The Uniting Church v Takacs [2008] NSWCA 141 (20 June 2008)

NEW SOUTH WALES COURT OF APPEAL

CITATION:
The Uniting Church v Takacs [2008] NSWCA 141

FILE NUMBER(S):
40176/07

HEARING DATE(S):
6 February 2008

JUDGMENT DATE:
20 June 2008

PARTIES:
THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (NSW) t/as Northaven Retirement Village (Appellant)
John Ernest TAKACS (Respondent)

JUDGMENT OF:
Hodgson JA McColl JA Basten JA

LOWER COURT JURISDICTION:
Supreme Court - Common Law Division

LOWER COURT FILE NUMBER(S):
SC 20224/05

LOWER COURT JUDICIAL OFFICER:
Rothman J

LOWER COURT DATE OF DECISION:
6 March 2007

LOWER COURT MEDIUM NEUTRAL CITATION:
Takacs v The Uniting Church [2007] NSWSC 175

COUNSEL:
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P G MAHONY SC/ R E QUICKENDEN (Respondent)

SOLICITORS:
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CBD Law (Respondent)

CATCHWORDS:
TORTS – Personal injury – Breach of statutory duty – Negligence – Construction Safety Act 1912 – Construction Safety Regulations 1950, Regs 73 and 74 – Painting contractor engaged to measure and quote – Whether "construction work" – Whether construction work carried out by owner – Whether owner in charge of construction work – Contractor falls from roof – Whether owner negligent.

LEGISLATION CITED:
Civil Liability Act, Sch 1, Pt 3, cl 6
Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW), s 4(1) and Sch 3
Construction Safety Act 1912 (NSW) s 3, s 22
Construction Safety Regulations 1950 (NSW) regs 73 and 74
Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 7
Interpretation Act 1987 (NSW), s 33
Occupational Health and Safety Act 2000 (NSW), s 139 and Sch 1, Sch 3, cll 3(c) and 4
Scaffolding and Lifts Act 1912 (NSW)
Scaffolding and Lifts (Amendment) Act 1978 (NSW), Sch 1, cl 2
Statutory Duties (Contributory Negligence) Act 1945 (NSW)

CATEGORY:
Principal judgment

CASES CITED:
Almeida v Universal Dye Works Pty Limited [2000] NSWCA 264; [2001] Aust Torts Reports 81-603
Balesfire Pty Ltd t/as Gutter Shop v Adams [2006] NSWCA 112
Bhambra v Roet [2003] NSWCA 393
Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Company of Australia Ltd [1931] HCA 53; (1931) 46 CLR 41
Dalton v Angus (1881) 6 App Cas 740
Darling Island Stevedoring and Lighterage Co Ltd v Long [1957] HCA 26; (1957) 97 CLR 36
Davey v Skinner [1961] 61 SR (NSW) 648
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8; (2002) 209 CLR 95
Fox v Percy [2003] HCA 22; (2003) 214 CLR 118
H C Buckman & Son Pty Limited v Flanagan [1974] HCA 30; (1974) 133 CLR 422
Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21
House v the King (1936) 55 CLR 449
Jones v Bartlett [2000] HCA 56; (2000) 205 CLR 166
Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298
Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267
Lenz v Trustees of the Catholic Church [2005] NSWCA 446
Marshall v Whittaker's Building Supply Co [1963] HCA 26; (1963) 109 CLR 210
Maggiotto Building Concepts Pty Ltd v Gordon [2001] NSWCA 65
Northern Sandblasting Pty Ltd v Harris [1997] HCA 39; (1997) 188 CLR 313
Papatonakis v Australian Telecommunications Commission [1985] HCA 3; (1985) 156 CLR 7
Phillis v Daly (1988) 15 NSWLR 65

R v Neil ex parte Cinema International [1976] HCA 11; (1976) 134 CLR 27
Romeo v Conservation Commission of the NT [1998] HCA 5; (1998) 192 CLR 431
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1; (1986) 160 CLR 16
Sweeney v Boylan Nominees Pty Ltd [2006] HCA 19; (2006) 226 CLR 161
Takacs v The Uniting Church [2007] NSWSC 175
Thompson v Woolworths (Queensland) Pty Ltd [2005] HCA 19; (2005) 221 CLR 234
Todorovic v Moussa [2005] NSWCA 100
Van der Sluice v Display Craft Pty Limited [2002] NSWCA 204

TEXTS CITED:

DECISION:
(1) Appeal allowed.
(2) Judgment below set aside.
(3) In lieu thereof judgment for the Trust and order that the plaintiff pay the Trust's costs of the proceedings.
(4) Order that the plaintiff pay the Trust costs of the appeal and have a certificate under the Suitor's Fund Act if otherwise eligible.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40176/07

SC 20224/05

HODGSON JA

McCOLL JA

BASTEN JA

20 JUNE 2008

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (NSW) t/as Northaven Retirement Village v John Ernest TAKACS

Headnote

Facts

The plaintiff, Mr Takacs, was a painter. He was seriously injured when he fell from the roof of a building at the Northaven Retirement Village, owned and operated by the defendant, the United Church in Australia Property Trust.

Mr Bagnara was the buildings maintenance manager for the defendant. He invited the plaintiff to inspect the roof for the purpose of providing a quotation for repairs. Mr Bagnara directed the plaintiff to the roof and then departed. Whilst measuring the roof, the plaintiff's foot tripped on the kliplok roof, and he fell.

The plaintiff claimed damages for breach of statutory duty under Regulations 73 and 74 of the *Construction Safety Regulations* 1950, and in negligence. The primary judge found for the plaintiff on both bases, determining contributory negligence at 20%. The defendant appealed.

Issues on appeal

1. The issues on appeal were:

(1) Whether the primary judge impermissibly drew inferences from the Trust's failure to call Mr Bagnara.

(2) Whether the measurement for a quote constituted 'construction work' under the regulations.

(3) Whether the Trust was carrying out construction work for the purposes of Regulation 73.

(4) Whether the Trust was in charge of construction work for the purposes of Regulation 74.

(5) Whether the Trust was in breach of a common law duty of care.

(6) Whether, if there was a breach of duty, the apportionment for contributory negligence was appellably wrong.

HELD (allowing the appeal):

(*Per Hodgson JA, McColl JA agreeing*)

(1) Whether a person is obliged to comply with Regulation 73 in relation to building work depends on whether that person is actually carrying out building work, either directly or by servants or agents. There was no evidence that Mr Bagnara or the Trust were carrying out building work of which the painting work was a part.

(2) The question of who is in charge of building work for the purposes of Regulation 74 is one of overall responsibility for the conduct of the building work, not merely who is in charge of or occupying the property on which the work is being done. Neither Mr Bagnara nor the Trust had such overall responsibility.

(3) The Trust did not breach its duty of care. The risks involved in going onto the roof were obvious and the risk of injury was very small.

(*Per Hodgson JA*)

(4) The measurement for the quote was sufficiently connected with actual painting for the quote to be 'building work' under Regulation 73. Work "in" painting extends to work

incidental to a painting job which the persons concerned intended to be carried out, and which either did proceed or would but for the accident have proceeded.

(5) It was open to the primary judge to infer that Mr Bagnara's maintenance of the Trust buildings was a substantial part of his duties.

(*Per McColl JA*)

(6) Mr Takacs was not the Trust's agent. The Trust did not in any manner purport to carry out, or assume charge of, the work of measuring the roof. Further, the case was run at trial and on appeal on the basis that Mr Takacs was an independent contractor.

(*Per Basten JA, dissenting*):

(7) The Trust was carrying out construction work. Mr Takacs was acting as the Trust's agent in assessing the roof in order to determine what repairs were necessary. The project of determining what if any work was to be done was Mr Bagnara's project, not that of the plaintiff.

IN THE SUPREME COURT
OF NEW SOUTH WALES
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CA 40176/07

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HODGSON JA

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20 JUNE 2008

THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (NSW) t/as Northaven Retirement Village v John Ernest TAKACS

Judgment

1 HODGSON JA: On 6 March 2007, Rothman J in the Common Law Division delivered his decision in proceedings in which the respondent (the plaintiff) had sued the appellant (the Trust) for damages for personal injury, giving judgment for the plaintiff in an amount of $913,390 and ordering the Trust to pay the plaintiff's costs.

2 The Trust has appealed from that decision.

3 The plaintiff's injury occurred on 4 May 1999, when he fell about 9 metres from the roof of premises owned and operated by the Trust. The plaintiff had claimed damages at common law, and also pursuant to regulations 73 and 74 of the *Construction Safety Regulations* 1950 (NSW) (the Regulations) made pursuant to the *Construction Safety Act* 1912 (NSW) (the Act).

The Act and the Regulations
4 The relevant statutory provisions were set out as follows by the primary judge:

[33] The Construction Safety Act 1912 (NSW) (Act No 38) as it was in force at the time of the accident on 4 May 1999 had relevant definitions which were:

[3] (1) 'Building work' means:

(a) work in constructing, erecting, installing, adding to, altering, repairing, equipping, finishing, painting, cleaning, signwriting, sheathing, spraying, dismantling or demolishing or any other prescribed operation that:

(i) is done in relation to a building or structure, at or adjacent to the site thereof, or ...

...

'Construction work' means:

(a) building work, excavation work, compressed air work and diving work ...

'Constructor', in relation to any construction work, means the person who by himself or herself (otherwise than as a servant or agent of the person carrying out that work) or by the person's servants or agents carries out that work.

[34] The relevant provisions of the *Construction Safety Regulations* 1950 (NSW) made pursuant to the *Construction Safety Act* 1912 (NSW) are:

[73] Any person who directly or by his servants or agents carries out any construction work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in such construction work and for this purpose, without limiting the generality of the foregoing, he shall, subject to Regulation 74:

(1) provide suitable and safe scaffolding, which shall conform to the requirements of these Regulations, for all work which cannot be done safely by a person standing on permanent or solid construction, except when such work can be done safely from ladders constructed in conformity with the provisions of these Regulations,

...

(3) provide means by fencing or otherwise for securing the safety of any person working at a place from which he would be liable to fall a distance of more than 1.8 m,

...

(8) effectively fence in the manner prescribed by these Regulations, all platforms, the open sides of all floors, openings in floors, roofs and platforms into which persons could accidentally walk, the open sides of stairways and stairway landings and all excavations and holes more than 1.5 m deep.

