also find

the Second Defendant liable in negligence as a joint tortfeasor with the Third Defendant on the basis (which is pleaded against her) that she as director of the Third Defendant, induced and/or procured and/or authorised the breaches of duty I have found were committed by the Third Defendant. In other words I accept as valid the Claimant's analysis of the implications of the evidence which I have rehearsed above at paragraphs 39 to 44. I find she did procure and authorise the set-up which is at the root of the Third Defendant's breaches of duty whereby an incompetent McDonald was engaged with a major role in overseeing works, in particular works at height and whereby her husband acted as an unremunerated project manager without any written contract setting out his responsibilities, and whereby there was no proper planning or organisation in advance, in relation in particular to works required at height in the roof void. I repeat in this regard my general adverse findings on the Second Defendant's approach and that of her husband, to health and safety and the planning and the organisation of the project which the Second Defendant had at root instigated. I agree with the Claimant's submission that it is through the conduct of the Second Defendant and that of her incompetently appointed agents that Third Defendant has become liable to the Claimant at common law. She has not merely facilitated the breaches of duty of the Third Defendant, rather she induced and/or procured and/or authorised them.

Breach of Statutory Duty: the CDM Regulations

153. I do not however find any liability (pleaded in any event only against the Third Defendant) under the Construction (Design and Management) Regulations 1994. I have already set out paragraphs 65 to 71 the material content of these Regulations and the pleaded basis of liability under Regulation 10 for failing to ensure that the construction phase of the project did not start unless a health and safety plan had been prepared which was compliant with regulation 15(4). This was not a matter gone into in any great depth during the trial save for the general purpose, which I have already identified, of investigating the general competence or otherwise of the Second Defendant and her husband when it came to understanding matters of health and safety. The joint statement of the experts was that on the basis of the project programme disclosed to them there was reasonable grounds for believing the project was not notifiable within the meaning of the regulations and there was insufficient information to determine whether more than 4 persons were to be carrying out construction work at any one time, all of which makes it questionable whether the material regulation 10 applied to this project at all.

154. However what determines the issue of liability for this court is that whether or not the regulation was triggered and whether or not the plan complied with the material regulation (and I can see considerable force in the submission that it did not, absent the appointment of an appropriate planning supervisor) I do not find that any breach can properly be said to be causative of the Claimant's accident. It is too remote.

Post script on liability: Recent authorities:

155. Since drafting this judgment on liability, I have received – at the request of the parties – further submissions from the parties on the implication for this case on two recent decisions of the Court of Appeal in (i) Kmiecic v Isaacs [2011] EWCA Civ 451 and (ii) Ceva Logistics Ltd v Lynch [2011] EWCA Civ 188.

156. Nothing however in either decision would lead me to alter my conclusions on liability already set out.

157. Kmiecic involved consideration of the applicability of the self same regulations (the CR and the WHR) as are material to the present claim in an action brought against the householder/occupier by a casual worker brought onto the premises by a building contractor engaged by the Defendant to effect repairs to a garage roof, who when working on the roof had fallen from a ladder. Kmiecic is a decision on its own facts but it confirms the need following McCook, for the occupier of the site to have factual control over the works being carried out. Factual control was found not to have arisen on the facts of that case merely because the occupier had originally allowed the Claimant access to the roof through a bedroom window. In other words it was understandably held that the mere exercise of control of access to the roof as an occupier of the site did not in itself mean that the occupier was purporting to exercise control over the way in which the work on the roof was undertaken. It is noteworthy however that the court appears to have also confirmed that if (as I have found in the present case) the occupier has assumed and retained control over the way the works were being carried on his premises, access and egress to the place of work, and his control over both, would relate to the manner in which the works were being carried out.

158. Ceva Logistics is a decision in relation to the control test imposed by regulation 4(2) of the Workplace (Health and Safety) Regulations 1992 which is in similar but not in identical terms to that in the 1996 Regulations material to the present claim providing that "every person who has *to any extent* control of a workplace" shall comply with any requirement of the regulations applicable to the workplace which *"relates to matters which are within that person's control"*. The emphasis is the emphasis of this court to identify the differences between the two sets of Regulations, highlighted by the Defendants.

159. However I do not consider these to be material differences. Under both sets of Regulations the court is concerned to consider whether the control of the defendant was factually sufficient to enable compliance with the particular requirements of the regulations which he is said to have breached. Ceva concerned a claim against an occupier of a warehouse by an employee of an independent contractor brought on site to carry out electrical maintenance who was hit by a truck whilst carrying out electrical works in the warehouse. The court upheld the first instance decision imposing liability upon the occupier under the regulations on the grounds that as a matter of fact (the court again following the approach in McCook) he had the requisite control over the movement of vehicles and pedestrians, including the Claimant, albeit he had no control over how the Claimant did his job in replacing failed lamps. Hence the occupier came under the duty to comply with that regulation of the 1992 regulations providing that "*every workplace shall be organised in such a way that vehicles and pedestrians can circulate in a safe manner*".