Provided that it shall be permissible to remove when necessary any guard rail, fence or part thereof for the purpose of handling materials or for the installation of other work, subject to such guard rail, fence or part thereof being at once replaced upon completion of such work,

...

[74] (1) Where there is a risk that a person engaged in construction work may fall because there is no adequate hand hold or foot hold, the person in charge of the construction work shall provide:

(a) a safety belt and safety line or safety harness and safety line complying with the requirements of **AS 1891** for the use of that person, or

(b) a safety net complying with the requirements of BS 3913, while the work is being carried out ...

FACTS

5 There was no dispute concerning the primary judge's following findings as to the facts of the accident:

[3] The plaintiff, having been born on 28 January 1967, was 32 years of age at the time of the incident. The plaintiff completed a four year apprenticeship as a painter. He worked for a business called Douglas Painting Services for one year and thereafter purchased the business, changing its name to Brush-Rite. The work performed by the plaintiff in that business was the painting of shipping containers and commercial buildings (although, in the latter case, not generally new construction).

[4] The plaintiff operated the business that he had acquired as a partnership and had done so from approximately June 1997.

......

[6] The plaintiff performed work for a variety of companies including Telstra, Arnott's Biscuits, McDonalds and the like. His work included painting machinery, walls and buildings, ovens and other machinery and other maintenance. He was, as is obvious, an experienced painter who was aware of the means of safe use of ladders. Notwithstanding his apprenticeship and experience he had never worked on roofing and had never had occasion to build scaffolding.

[7] As already stated, on 4 May 1999 the plaintiff fell from the roof of the premises owned and occupied by the defendant. The plaintiff had gone to the premises at the invitation of Mr Bruno Bagnara, the defendant's building maintenance manager.

[8] The plaintiff had worked for the defendant on a number of occasions at different locations on the North Shore of Sydney. On each occasion the plaintiff was invited to measure, quote

and ultimately perform work. On each occasion the arrangement was made with Mr Bruno Bagnara.

[9] The evidence is that Mr Bagnara took care of the maintenance of the buildings of the defendant and I infer that he organised, coordinated and supervised general building maintenance and minor construction work for the various premises of the defendant. He was employed by the defendant and had an office in the basement of the defendant's premises at the Northaven Retirement Village.

[10] On 4 May 1999 the plaintiff received a telephone call from Mr Bagnara who asked him to "come and do a quote". Mr Bagnara told the plaintiff that he wanted him "to have a look at a roof".

[11] The plaintiff responded that it was getting a little late and that he just wanted to go home and asked if it were possible if he could do it tomorrow. After a short conversation about the then location of the plaintiff, Mr Bagnara said to him:

'You have to drive past here to go home; so just drop in.'

As a consequence of that conversation, the plaintiff arrived at the premises at Northaven.

[12] On the way to Northaven, the plaintiff collected a friend of his, another painter, Mr John Ayre, to whom he was providing a lift home to the Central Coast where they both lived and where they were intending to go for a drink.

[13] On arrival at Northaven the plaintiff and Mr Ayre went to Mr Bagnara's office in the basement. Mr Bagnara said to him:

'Come with me; come up and I'll show you what I want you to look at.'

[14] At that point the plaintiff, Mr Bagnara and Mr Ayre climbed an internal staircase that went to the top of the building to a locked door. Mr Bagnara unlocked the door and said:

'Come out here.'

The plaintiff did precisely that; at which time he, Mr Bagnara and Mr Ayre were standing on a roof platform on an air-conditioning unit. About 6 foot below the platform was the main roof.

[15] The main roof consisted of old profile kliplok roofing. Kliplok roofing is a form of roof sheeting in which the sheets lock together by clips — hence the name. Each sheet consists of a number of ridges with a flat panel between each of them. In the case of this kliplok sheeting, the ridges are not sufficiently distant from each other to be able to place the length of a foot between the ridges, at right angles to them, on the flat panel. As a consequence, it was difficult to walk across the roofing and it would require either walking sideways (placing each foot sideways in the flat panel between the ridge) or placing the foot on two ridges (the heel on one ridge and the toe area on the other).

[16] While standing on the platform surrounding the air-conditioning tower Mr Bagnara showed the plaintiff the area of the roof that was, in Mr Bagnara's view, problematic. There

was rust on a section of the roof. The rust that he was shown was between the ridges in the flat panel section of some sheets and was, in the opinion of the plaintiff, very minor. That opinion is not controverted.

[17] When the plaintiff saw the section of rust from the platform, he expressed the view to Mr Bagnara that:

'I would have thought there would still be many many years before it needed work.'

Mr Bagnara asked how it would be treated and the plaintiff responded:

'There are paint chemicals you can put on to sort of create a coating to put the rust back into the roof to seal it off.'

Mr Bagnara responded that he wanted to get a quote to paint the roof. To that comment, the plaintiff responded:

'This sort of roof, if you want to do it properly, you should use industrial paints, so you are going to get that long-term issue out of it. The cost of industrial painting on this size roof; surely it would be cheaper to get a roofer in and replace it.'

Mr Bagnara said:

'Still just measure it, and give me a quote and we'll talk about it later.'

[18] The three of them then moved around the platform to an area where another section of the roof (or another part of the roof) could be seen and Mr Bagnara said:

'You know we want you to measure this roof too.'

The plaintiff responded:

'How are we going to get down there?'

[19] After a further currently irrelevant conversation and at Mr Bagnara's suggestion, the plaintiff and Mr Ayre waited while Mr Bagnara obtained a ladder which fitted into a section of the platform where the balustrade was not glassed in. He lowered the ladder through the balustrade onto the roof below. Mr Bagnara then said words to the following effect:

'Go down and measure the roof. I'm going back to my office; as soon as you measure it bring the ladder back to me and go home.'

[20] It seems the plaintiff commented on the design and the absence of glass panels in two places on the air-conditioning platform to which Mr Bagnara said:

'This is always how we get access to that roof.'

[21] The ladder, as earlier stated, was placed in the gap in the balustrade to the roof below by Mr Bagnara leaning it back on the chilling tower. The ladder was unsecured. In accordance with the abovementioned statement of Mr Bagnara, the plaintiff climbed down the ladder as

did Mr Ayre. Mr Ayre stayed at the base of the ladder holding the coil end of a measurement tape while the plaintiff walked out over the roof in order to do one measurement of the roof's length and one measurement of its breadth. The plaintiff held the end of the tape measure and the tape moved out of the coil as the plaintiff moved away from Mr Ayre.

[22] As earlier stated it was not possible to walk normally on the roofing. The plaintiff walked on the roofing by having the heal of his shoe on one ridge and the front of his shoe on the next; thereby walking on two ridges at a time and the major part of his foot (or boot) was unsupported. The plaintiff was wearing steel-capped work boots. The top of the ridges were approximately 50 to 60 millimetres in height above the flat panel of the sheeting.

[23] The intention was for the plaintiff to go to the end of the roof, crouch down and hold the tape so that Mr Ayre could read the measurement required by Mr Bagnara.

[24] Surrounding the roof sheeting was a parapet the height of which varied because of the slope of the roof. At one end of the roof the parapet was approximately 600 millimetres and at the far end (the end to which the plaintiff was walking) it was at or about shin height.

[25] As the plaintiff approached the end of the roof he crouched in order to place the tape along the roof and measure it relatively accurately. As he crouched his foot slipped between the ridges of the kliplok, got caught there and the plaintiff stumbled.

[26] It was his right foot that was caught between the ridges of the kliplok and the stumble was enough to put the plaintiff off balance. The plaintiff was unable to regain balance, went to grab for the parapet but, because of its height, or lack of it, was unable to grab it and rolled over the edge of the roof. The plaintiff fell 3 stories, approximately 9 metres, landing on his right upper arm and the right side of his body. He suffered multiple injuries to the details of which I will return later in this judgment.

Decision of Primary Judge

6 The primary judge drew the following conclusory findings, some of which are the subject of dispute:

[30] From the circumstances recited above, a number of conclusions can be drawn. First, the plaintiff was not an employee of the defendant. Secondly, the defendant employed a construction or building manager whose task was to coordinate and organise the repair and renovation of the buildings used in the business of the defendant. Thirdly, and predominantly because of the immediately preceding statement, the defendant was engaged in construction work (a definition with which I will deal later), although it was not the sole or major undertaking in which it was engaged. Fourthly, as part of that organisation the building manager, Mr Bagnara, contacted the plaintiff (a person who regularly performed work for the defendant) and required him, over his protestations, to attend at a time inconvenient to him. Fifthly, the plaintiff informed the defendant that it was unnecessary, at that time, to paint the roof and that, given the cost of proper treatment of the roof, it would be less expensive to replace it. Lastly, the defendant, through Mr Bagnara, required the plaintiff to descend to the roof, provided the means by which the plaintiff could descend and required the plaintiff to provide, not only a quote for painting, but measurement of the roof, and then to return the ladder to Mr Bagnara.

[31] There is no evidence to suggest that any other person was asked to quote on the roof; nor that there was an intention on the part of the defendant to request any other quote. It is also clear that Mr Bagnara, who at all relevant times was the employee of the defendant, retained control over what was required of the plaintiff as to both end product and the manner in which that end product would be derived. Thus, it is clear from the conversations, that Mr Bagnara directed the plaintiff onto the roof; directed him to take and provide measurements of the roof; and directed him as to the time at which he should come to perform the work. Mr Bagnara also directed him as to the means by which he would gain access to the roof and at all stages had control over whether, if at all, the plaintiff would gain such access.

7 The primary judge carefully reviewed authorities relevant to Regulation 73, in order to determine whether the Trust or the plaintiff was carrying out construction work.

8 Among the authorities he referred to was *Maggiotto Building Concepts Pty Ltd v Gordon* [2001] NSWCA 65, in which a head contractor had been held to be in breach of Regulation 73, in relation to an aspect of building work being performed by a sub-contractor; and to *Kolodziejczyk v Grandview Pty Ltd* [2002] NSWCA 267, where *Maggiotto* was distinguished by Heydon JA in a finding that it was the sub-contractor and not the head contractor that was carrying out the relevant aspects of the building work. The primary judge continued:

[57] An analysis of the three differences adumbrated by Heydon JA, because of which a different result ensued, confirms the similarity between these present proceedings and the factual circumstances in Maggiotto. I will deal with them shortly.

(i) The building manager, Mr Bruno Bagnara, an employee of the defendant, was coordinating and supervising the activity of the plaintiff. True, this was not a case involving a large number of eclectic trades, but coordination and supervision was in fact required and undertaken.

(ii) Mr Bagnara gave directions as to when, where and in what order the work was to be done and how it was to be done.

(iii) Mr Bagnara determined the materials needed, supplied the materials when needed (in this case the ladder) and directed its use and the manner of its use as well as the manner of the plaintiff's access to the roof area.

9 The primary judge then discussed *Bhambra v Roet* [2003] NSWCA 393, *Todorovic v Moussa* [2005] NSWCA 100, and *Lenz v Trustees of the Catholic Church* [2005] NSWCA 446. He then continued:

[70] The defendant submits that a distinction ought to be drawn between a contractor (or head contractor) who is engaged in the building industry and an occupier, which, it says, better describes the defendant's status.

[71] There are answers to this submission: first, the Act and Regulations make no such distinction; secondly, the fact that the defendant is the occupier of the premises does not, in

the circumstances of this case, signify that the defendant is not in the building industry and in the same position as a "usual" head contractor.

[72] The mere fact that the defendant is predominately providing aged care residential facilities does not mean that it cannot also be engaged in the building industry, or in building activities. The employment of one or more persons whose duties are confined to building maintenance, the organisation of contractors, their coordination and direction means that, at least in relation to the work of Mr Bagnara (and/or any other such person) the defendant is engaged in the building industry: see, by analogy, *R v Central Reference Board; ex parte Theiss* [1948] HCA 9; (1948) 77 CLR 123 and *R v Isaac; ex parte TWU* [1985] HCA 80; (1985) 159 CLR 323.

[73] The defendant is in a different position to an occupier whose organisational structure did not involve the employment of persons full-time on organising construction work (as defined).

[74] There is, however, some force in the defendant's submission in this regard and it relates to the approach suggested by Jacobs J in *Buckman*. While, in the case of a building company, one may well be less likely to infer a full delegation of all preliminary steps involving safety, a court may be less likely to infer a retention of responsibility (or involvement in the building work) in the case of the contractual arrangement involving a householder or occupier.

[75] This will not necessarily exempt all householders, but it would exempt the vast majority. As for occupiers who are generally involved in building work, it will be a matter, as it always is, for an examination of their role in the building work being undertaken.

[76] I make it clear that the reference in this analysis to the term "building industry" is not intended to suggest a different test or different wording than "building work". It is used to denote activity beyond the particular work in question which would otherwise be "building work" (as defined) undertaken personally or by servants or agents.

10 The primary judge then considered whether or not measurement for the purposes of giving a quotation was construction work, and he concluded:

[82] Likewise, measuring a roof, or any other part of a building, may not, without more, be included in the definition of building work. However, the task of construing an Act is not confined to giving each word a meaning. Otherwise one would use a dictionary not a judge. Where, as here, the measurement is done for the purpose of repairing or painting the building or structure, or the roof of the building or structure, it is building work. This is so whether the purpose has been effected or whether it is certain.

......

[86] However, it is impossible (or extremely difficult and inefficient) to perform any building work without measuring for the purpose of determining how much material is required. Measuring a roof to determine how much paint is required (and how many days will be required to paint it) is a necessary and essential part of painting and is properly within the term "building work" and therefore within the term "construction work".

11 The primary judge went on to say that work “in” painting in the definition of “building work” in s 3 of the Act extended to work “in relation to” painting, referring to *R v Neil ex parte Cinema International* [1976] HCA 11; (1976) 134 CLR 27 at 33 per Jacobs J.

12 The primary judge concluded that the Trust was responsible for duties imposed by Regulation 73; and that the Trust had not complied with Regulation 73(3). On that basis, he found the question of liability in favour of the plaintiff.

13 As regards Regulation 74 the primary judge made the following findings:

[95] I reiterate the conclusion of fact at paras [30] and [31], infra. It is either a finding I make or an inference I draw that: the requested measuring was for the purpose of repairing and/or painting the roof; that the method of gaining access to the roof and the requirement to measure were directed by Mr Bagnara in the course of his employment (see [17], [18] and [19], infra); and that the quote sought was procedural and did not affect the intimate connection between the measuring and the repair/painting. There were no considerations by the defendant other than that the plaintiff would be instructed to complete the task and that the purpose of the measurement and quote was to repair and/or paint the roof. In those circumstance the work was “work in ... repairing ... [and/or] ... painting” the building and it was performed at or adjacent to the site of the building. It was “building work”.

[96] I also draw the inference from the conversations and circumstances surrounding them that Mr Bagnara, and, therefore, the defendant, remained in charge of the building work.

[97] Each of the aforementioned inferences are available. They are matters on which Mr Bagnara (and other officers or employees of the defendant) could testify and did not. I am more readily able to draw the inferences and I do so. I also draw the inference that any evidence that Mr Bagnara might have given would not have assisted the defendant’s case.

14 He went on to hold that the Trust had failed to comply with Regulation 74(1)(a).

15 On the question of negligence, the primary judge held that the Trust, as occupier of the land and building in question, had directed or invited the plaintiff to descend by ladder to a roof on which the plaintiff was directed or requested to take measurements; and that in those circumstances, the Trust owed the plaintiff a duty of care to take reasonable care to avoid a foreseeable risk of injury to the plaintiff.

16 On the question of breach, the primary judge said that the question was whether the Trust “had in place a system which included arrangements for work of the kind here required” (paragraph [111]). The primary judge found that it did not, and he found a breach of the Trust’s duty of care, in the following terms:

[116] In the circumstances I find that the risks are not such and are not so obvious that the defendant did not require a response and there has been a breach of the duty of care by the defendant in that it did not:

(a) fence an area on which it was requiring work;

(b) provide a safe platform or walkway (a plank) to render more stable the surface upon which the plaintiff was required to walk;

(c) provide the plaintiff with a safety harness; and

(d) when requiring the plaintiff to walk on and measure a roof, make available to the plaintiff an adequate hand-hold or foot-hold.

17 On the question of contributory negligence, in relation to the common law claim, the primary judge found that the plaintiff did depart from the standard of care of a reasonable person. However, having regard to the inexperience of the plaintiff in relation to roofs, and his assessment that the defendant was significantly more responsible for the accident, he determined contributory negligence at 20%.

Grounds of Appeal

18 The Trust relies on the following grounds of appeal:

(1) His Honour erred in finding that the conduct of the respondent was reasonably foreseeable.

(2) His Honour erred in finding that in the circumstances the appellant owed to the respondent a duty of care.

(3) His Honour erred in finding that the appellant was in breach of any duty of care.

(4) His Honour erred in finding that the role of Mr Bagnara, an employee of the appellant, was such as to give him control over, and make him responsible for, the totality of the respondent's activities whilst the respondent was on the appellant's premises.

(5) His Honour ought to have held that the respondent, as an independent contractor, had complete control over such activities as he was undertaking, and that the appellant had no involvement in how the activities were to be undertaken.

(6) His Honour erred in finding that the appellant was engaged in "construction work" and/or "building work" within the meaning of section 3 of the *Construction Safety Act*, 1912 (NSW).

(7) His Honour erred in finding that the preparation of a quote was "building work" within the meaning of section 3 of the *Construction Safety Act*, 1912 (NSW).

(8) His Honour erred in finding that the appellant retained any involvement in the carrying out of the work and/or that the appellant remained "in charge" of the work, thereby retaining responsibility for non-compliance with Regulations 73 and 74 of the *Construction Safety Regulations*.

(9) His Honour erred in finding that the appellant was in breach of Regulations 73 and 74 of the *Construction Safety Regulations*, and that such breaches were causative of the respondent's accident.

(10) His Honour erred in impermissibly drawing any inference from the appellant's failure to call Mr Bagnara to give evidence, with the effect that his Honour made findings in favour of the respondent that were not available on the evidence.

(11) His Honour erred in finding that the respondent was only guilty of contributory negligence to the extent of 20 per cent.

19 The grounds raised six main issues, which I will deal with in turn:

(1) Did the primary judge impermissibly draw inferences from the Trust's failure to call Mr Bagnara?

(2) Was measurement for a quote construction work?

(3) Was the Trust carrying out construction work (Regulation 73)?

(4) Was the Trust in charge of construction work (Regulation 74)?

(5) Was the Trust in breach of a duty of care?

(6) Was the apportionment for contributory negligence appellably wrong?

Failure to call Mr Bagnara
20 The primary judge found that Mr Bagnara was employed "to co-ordinate and organise the repair and renovation of the buildings used in the business of" the Trust, and he used this to base a conclusion that the Trust was carrying out construction work.

21 It was submitted for the Trust that there was no proper basis for the primary judge to conclude, in effect, that Mr Bagnara supervised repairs or renovations or co-ordinated the activities of those contracted to undertake them. The evidence did not give a basis for such an inference, and the failure of the Trust to call Mr Bagnara did not provide such a basis.

22 The evidence was that the plaintiff had worked before on three or four different buildings of the Trust; that on each occasion he had dealt exclusively with Mr Bagnara; that the plaintiff understood Mr Bagnara to be a gentleman whose duties included the general maintenance of the buildings of the Trust; that the plaintiff didn't think he did any maintenance himself; that Mr Bagnara would get outside contractors in to do things, if he didn't do minor aspects of maintenance himself; that his job, as the plaintiff understood it, was to get quotes from tradesmen for the purpose of getting work done on various premises that the Trust had; that Mr Bagnara had an office at the Northaven Retirement Village; that he had a key to get access to the roof and provided a ladder for access to the roof; and that having shown the plaintiff onto the roof, he left the plaintiff to get on with the measurements for the quote.

23 Mr Mahony SC for the plaintiff submitted that it could be inferred that Mr Bagnara had no other duties than those associated with maintenance of buildings of the Trust, and that the primary judge's conclusions were supported by evidence and could confidently be drawn because of the absence of Mr Bagnara.

24 In my opinion, on the basis of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298, it was open to the primary judge to infer that Mr Bagnara's evidence would not have assisted the Trust, and to draw inferences, in relation to matters on which Mr Bagnara could have given evidence, more confidently against the Trust, provided there was evidence supporting those inferences.

25 There was no evidence that Mr Bagnara had any building qualifications, or experience in building work beyond that of arranging for contractors to do maintenance work on the Trust buildings; so in my opinion no inference could be drawn that Mr Bagnara had any such qualifications or experience.