160. What is of assistance to the present case is the way in which both Jackson LJ and Moore-Bick LJ expressed the test of control in terms of the ability of the Defendant to exercise control over the matters with which the particular requirement of the regulation pleaded against him was concerned. Jackson LJ at para. 47 said that in his view "regulation *4(2) of the 1996 regulations and regulation 4(2) of the 1992 Regulations are similar in their effect. Regulation 4(2)(c) of the 1992 Regulations*

limits the responsibility of the workplace owner or occupier to matters in respect of which it is, or should be able, and competent to give instructions to visiting contractors and other employees" Moore-Bick LJ at paragraph 69 put the matter thus "*…the nature and purpose of the Regulations point clearly to the conclusion that they are also intended to impose on those who have the ability to exercise control over conditions in the workplace to any extent, a duty to make it reasonably safe for these who use it by ensuring compliance with the Regulations to the extent that they exercise control*".

161. I have sought to adopt a like approach in coming to my findings on control against the Defendants for the purposes of the regulations material to this claim and again nothing said by the Court in Ceva leads me take a different view. I have sought to look at the extent of the Defendants' respective control and their ability to exercise control, on a regulation by regulation basis. The Defendants in this case undoubtedly in my judgment had the ability and competence to impose control over access to the roof void and safe working at height. It was of course their case that they could give instructions on these points. Control is and was not lost because they chose to exercise it through an agent whether it be the unremunerated husband of the Second Defendant or the incompetent Mr McDonald. Contrary to the submissions of the Defendants ('*D3 had a mechanism to prevent precisely this occurring by having PM as key holder and a competence check of all those who were at work on site, together with a risk assessment under the responsibility of SU. PM flouted that for the first time'*) the mechanism whereby they chose to exercise that control was in my judgment wholly inadequate to ensure compliance with the material requirements relating to access to the roof void, and proper advance planning and organisation of the construction works, in particular works at height. On any view of the evidence the role they purported to assign to Peter McDonald upon which so much reliance is placed in the Defendants submissions, lacked all clarity and had not been properly communicated to Peter McDonald.

162. I also found helpful the approach of Jackson LJ at paragraph 55 of Ceva to the imposition of a duty of care at common law concurrent with the material statutory duties which are found to exist. As the Claimant submits, the decision confirms, if confirmation be required, that in an appropriate case a site owner will owe a duty of care at common law to employees/assistants of external contractors. I have similarly found a duty of care focussed upon particular matters for which I have found they had responsibility and ability to control in relation to the construction works, in particular in relation to places of potential and foreseeable work at height and access thereto, and appropriate planning organisation and supervision to ensure safety.

Contributory Negligence

163. For all these reasons I find both Defendants liable to the Claimant in breach of statutory duty and common law negligence.

164. In these circumstances I must consider the question of contributory negligence. This is pleaded against him in terms of his failure to take particular care in various aspects when working at height in the immediate vicinity of fragile material. Also pleaded against him are his breaches of statutory duty under the Construction Regulations relating to safe place of work (regulation 5) and appropriate training and experience for work at height to which he himself was subject by virtue of reg. 4(3) ('*it shall be*

the duty of every employee carrying out construction work to comply with the requirements of these regulations in so far as they relate to the performance of or refraining from an act by him'). It is further alleged that he failed to comply with regulation 14 of the Work at Height Regulations to which he was subject as an employee, in failing to report to Peter McDonald that he was working near to fragile material.

165. To a degree I accept that the Claimant must be held to have failed to have taken proper care for his own safety when working to his own knowledge at height near fragile material without the proper experience or training, and to have himself acted in breach of the pleaded regulatory duties. In his own witness statement he conceded that '*Peter had warned us to be careful where we walked up there in case we fell into the ceiling*" and in his HSE statement (which on the evidence was read back to him before being signed by him as true) he is recorded as saying that no one explained the risks to him but "*Peter did say 'be careful' and 'I understood that I could fall through the ceiling*". Although the Claimant did seek to go back on these concessions in oral evidence, and due allowance must be made for misunderstanding of language as regards the HSE statement, nonetheless I consider that these are admissions to which the Claimant should be held bound.

166. This said however as the Defendant rightly submits, in determining this issue of contributory negligence, the court is not concerned to apportion degrees of carelessness but the Claimant's relative blameworthiness and causal potency when set against that of the acts and omissions of the Defendants which have founded their liability to him for his injuries. Moreover the court must be mindful that it is part of the statutory purpose of the statutory regulations of which I have held the Defendants to be in breach to protect the workman against the very acts of inattention relied on against the Claimant as contributory negligence and the court should be slow to make such a finding where there has been breach of statutory health and safety duties owed to a worker. See Toole v Bolton MBC [2002] EWCA Civ 588.

167. In all the circumstances of this case, as between the Claimant and the Defendants, by far the greater degree of blameworthiness for the Claimant's accident and causal potency must in my judgment be upon the Defendants. I do find the Claimant to be guilty of a degree of contributory negligence but only to a very modest degree which I assess at 10%.

168. Accordingly for the reasons I have given, at the handing down of this judgment and subject to any further submissions which may be made I shall enter judgment for the Claimant against both the Second and Third Defendants for 90% of damages to be assessed.