26 In his initial findings of fact, the primary judge did not explicitly draw an inference that Mr Bagnara had no duties other than those associated with maintenance of the Trust's buildings, although the finding that his task was "to co-ordinate and organise the repair and renovation of" the Trust buildings could be understood as suggesting this; and such a finding does seem to be clearly implied in paragraphs [72] and [73] of his judgment.

27 In my opinion, it was open for the primary judge to infer that Mr Bagnara's role in relation to maintenance of the Trust buildings was a substantial part of his duties, but not that he had no other duties. To the extent that the primary judge's findings convey that a very substantial part of Mr Bagnara's duties involved the obtaining and acceptance of quotes for building work, arranging for this work to be done, and performing for the Trust an owner's role in assessing whether the work was done and was satisfactory, in my opinion those findings are supported by the evidence.

28 The question whether his finding to the effect that Mr Bagnara's duties were confined to these matters vitiates his finding that the Trust was carrying out construction work or in charge of construction work, is best considered in relation to those issues.

Was measurement construction work?

29 For the Trust, it was submitted that the definition of "building work" in s 3 of the Act should be interpreted strictly, because of the penal sanctions associated with it; and that mere preparatory work involving inspections, travelling to and on the site, and the giving of quotes, does not fall within that definition.

30 In oral submissions, Mr Garling SC for the Trust submitted that, where actual building work had not commenced and might never commence, measurements for a quote could not constitute work "in" painting. To be work "in" painting, it would have to be a necessary and

integral part of painting, or at least closely incidental to the actual work of painting. If there were in existence a contract to paint, measurement for the purpose of performing that work might be work in painting; but here there was no contract, and might never be any contract or any work.

31 Mr Mahony submitted that work in painting extended to work in relation to painting, and it did not matter that the outcome of the quote was not certain. Particularly was this so, where what was done was in accordance with a system that had in the past led without exception to work being done.

32 In order that Regulation 73 apply, a person must be carrying out construction work; and for the purposes of this case, this means that the Trust must be carrying out building work. Among other things, building work means work "in" painting that is done "in relation to" a building "at or adjacent to the site thereof". I am inclined to think that work "in" painting does not extend as widely as work "in relation to" a hypothetical painting job that might or might not occur, and in fact does not occur. However, in my opinion it does extend to work incidental to a painting job, which the persons concerned intended to carry out or to have carried out, and which either did proceed or would but for the accident have proceeded.

33 In the present case, there was no painting actually being done; and as pointed out by Mr Garling, there was no contract or even a firm arrangement that it would be done. On the other hand, as pointed out by Mr Mahony, on previous occasions the quotation procedure had always led to performance of the painting work.

34 In my opinion, in circumstances where Mr Bagnara was not called to suggest there was real doubt as to whether the painting would proceed, the inferences can be drawn that he intended to have the painting carried out and that there was a high probability that painting would, but for the accident, have proceeded (indeed, a finding could be made, on the balance of probabilities, that it would have proceeded); and on the basis of those inferences, in my opinion the connection with actual painting was sufficiently close for the measurement for the quote to be work "in" painting.

Was the Trust carrying out construction work?

35 Much of the primary judge's discussion on this question was directed to the issue whether the Trust (or Mr Bagnara) had delegated construction work to the plaintiff; but in my opinion, there is an anterior question, whether the Trust could be said to be carrying out building work at all.

36 Mr Mahony submitted that the primary judge's decision was correct. He referred to the decision in *Lenz* at [62]-[64]; and he submitted that in this case, what was being done by the Trust through Mr Bagnara was not mere rudimentary co-ordination of activities, but work actively instituted and carried through by Mr Bagnara on behalf of the owner of a number of properties, following a system involving the obtaining of quotations and the performance of work.

37 In my opinion, it is clear that whether a person is obliged to comply with Regulation 73 in relation to building work depends on whether that person is actually carrying out building work, either directly or by servants or agents: this is established by the majority decision in *H C Buckman & Son Pty Limited v Flanagan* [1974] HCA 30; (1974) 133 CLR 422, and see also *Maggiotto* at [24] per Ipp AJA. I agree with the analysis of this issue in the judgment of McColl JA in this appeal.

38 Where there is a head contractor carrying out building work and a subcontractor carrying out building work which is part of what has to be done by the head contractor, and an accident occurs in the course of the building work being carried out by the subcontractor, there can be difficult questions as to whether one or other or perhaps both of the head contractor and subcontractor is or are actually carrying out the relevant building work. That question is addressed in the cases of *Maggiotto*, *Kolodziejczyk*, *Bhambra*, *Todorovic*, and *Lenz* referred to earlier.

39 However, this question does not arise unless there is building work that one person is carrying out, and part or parts of that work is or are carried out by another person or other persons, who are not employees and may not be considered agents. In particular, it does not arise when a householder, who is not otherwise carrying out building work on his or her property, engages a contractor to carry out a piece of building work. In that circumstance, the householder is not carrying out that building work at all.

40 The primary judge sought to distinguish that situation from the one under consideration here, by finding to the effect that the Trust, having engaged Mr Bagnara with duties confined to building maintenance, organisation of contractors, and their co-ordination and direction, was engaged in the building industry and was thus carrying out building work.

41 I have already expressed the view that the evidence did not justify a conclusion that Mr Bagnara had no other duties than those associated with maintenance of the Trust buildings, but that it did justify a conclusion that this was a very substantial part of his duties. However, in my opinion there was no evidence that Mr Bagnara or the Trust was at the relevant time carrying out any building work of which the painting work was part. It could be inferred that there would be a number of maintenance and repair jobs, and perhaps renovation jobs, occurring from time to time at various of the Trust's buildings, and perhaps also that there would be a number of such jobs going on at the same time. But there was no evidence whatsoever that these would be other than disparate and independent projects. Accordingly, it was and is not possible to identify any building work that the Trust was relevantly carrying out, aside from the particular painting job for which the plaintiff was asked to quote. Since there was no evidence that there was such building work of which the painting job was part, *Jones v Dunkel* could not support an inference to this effect.

42 The question then is, in respect of the particular painting job for which the plaintiff was asked to quote, was the Trust carrying out building work?

43 In my opinion, the answer is plainly No. The Trust was not relevantly in any different position from a householder engaging a contractor to do a particular piece of work on the householder's property. Since there was no wider project or building work, there was no element of co-ordination involved, not even the rudimentary co-ordination referred to in *Lenz*. Accordingly, in my opinion, the primary judge was in error in finding that Regulation 73 applied to the Trust.

Was the Trust in charge of construction work?

44 Mr Mahony submitted that the primary judge was correct in holding that the Trust through Mr Bagnara was in charge of the construction work. Mr Bagnara was in control of the situation, provided access to the roof through a locked door, put the ladder in place, and said to the plaintiff to go and do the measurements. This was more than a mere request, being more of the nature of a direction. Mr Mahony referred to *Almeida v Universal Dye Works Pty Limited* [2000] NSWCA 264; [2001] Aust Torts Reports 81-603 at [131]- [134].

45 In my opinion, as pointed out by Heydon J in *Kolodziejczyk* at [88], the question is, who is in charge of the building work in the sense of having overall responsibility for the conduct of the building work. This can apply to a head contractor who is not actually carrying out the particular building work in the course of which an accident occurs, as decided in *Almeida*; but it still must be the case that the person in question is in charge of the *building work* (not the property on which the building work is being done) in the sense of having responsibility for the *conduct of that work*.

46 In my opinion, the circumstance that Mr Bagnara asked for the quote to be given, unlocked a door, provided a ladder, and requested or directed the plaintiff to go and do the measurement, does not mean that he was in charge of the relevant building work, that is, the work in painting the roof. In my opinion, there was no basis on which the Trust or Mr Bagnara could have been found to be in charge of the work in painting the roof; and the primary judge's finding to the contrary was in error.

47 Accordingly, Regulation 74 did not apply to the Trust, and the Trust was not in breach of that Regulation.

Was the Trust in breach of a duty of care?

48 It was submitted for the Trust that there was no duty of care owed to the plaintiff. In my opinion, it is clear that the Trust did have a duty of care, arising from its occupation of the property and its invitation to the plaintiff to come on to the property and give a quote for painting. This duty can be broadly expressed as a duty to take reasonable care to avoid a foreseeable risk of injury to the plaintiff.

49 On the question of breach of duty, Mr Garling submitted that any risks of injury to the plaintiff were obvious, and did not call for any precautions to be taken by the Trust. In particular, the height of the roof above ground was obvious, the nature of the surface of the roof was obvious, and the fact that there was no fencing was obvious. There was nothing of the nature of an unusual danger or a trap. The Trust was entitled to assume that to ask an

experienced professional painter to go on to a roof such as this was not asking him to do something outside his experience, as confirmed by the evidence of the other painter, Mr Ayre. He submitted that there was accordingly no breach of duty of care in this case, adopting written submissions referring to *Phillis v Daly* (1988) 15 NSWLR 65 at 75; *Romeo v Conservation Commission of the NT* [1998] HCA 5; (1998) 192 CLR 431 at [50] and [123]; *Jones v Bartlett* [2000] HCA 56; (2000) 205 CLR 166 at 177; and *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19; (2005) 221 CLR 234 at 246.

50 Mr Mahony submitted that the primary judge's decision was correct. He submitted that the roof was dangerous, and the nature of the surface was not obvious until one walked on it. The ridges on the surface meant that one had to walk across it placing the heel on one ridge and the toe on another giving rise to risks that were exacerbated when close to the edge of the roof because of the lack of a parapet of any height. In the absence of a fence or a harness, the plaintiff should not have been asked to go onto the roof at all. The plaintiff was not experienced in working on roofs, so his case was not affected by *Van der Sluice v Display Craft Pty Limited* [2002] NSWCA 204.

51 No particular error in the reasoning of the primary judge is relied on. However, in circumstances where the primary facts are either not in dispute or clearly found, and the only question is whether a breach of duty of care is shown on the basis of those primary facts, an appeal court can intervene if satisfied that the conclusion of the primary judge was wrong. It is not a case where error of fact of the kind discussed in *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118, or an error in the exercise of discretion of the kind discussed in *House v the King* (1936) 55 CLR 449, has to be established.

52 There is force in Mr Garling's submissions that the risks involved in going onto this roof were obvious. The respects in which the risks may not have been completely obvious are the following: risks due to the particular configuration of the surface of the roof; risks due to the plaintiff's inexperience in working on roofs; risks due to the plaintiff's footwear, namely steel-capped boots, suggesting a possible lack of flexibility and thus a greater risk of tripping on this kind of surface; and possibly risks arising from the plaintiff being tired at the end of a day's work.

53 There is no evidence that the configuration of the surface of the roof was particularly unusual, that is, that kliplok roofs of this kind are uncommon. Furthermore, the configuration would have been obvious immediately it was stepped onto.

54 There is no evidence that the plaintiff's inexperience in working on roofs either was known or should have been known to Mr Bagnara. The plaintiff was an experienced painter, and as confirmed by Mr Ayre's evidence, it is reasonable to expect that an experienced painter will have worked on roofs. There is no evidence that any inflexibility of the plaintiff's footwear should have been noticed by Mr Bagnara.

55 There was no evidence concerning any particular tiredness in the plaintiff of which Mr Bagnara should have been aware, and the plaintiff's level of awareness was a matter as to which the plaintiff could reasonably be considered to have been more aware than Mr Bagnara.

56 In these circumstances, in my opinion, although the magnitude of the injury which could have been caused to the plaintiff if he fell from the roof was very great indeed, the risk of him doing so was very small; and in my opinion it would not have been a reasonable response of the Trust or of Mr Bagnara to this risk not to invite a tradesman such as the plaintiff to go on to the roof at all. In my opinion, it would not have been a reasonable response to refrain from inviting a tradesman to go on to the roof without first fencing the roof, or making available some hand-hold or foot-hold at all parts of the roof to which the plaintiff might go. There is no suggestion by the plaintiff that a warning was called for. The remaining respects in which it is said that the Trust was negligent are that it failed to place planks across the kliplok roof so that the dangers provided by the ridges of the roof would be avoided, and that it failed to provide a safety harness.

57 In my opinion, a reasonable person in the position of the Trust or Mr Bagnara would not have seen either of these steps as being reasonably required by the risks to which the plaintiff was exposed, having regard to the remoteness of those risks. The provision of planks would have reduced the risk of tripping on ridges, so long as the planks were reasonably secure and extended to every part of the roof to which the plaintiff wished to go in order to complete his measurements. However, to provide and secure planks to that extent would not in my opinion be called for, having regard to the smallness of the risk and the less than complete elimination of that small risk that the planks would provide. A safety harness would need to be of such a character that it could permit the plaintiff to go to every part of the roof to which he wished to go, and also would restrain him from falling from the roof. The setting up of a safety harness of that kind would be a substantial operation, and again, in my opinion, not called for having regard to the smallness of the risk.

58 Accordingly, while it is extremely unfortunate that the plaintiff suffered such a serious accident and consequent injuries, in my opinion there was no breach of duty of care by the Trust which makes the Trust responsible for the accident, and liable to pay the plaintiff compensation for it.

Apportionment for contributory negligence

59 Having regard to my conclusion on the previous question, this does not arise.

CONCLUSION

60 For the reasons I have given, in my opinion the following orders should be made:

(1) Appeal allowed.

(2) Judgment below set aside.

(3) In lieu thereof judgment for the Trust and order that the plaintiff pay the Trust's costs of the proceedings.

(4) Order that the plaintiff pay the Trust costs of the appeal and have a certificate under the *Suitor's Fund Act* if otherwise eligible.

61 McCOLL JA: I have had the benefit of reading in draft the judgments of Hodgson and Basten JJA. I agree with the orders Hodgson JA proposes for the following reasons.

62 I agree with Hodgson JA that the Trust did not breach any duty of care it may have owed the respondent. He was an independent contractor with apparent expertise to safeguard himself in undertaking his trade. The Trust was not under a duty to give him any warning or provide safeguards in such circumstances: *Papatonakis v Australian Telecommunications Commission* [1985] HCA 3; (1985) 156 CLR 7 (at 30) per Brennan and Dawson JJ; see also *Balesfire Pty Ltd t/as Gutter Shop v Adams* [2006] NSWCA 112 (at [39], [48]) per Mason P (Santow JA and Hislop J agreeing).

63 The respondent's case for breach of statutory duty turned on whether the Trust had breached either reg 73 or 74 of the Construction Safety Regulations 1950 made pursuant to the *Construction Safety Act* 1912. The first issue identified for resolution in that context was whether steps taken to provide a quote for painting the roof of the Trust's premises constituted "building work" within s 3 of the *Construction Safety Act* and, therefore "construction work" in the same section, and for the purposes of the two regulations. If that definition was satisfied, two further issues were whether the Trust was either "directly or by [its] servants or agents [carrying] out [that] construction work" (reg 73) or "in charge of [that] construction work" (reg 74). The Trust did not dispute that if it was subject to those obligations, breach of them had been established.

64 It is not necessary for the purpose of reaching my decision to determine the first issue. I shall assume, for present purposes that the activity in which the respondent was engaged, measuring the roof preparatory to submitting a quote for its painting, fell within the statutory language. It is unnecessary to determine that issue because I also agree with Hodgson JA that the Trust was not carrying out any "building work", either generally (Hodgson JA at [41]) or in relation to asking the respondent to give a quotation for painting the roof (Hodgson JA at [42] – [43]). I also agree with Hodgson JA that the Trust was not in charge of that work (Hodgson JA at [46]).

65 The purpose of the *Construction Safety Act* and the Construction Safety Regulations is to "place particular responsibilities upon the person actually carrying out the particular building work, that is to say, doing it himself personally, or by his servants or by those whose acts are in law his acts...": *H C Buckman & Son Pty Ltd v Flanagan* [1974] HCA 30; (1974) 133 CLR 422 (at 427) per Barwick CJ, Stephen JJ agreeing.

66 In Barwick CJ's view (*Buckman*, at 427 - 428), his interpretation of the *Construction Safety Act* and the Regulations was consistent with "an eminently practical and workable scheme of legislation", which would ensure "the safety of all". However, his Honour rejected the view that the word "agents" included "the independent contractors who are themselves carrying out the building work which they have contracted to do", a point he developed in his consideration of *Davey v Skinner* [1961] 61 SR (NSW) 648. He agreed (at 428) with the majority view in *Davey v Skinner* (at 652) that:

“Regulation 73 does not impose its obligations on an employer as such nor does it limit its safety measures to employees as such. Nor does it, for example, refer to a contractor as the person obliged to conform to its provisions. In broad terms it directs its provisions to any person who carries out any building work ... *The obligations rests on the active person, that is the one who carries out the work in actual fact.*” (emphasis added)

He added (at 428 – 429) that he was:

“...unable to accept the contrary view of the minority judgment in that case that reg 73 is directed to the principal contractor or building owner. Building work is so defined that it does not necessarily refer to the total work to be performed in a building, but the definition is suitably worded to enable each section of work being done, eg as ‘painting, cleaning and signwriting’, being regarded as building work so that *the obligation to take the specific safety measures are imposed on that person who is carrying on or carrying out that particular work.*” (emphasis added)

Then, dealing (at 429) with that aspect of the majority judgment in *Davey v Skinner* concerning independent contractors, he said:

“*It is not consistent, in my opinion, with that conclusion to include independent contractors who are carrying out particular building work as ‘agents’ of the building owner or contractor so as to impose on him the obligation which clearly will fall upon the independent contractor vis-à-vis the building work he is actually doing*. Consequently, I am unable to accept the view expressed by the majority in *Davey v Skinner* [1961] NSWR at 221 when they said: ‘In some circumstances such an expression [servants or agents] could extend to independent contractors, as Williams J held in *Ryan's Case* (97 CLR) at 96.’ But I do agree that: ‘The use of the familiar phrase ‘servants or agents’, from the subject-matter of the Regulations, is intended to embrace those employed under a contractor for services, that is, not merely servants properly so called, but also the agents, whom, though not strictly servants, the person carrying out building work employs to do for him what he has engaged to do’, that is to say, persons whose acts are in law the acts of a principal. But this description does not include independent contractors.’ ” (emphasis added)

67 McTiernan J (who formed the majority with Barwick CJ and Stephen J) also emphasised (at 432) the necessity to look at the “specific function” being undertaken and, too, rejected the proposition that those who engaged the plaintiff, an independent contractor, could be vicariously liable under the Regulations as regards the work he carried out, observing that “the relationship between an independent contractor and the person with whom he contracts does not carry with it the legal consequences of the relationship of agency.”

68 As Mason P (with whom Santow and Basten JJA agreed) explained in *Lenz v Trustees of the Catholic Church* [2005] NSWCA 446 (at [52] – [53]), despite amendments to regs 73 and 74 both of a textual and substantive nature, their evident purpose has not changed since *Buckman*:

“For each regulation, the protection enures at least for the benefit of all persons engaged in the construction work calling forth the relevant duty ... it is necessary to identify the person or persons subject to the particular duty, and the scope of the particular duty, depending upon the sub-regulation(s) invoked.”

69 In *Lenz*, Mason P comprehensively examined the authorities dealing with regs 73 and 74. That summary relevantly included:

"51 Building (and therefore, relevantly, construction) work does not necessarily refer to the total work to be performed in a building. Each section of work performed (for example, painting, cleaning, sign-writing, dismantling or demolishing: see s3 (1)(a) of the Act for the definition of 'building work') is regarded as building work so that the obligation to take specific safety measures in the sub-pars of reg 73 may be imposed on the person who is carrying out that particular work (*H C Buckman and Son Pty Ltd v Flanagan* [1974] HCA 30; (1974) 133 CLR 422 at 428).

...

54 Regulation 73 speaks to 'any person who directly or by his servants or agents carries out any construction work'. Reg 74 addresses 'the person in charge of the construction work'. The terms are not synonymous in expression or identical in application. Neither are they mutually exclusive.

...

55 Merely to establish that a person is the owner or occupier of a building site will not prove that he or she was also carrying out the construction work (cf reg 73) or in charge of the construction work (cf reg 74) (see Almeida at [143]).

...

57 Regulation 73's class of persons who 'directly or by servants and agents carry out any construction work' is capable of embracing persons involved at different layers of responsibility or particularity of work. The reference to agency is expansive. Regulation 73 does not restrict itself to imposing an obligation on an employer as such, or limiting its safety measures to employees as such. 'By imposing obligations on such persons in respect of the several sections of the total building enterprise the safety of all will be secured'. (*Buckman* at 427-428 per Barwick CJ (McTiernan and Stephen JJ agreeing), *Maggiotto* at [16]-[17]).

58 It is, however, clearly established that reg 73 only places the obligation upon 'the active person, that is the one who carries out the work in actual fact' (Davey v Skinner [1961] SR (NSW) 648 at 651; Buckman at 428; Maggiotto at [17], [24]; Multiplex at [56]-[61]. See also Heatherington [sic, Hetherington] *v Mirvac Pty Ltd [1999] NSWSC 443).*

59 It follows that reg 73 does not apply to a head contractor who has wholly delegated the task in question to a sub-contractor *(Buckman* at 428; *Almeida* at [117] (Santow AJA)). *Independent contractors who themselves carry out the work they have contracted to do are not thereby the agents of the head contractor who thereby expose the head contractor to reg 73's obligations with reference to the construction work they are performing (Buckman at 428; Almeida at [117]; Maggiotto at [16]).*

...

61 In some circumstances*, a head contractor or building owner who has otherwise delegated the performance of particular construction work to a sub-contractor, may participate in that*

building work and thereby become one of the persons carrying out the construction work (*Maggiotto* at [24]-[25])....

62 Similarly, a head contractor fell within reg 73 when it engaged in an activity so 'intimately connected' with the construction activity (organising 'dewatering') as to constitute part of it (Multiplex); when an employee of the head contractor actually participated in the building activity in question (Buckman); and when the head contractor became involved in coordination and supervision of different trades on the site or the supply of building materials to sub-contractors (Maggiotto at [36]; Zahner v Andreas Pty Ltd [2001] NSWCA 352 at [33]- [34]; Todorovic at [26]-[27]; F & D Normoyle at [20]-[26]). See also Mason J's reference to participation 'by act or approval' in *Buckman* at 444. The line between delegation and continuing participation on the head contractor's part may be a fine one on the facts (see for example how *Maggiotto* was distinguished in *Kolodziejczyk* at [73], [83]).

63 Furthermore, when a head contractor delegates a particular aspect of building work, circumstances may arise that require preliminary steps or ancillary work to be undertaken to ensure the safety of those who will be working on the delegated task. The task of doing the work necessary to complete the *preliminary steps* or ancillary work may not be within the work delegated. In such a situation, were the head contractor not to be duty bound to comply with reg 73 in regard to the ancillary work or preliminary steps, there would be a gap in the security net that the regulation is intended to provide. The safety of all involved in the total building enterprise would then not be secured. It is a question of fact in each case as to whether the sub-contractor has been instructed to perform the preliminary steps as well as the work the subject of the express instructions (Buckman at 446 (Jacobs J); Maggiotto at [26]-[29], Kolodziejczyk at [72]; Todorovic at [27]).

64 *If no more can be said than that the building is for and at the expense of a person, then reg 73 does not impose obligations on that person* (*Castellan v Electric Power Transmission Pty Ltd* (1966) 84 WN (NSW) 502 at 504). *The activities of owner-builders who engage in rudimentary coordination of various trades or who occasionally act in the capacity of builder's labourer are not generally sufficient to bring such persons within the ambit of reg 73* (*Bhambra* at [41]-[48]).

65 In contrast to reg 73, reg 74 is directed at 'the person in charge of the construction work'. It is always necessary to identify the relevant construction work. However, a head contractor, with or without an interposed sub-contractor, is usually 'the person in charge of the construction work'. This is borne out by the language of reg 74 and is consistent with the relatively passive obligation to 'provide' items of safety equipment that forms the main content of the regulation.

66 The case law establishes that the 'person in charge of construction work' includes the head contractor (without an interposed subcontractor) or the person with overall responsibility for the construction work, that person being the person responsible for the work to the proprietor, co-ordinating the various trades and making the site under its control available to those doing the work (*Almeida* at [130]-[131] per Santow AJA; Kolodziejczyk at [88] per Heydon JA). Because the head contractor remains responsible to the proprietor for the work done, it could not discharge that responsibility if not in overall charge of the work and the site (*Almeida* at [130] per Santow AJA)." (emphasis added)

70 I would add to this summary, the observation that reg 74 does not apply to a person who has no responsibility for the work, that is to say, where it is being performed by an independent contractor: *Kolodziejczyk v Grandview Pty Ltd* [2002] NSWCA 267 (at [88]) per Heydon JA (Ipp AJA agreeing) or where the owner or occupier of the building is not "in charge of" the work "in a real sense": *Almeida v Universal Dye Works Pty Ltd* [2000] NSWCA 264; (2000) 103 IR 433 (at [142]) per Santow AJA (Priestley JA agreeing).

71 The respondent's case was that the relevant "building work" for the purposes of the statutory counts was measuring the roof for the purpose of repainting it: *Takacs v The Uniting Church* [2007] NSWSC 175 at [82], [86], [90] (reg 73) and [95] (reg 74).

72 The respondent did not advance a case that the Trust was vicariously responsible for his activity in measuring the roof, rather that it was bound by reg 73 because it had not completely delegated to the respondent the task in hand. He based this submission on the fact that Mr Bagnara was co-ordinating and supervising his activities, gave him directions as to when, where and in what order the work was to be done and determined the materials he needed, the key to the roof and a ladder to gain access. In like vein he contended that the Trust was in charge of the relevant work because Mr Bagnara was responsible for the respondent's presence on the roof, for directing him there and for providing the means of access thereto. These submissions largely reflected the primary judge's finding (at [69]) that the Trust did not wholly delegate the building work in question to the respondent. Mr P Mahony of Senior Counsel, who appeared with Mr R Quickenden for the respondent, accepted that his Honour's conclusion that "[the Trust] directed the plaintiff as to the time of the performance of the work" was "slightly inaccurate", but submitted that there was "economic compulsion" in the Trust's request that the respondent attend the premises on the day it wanted. It was not clear how that advanced his argument that the burden of the Regulations fell on the Trust.

73 Inherent in these submissions is the proposition which was common ground on appeal and at trial that the respondent was an independent contractor (he was a self-employed painter) and an attempt to avoid the consequences of that status (that he was responsible for the work he undertook) by arguing that the Trust had not entirely delegated to him the task in hand.

74 On appeal, the respondent appeared to put the case as to what constituted "building work" in two ways. First, on the basis with which the primary judge dealt with the matter, namely the act of measuring the roof preparatory to giving a painting quote and, secondly, in asserting that the provision of the ladder by Mr Bagnara and putting it in place to provide the respondent with a means of access to the roof to perform "his delegated task" was building work. I do not understand the latter contention to have been pursued. If it was, it would not have been, in my view, causally related to the respondent's accident.

75 Accepting for present purposes that measuring a roof preparatory to giving a painting quote can constitute building work, it was the respondent who was undertaking that work. Mr Bagnara's conduct in asking him to attend the premises for the purpose of giving a quote and

giving him access to the roof, did not mean he participated in the activity in which the respondent was engaged in the sense to which Mason P referred in *Lenz* (at [61] – [62]). It was the respondent who undertook the activity of measuring the roof. Mr Bagnara may well have asked him to measure it, but that was no more than a sensible request to an independent contractor to ensure any quote submitted was soundly based. The respondent may have responded to Mr Bagnara's request, but he was not subject to his direction. He could, had he seen fit, have refused to undertake the task at hand. This was not a case of incomplete delegation. Mr Bagnara no more participated in the work the respondent undertook than the head contractors who had sub-contracted the work to Mr Flanagan in *Buckman*. Here there was, as yet, no contract. But if work preliminary to entry into a contract to carry out the actual work can constitute "building work" for the purpose of the statutory counts then, depending on the facts, so, too may the conduct of the putative head contractor be assimilated to the position it would have been in had there been a contract.

76 Had the Trust ultimately entered a contract with the respondent for him to carry out the activity of painting of the roof, he would have been so engaged as an independent contractor. His acts would not, in law, have been the Trust's acts. An independent contractor does not become the "agent" of the principal for the purpose of reg 73 merely because the parties enter into a contract for services: *Balesfire* (at [65]). It would have been up to him to decide how to perform the task at hand consistent with him carrying on his own trade, including determining what, if any, safeguards should be deployed: *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; (1963) 109 CLR 210 (at 217) per Windeyer J (expressed in dissent, but referred to with approval in *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 (at [40]) per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95 (at [40]) per Gaudron, McHugh, Hayne and Callinan JJ); *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 (at 37) per Wilson and Dawson JJ. In my view the respondent did not lose his independent contractor status merely because he had not yet entered into a contract.

77 For the same reasons, in my view, the Trust could not be regarded as having been "in charge of" the construction work for the purposes of reg 74. It was the respondent who was in charge of the activity of measuring the roof. He was shown the site, given access to it, then went about the relevant activity.

78 In my view, the case falls within the two propositions articulated by Mason P in *Lenz* (at [55] and [64]) that the mere fact that the Trust was the owner or occupier of the premises did not prove it was carrying out the building work, nor was it in charge of it and, too, that no more could be said on the facts than even though the building work may ultimately be at the Trust's expense, did not impose obligations on it pursuant to either regulation.

79 I cannot, with respect, accept Basten JA's analysis of the case that, in effect, Mr Bagnara did not call the respondent to the premises preparatory to engaging his services as a painter, but merely to ask him to undertake a mechanical task he could otherwise have performed and that in engaging in that work the respondent was the Trust's agent (Basten JA at [109]). That is not, in my view, the way the case was conducted at trial or on appeal.

80 The case was run on the basis the respondent was an independent contractor. The respondent did not advance a case that he was the Trust's agent in measuring the roof, rather that both were carrying on the relevant activity and that the former had not entirely delegated the task to the latter. However the task the respondent undertook was anterior to him contracting to perform work for the Trust, and was integral to his trade as a painter. The fact that the respondent had not yet entered a contract with the Trust to undertake the painting work, could not make him any more the Trust's agent for the purpose of carrying out the measurement preliminary to submitting a quote, than it would had he actually been engaged to paint the roof.

81 It should be borne in mind that use of expressions such as " 'delegate' or 'agent' ... must not be permitted to obscure the need to examine what exactly are the relationships between the various actors": *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 161 (at [13] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Here the Trust sought to engage the respondent's services as an independent contractor to undertake a task which would enure to their respective benefits, but it did not in any manner purport to carry out, or assume charge of, the work of measuring the roof to determine what would be involved in its painting: *Sweeney* (at [32] - [33]).

82 Further there is no evidence which would warrant the conclusion the respondent was undertaking a task Mr Bagnara would otherwise have undertaken. It may have been a task anyone with a tape measure could have undertaken. Whether or not that was so was not explored at trial. What was, no doubt, not a mechanical task was translating the measurements once taken into a quote for painting the roof, which presumably would have included identifying the appropriate paint. The evidence was that the course Mr Bagnara took in inviting the respondent to attend for the purpose of preparing a quote was the practice he had adopted ancillary to engaging his services as a painter. He undoubtedly did so relying on the respondent's skills as a painter.

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83 BASTEN JA: Mr Takacs ("the plaintiff") was a painter by occupation. On 4 May 1999, he was seriously injured when he fell nine metres from the roof of a building at the Northaven Retirement Village, owned and operated by the Uniting Church in Australia Property Trust (NSW) ("the Trust").

84 The plaintiff claimed damages from the Trust on the basis of breach of statutory duty and negligence. The primary judge, Rothman J, upheld his claim on both counts: *Takacs v Uniting Church in Australia Property Trust (NSW) t/as Northaven Retirement Village* [2007] NSWSC 175; 161 IR 155. His Honour also apportioned negligence, finding the plaintiff 20% responsible for the accident. This would have resulted in a diminution of damages payable in negligence, but did not affect the award for breach of statutory duty.

85 The Trust did not challenge the assessment of damages, but did challenge the findings of

the trial judge in relation to liability. It is convenient to deal first with the challenge in relation to the breach of statutory duty.

Breach of statutory duty

86 The claim for breach of statutory duty was said to arise under two provisions, namely regs 73 and 74 of the Construction Safety Regulations 1950 (NSW) ("the Regulations") as in force in May 1999. The Regulations were originally made pursuant to the *Scaffolding and Lifts Act* 1912 (NSW), which in 1979 was renamed the *Construction Safety Act* 1912 (NSW): see *Scaffolding and Lifts (Amendment) Act* 1978 (NSW), Sch 1, cl 2. Unsurprisingly, there have been legislative changes from time to time since the commencement of the legislative scheme. The *Construction Safety Act* was repealed by the *Occupational Health and Safety Act* 2000 (NSW), s 139 and Sch 1. That repeal took effect on 1 September 2001. Separate provision was made for the repeal of the Construction Safety Regulations: *Occupational Health and Safety Act*, Sch 3, cll 3(c) and 4. It was common ground that the Regulations as in effect at the time of the accident applied. The relevant provisions are set out above at [4]. The issues which arose in relation to the operation of regs 73 and 74 were as follows:

(a) was the plaintiff engaged in construction work at the time of the accident;

(b) for the purposes of reg 73, was the Trust carrying out construction work at that time, and

(c) for the purposes of reg 74, was the Trust "the person in charge of the construction work".

87 In relation to the pleaded contravention of reg 73, breach was particularised as failing to provide "means by fencing or otherwise for securing the safety of the Plaintiff working at a place from which he would be liable to fall a distance of more than 1.8m". This particular substantially reproduced sub-reg 73(3). In relation to reg 74, again the particulars largely reproduced the terms of the regulation, pleading that there was no adequate handhold or foothold and that the Trust failed to provide a safety belt or harness and line. (There was, in addition, reference to the lack of a safety net, but that particular appears not to have been pursued.)

88 In this Court there was no challenge by the Trust to the proposition that, if the Regulations applied, there was no compliance: Tcpt (CA), 6/02/08, pp 14-15. However, somewhat curiously, ground 9 asserted that there was error on the part of the trial judge in finding that the breaches were "causative" of the accident. The written submissions for the Trust with respect to this ground amounted to little more than a restatement of the bases upon which it said the Regulations were not engaged. This challenge was not expanded upon in oral argument.

Construction of reg 73: general

89 As the trial judge noted, issues relating to the construction of reg 73 are inter-connected: accordingly, care must be taken in separating out particular aspects of the statutory language for separate treatment. Logically, the first question is whether the work was "construction work" for the purposes of the regulation. The phrase "construction work" was defined in s 3(1) of the *Construction Safety Act* to include "building work". The latter phrase was defined to include "work in ... painting ... done in relation to a building or structure, at or adjacent to the site thereof".

90 It is not in doubt that the intended work was "construction work" within the meaning of the definition: one issue was whether the preliminary work of measuring the area for the purpose of providing an estimate of cost was construction work.

91 The other aspect of reg 73 which was critical to its operation was its structure. It envisaged that, in a particular situation, a responsibility might be imposed upon one party, for the protection of another. The party bearing the obligation was any person who "carries out" construction work. The beneficiary of the protection was a person "engaged in" such construction work. To an extent, the categories appear to be interchangeable. In other words, a person who is engaged in construction work may also be carrying it out, and a person carrying it out may be engaged in such work.

92 Where the work was carried out by "servants or agents", there seems to have been an assumption that it was the employer or principal who carried out the construction work and not the servant or agent. This may be inferred from both the language of reg 73 and from the definition of "constructor" in the Act: in relation to the legislative history generally, see *Almeida v Universal Dye Works Pty Ltd* [2000] NSWCA 264; [2001] Aust Tort Rep ¶81-603; 103 IR 433 at [120]-136] (Santow AJA). The critical question then became whether a building owner, for which work was carried out, might not be the person who carried out the work and, if so, in what circumstances it would be such a person. The case-law treats this as a factual question: see *Lenz v Trustees of the Catholic Church* [2005] NSWCA 446; 148 IR 346 at [58]- [60] (Mason P). Whether it is a purely factual question is a matter of doubt. It would not serve the purposes of the legislative regime if the person on whom the duty was imposed could only be identified by a retrospective assessment of whether it in fact carried out construction work. Further, the difficulty is exacerbated by the imprecise nature of the criterion of "carrying out" work. In particular, where one party had contractual responsibility for work which would require safety measures within the scope of reg 73, it would be surprising if the regulation did not apply in circumstances where that party took no steps to comply with its contractual obligations. Perhaps reflecting the need to conduct a factual inquiry, the cases ask whether particular work has been "wholly delegated" to a sub-contractor: see, eg, *HC Buckman and Son Pty Ltd v Flanagan* [1974] HCA 30; (1974) 133 CLR 422 at 443. As noted by Mason P in *Lenz* at [62], "[t]he line between delegation and continuing participation on the head contractor's part may be a fine one on the facts".

93 Identification of the person on whom the regulation imposes its duty may arise in a variety of circumstances. For example, it may arise where an employee of the sub-contractor is injured and seeks to recover both from his or her employer and from the principal contractor. If one is insolvent, there will be a real question as to whether both are liable and, if not, which is liable. Alternatively, as in the present case, there may be an issue between the principal contractor and the sub-contractor. Where the principal contractor has wholly delegated the work to the sub-contractor, a breach of duty by the sub-contractor should not give rise to liability in the principal contractor. Although the circumstances appear to be different, the question and answer should be the same. It is not a question of whether the sub-contractor, as an individual, owes a statutory duty to himself or herself; it is a question of who is responsible for the failure to adopt a safe work practice. Thus a sub-contractor who fails to wear a safety harness may fall and injure himself, but may also injure another worker. If the

principal contractor is not liable to the sub-contractor, it should not be liable to the other worker. On the other hand, if the responsibility of the principal contractor is to co-ordinate sub-contractors so as to minimise the risk of harm resulting from multiple activities being carried out simultaneously, the injury to the worker may result both from a breach of that duty and the duty of the sub-contractor who failed to wear the harness.

94 In fact, the question is not entirely a factual one. *Buckman* concerned an accident at a school being constructed for the Department of Education, the principal contractor being Buckman. Buckman sub-contracted to Shaw the supply and erection of necessary structural steel. Shaw in turn sub-contracted the erection work to Flanagan. Whilst undertaking that work, Mr Flanagan was injured. In broad terms, the majority of the Court (Barwick CJ, McTiernan and Stephen JJ) held that the reference to an "agent" in relation to the person carrying out the work did not include an independent contractor for whose acts the principal contractor was not liable in law. Accordingly, the chain of sub-contracts excluded Buckman (and Shaw) from liability for lack of compliance with safety obligations in the erection of the steel. However, Buckman had been responsible for laying the concrete pads in which bolts were placed to which the steel was to be attached. When a particular stanchion was erected and bolted into place, it became apparent that the bolts had been misplaced. Buckman then had the bolts cut intending to replace them, but without warning Flanagan, with the result that the stanchion was rendered unstable and Flanagan fell and suffered injury. Thus, the actual intervention of Buckman in cutting the bolts, regardless of contractual responsibility, was the factor which brought Buckman within the operation of reg 73. The fact that "Buckman did undertake building work in connection with this stanchion" was sufficient to allow a jury to conclude that Buckman was carrying out construction work and was thus within the language of reg 73: at 429 (Barwick CJ).

95 In *Buckman*, several members of the Court spoke about "delegation" of the work required to be undertaken. That language has, understandably, been picked up in later decisions: see, eg, *Maggiotto Building Concepts Pty Ltd v Gordon* [2001] NSWCA 65 where Ipp AJA (Meagher and Stein JJA agreeing) remarked that it was "not unusual for a head contractor to delegate a specific task to a sub-contractor": at [29]. That language is curious because it is usually used in relation to the performance of a legal duty. Further, a delegate is generally understood to be an agent or representative of another. It does not in terms evoke the characteristics of an independent contractor, but rather the contrary: see *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Company of Australia Ltd* [1931] HCA 53; (1931) 46 CLR 41 at 48 (Dixon J), citied with approval in *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 at [39] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). The joint judgment in *Hollis* also referred to the remarks of McHugh J in *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313 at 366:

"The rationale for excluding liability for independent contractors is that the work which the contractor has agreed to do is not done as the representative of the employer."

96 The concept of delegation may have arisen because of the use of the term "agent" to define the manner by which a person carrying out the building work might undertake the work. Difficulties have arisen from the decision to limit the term "agent" to persons for whose conduct the principal was, under the general law, vicariously liable. Nevertheless, the

adoption of that test by Barwick CJ, McTiernan and Stephen JJ in *Buckman* precludes acceptance of the different view expressed by Mason J at 441 and accepted by Jacobs J at 445. Moreover, the fact that a person who has obtained the services of an independent contractor might be liable if he or she "directly authorised the doing of the act which amounts to a tort" demonstrates a degree of awkwardness in the accepted approach: *Colonial Mutual Life*, 46 CLR at 48 (Dixon J).

97 In a number of cases in this Court, the question of whether work has been "wholly delegated" to a sub-contractor has been addressed by asking whether the steps required by the Regulations to make safe the performance by the sub-contractor of its specific tasks have themselves been delegated to the sub-contractor. In *Maggiotto* at [26], Ipp AJA stated that it "must be a question of fact in each case as to whether the other person has been instructed to perform the preliminary steps as well as the work, the subject of express instructions". Following Jacobs J in *Buckman*, his Honour concluded that "the head contractor will only be regarded as having instructed the other person to perform the preliminary steps if that person was particularly directed to do the specific work 'necessary in order to fulfil the [head contractor's] statutory duty'": at [27]. The result would be, as his Honour noted, that the head contractor would avoid the statutory duty only where it specifically instructed the sub-contractor to take the necessary steps to fulfil the duty. Yet, under the general law, that might be a case in which the head contractor would become liable vicariously for the failure of the sub-contractor to carry out those works properly. According to the majority in *Buckman* the test of liability for breach of the statutory duty depends upon liability under the general law for the acts of the head contractor's agent. It is not easy to understand how the adoption of these remarks of Jacobs J can stand with the reasoning of Barwick CJ in *Buckman*: cf *Maggiotto* at [29].

98 As noted by McHugh J in *Northern Sandblasting* (138 CLR at 367), Lord Blackburn had expressed the responsibility of an owner of land in an action for nuisance in the following terms – see *Dalton v Angus* (1881) 6 App Cas 740 at 829:

"[A] person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

99 An action for breach of statutory duty is, like nuisance, a tort of strict liability and there is no obvious reason why Parliament should have permitted a person otherwise carrying out construction work to avoid responsibility under the Regulations by such a device. For present purposes, the scope of the term "agent" must be identified in a non-contractual situation, although assistance may be obtained by analogy from the principles underlying the restriction identified by the majority in *Buckman*. Just as the concept of control may provide a primary discrimen between employees and independent contractors, so it provides a significant factor in determining whether a person not in a contractual relationship with another person carrying out building work was in fact an agent of the other person.

‘Carrying out’ construction work: application of principles

100 The plaintiff was not, in truth, either an employee or an independent contractor of the Trust. He was a person who had been invited onto the premises in order to provide an estimate of the cost to the Trust if it proceeded with the proposed painting work. That fact focuses attention on the separate challenge raised by the Trust, namely that the plaintiff’s activity at the time did not constitute “construction work” for the purposes of the regulation.

101 This question led the primary judge to a detailed consideration of what was covered by the phrase “work in ... painting”, which formed part of the definition of “building work” in the *Construction Safety Act*. The use of the word “in” in this context, where it links “work” with a more specific kind of activity, is a grammatically awkward construct. The specification of separate activities may provide some indication of the scope of “building work” but does not appear to expand the meaning of the phrase “building work” by referring to it as “work in” activities understood to constitute building work. It provides little by way of assistance in identifying the scope of the activity. The scope of the phrase “building work” is better understood by considering it in its operative context.

102 That context includes reg 73. The first question raised by reg 73 is whether a person is, at a particular point in time, carrying out any building work. The Trust argued that it was not, at least until it had directed an employee, or engaged a contractor to undertake the work or, possibly, not until the physical activity had been commenced. The Trust rejected the view that the plaintiff was on the site for a purpose which was solely connected with painting work and which might allow a finding that he was at that time “engaged in” painting work. That inference as to the purpose of the worker, if drawn, might affect the question of whether the Trust was carrying out building work, but it is not necessarily determinative of it. Similarly, the fact that the plaintiff carried on an independent painting business is a relevant, but not a determinative factor. The better approach, in answering the first question, is to focus on the activities of the Trust.

103 Relevantly, the activities of the Trust were the activities of Mr Bagnara who was its building maintenance manager. Although Mr Bagnara was not called and there was no clear evidence as to what work he undertook, other than in relation to the present events, his Honour inferred that he “organised, coordinated and supervised general building maintenance and minor construction work for the various premises of” the Trust. While the definition of “building work” in the *Construction Safety Act* employed the term “means”, and in that sense was not a mere exemplification, the activities identified were broad in scope. Thus they include “installing, adding to, altering, repairing, equipping ... cleaning ... done in relation to a building or structure”.

104 Mr Bagnara had formed a view that rust, which was apparent on a section of the roof, required treatment. The plaintiff suggested that it might be cheaper to replace the roof than paint it with industrial paints giving long-term protection: see trial judge’s summary of the evidence at [16]-[18].

105 Although nothing turns on the precise inference, I would not have been satisfied on the

basis of this evidence that Mr Bagnara, on behalf of the Trust, had decided that the roof should be painted. I would infer that he wanted further information in relation to the work which might be undertaken, before he committed the Trust to any particular expense. That does not mean, however, that no activity falling within the definition of “building work” was then being undertaken by or on behalf of the Trust. Inspection of a building to determine what repairs or other work may be required could well involve potentially dangerous activities of the same kind as might be involved in undertaking the work. For example, if Mr Bagnara had climbed onto the roof in order to determine whether the roofing (or even the guttering) required attention, his circumstances would be very similar to those of a worker actually painting, cleaning, replacing or otherwise attending to defects in the roofing or guttering. The risks involved in that activity would be unrelated to whether or not further activities were determined to be necessary.

106 The purpose of reg 73 is not hard to identify. It gives effect to that aspect of the regulation-making power which is specifically directed to “the manner of carrying out construction work” and “safeguards and measures for securing the safety and health of persons engaged in construction work”: *Construction Safety Act*, s 22(2)(g)(iv) and (v). Such construction work, to the extent that it involves “building work” must be work done “at or adjacent to” the site of the relevant building or structure: *Construction Safety Act*, s 3(1). The commencement and termination of building work are not matters for precise delineation. Broadly speaking, the phrase is apt to cover all work undertaken by a building contractor at or near the relevant site. It may include preparatory work and cleaning up. A limitation on the work covered which restricted it to, for example, the actual carrying out of repairs or painting, so as to exclude inspection and preparation for repairs or painting, would not further the purposes of the Act. A construction which covered such preliminary or preparatory work would further the relevant purpose and should therefore be preferred: *Interpretation Act* 1987 (NSW), s 33.

107 If Mr Bagnara, an employee of the Trust, had lowered himself onto the roof in order to carry out an inspection to determine the nature of the repairs which were or might be required, it could have been inferred that the Trust was engaged in repairing the roof and hence was carrying out building work in relation to the building through its servant.

108 If Mr Bagnara did not undertake those steps himself, but invited a third person to inspect the roof, for the purpose of providing an assessment of the repairs required and the cost thereof, it might be inferred that the Trust was carrying out the same activity through an agent. The question in relation to this issue is whether the third party, who is not in attendance pursuant to any contractual arrangement, is properly described as an “agent” for the purpose of carrying out the work.

109 The accident occurred when the plaintiff was carrying out the entirely mechanical task of measuring the roof. This was not an activity calling on his skill, experience or training as a painter. It required a tape measure and a pocket calculator. If the Trust had had plans of the building available, it might not have needed the measurement to be undertaken at all. The special knowledge and expertise which was expected of the plaintiff related to the time and materials required once the area was calculated. Rather than carry out the mechanical task

himself, or with the assistance of an employee of the Trust, Mr Bagnara directed the plaintiff to measure the roof and provided access to the roof by means of a ladder. Ascertaining the area of the roof was necessary for Mr Bagnara's purposes, whether he decided to paint it or have the area re-roofed. The plaintiff might have been assisted in his task by Mr Bagnara, had he not, co-incidentally, collected on his way to Northaven Retirement Village a friend to whom he was providing a lift home. In effect, both men were at that stage acting as agents for the Trust in measuring the roof. Accordingly, not having "wholly delegated" the task of repainting the roof to any person at that stage, but the task having been commenced, the Trust was carrying out the building work, whether repairs or painting, by an agent – or in fact two agents.

'Engaged in' construction work: application of principles

110 The next question for the purposes of reg 73 is whether the plaintiff was "engaged in" such work. Once it is accepted that construction work was then being undertaken, it is difficult to resist the conclusion that both the plaintiff, Mr Bagnara and the plaintiff's friend were "engaged in" the work for the purposes of the regulation. The fact that their engagement was confined to a limited task and may have proceeded no further is beside the point, so long as the task itself formed part of the construction work. For the reasons given above, in my view it did.

111 The fact that a person may be engaged in construction work, whilst carrying out a preliminary activity is supported by the decision in *Lenz v Trustees of the Catholic Church* [2005] NSWCA 446. Mr Lenz was injured when he "climbed onto the roof to survey the unfamiliar building site in preparation for working on it": at [78]. The implicit recognition that the fall occurred while "the work" was being carried out seems also to have been an acceptance of the fact that the plaintiff, given his purpose for being on the site, was engaged in the work.

112 *Lenz* may appear to be distinguishable because there was no doubt that the relevant construction work was well underway when the plaintiff arrived on the site. However, it is clear that for the purposes of reg 73 it was necessary to identify the specific tasks to be undertaken by particular individuals. Thus, it was not the overall building operation which was relevant in relation to Mr Lenz's injury, but whether he was engaged in roofing, a task which he was qualified to perform, but which had not commenced. The distinction is therefore without substance.

113 *Lenz* also provides support for the view that construction work can be engaged in prior to any contractual arrangement with those who are to undertake it. Indeed, *Lenz* did not involve a contractual situation at all, but merely the voluntary provision of labour by members of the community. If Mr Lenz had been on the roof in order to assess the amount of roofing material which would have been required, the position would have been materially the same as in the present case.

114 There being no fencing or other means provided for securing the safety of a person working near the edge of the roof, it was conceded that, once the regulation was engaged, there was a breach by the Trust of its obligation under reg 73(3).

Regulation 74

115 While it is not uncommon to find fencing around flat roofs on modern buildings, especially in areas where workers are likely to be required to go to undertake maintenance work, more generally the common means of securing safety is by way of a safety belt or harness and line. Such a harness may provide a means of satisfying reg 73(3). The use of a safety belt and line (or harness and line) provides one of two specific alternative requirements under reg 74(1). However, the obligation under that regulation required the satisfaction of a different precondition, namely a risk of falling "because there is no adequate hand hold or foot hold".

116 The Trust argued that the precondition was not engaged in the present case because reg 74 "does not apply to the task such as the present undertaken on a flat roof". This submission was not expanded upon in oral argument. It requires the reference to adequate handholds or footholds to be read out of context. The precondition is primarily concerned with a risk of falling, the lack of adequate handholds or footholds being the cause of the risk. If the work required a person to stand at the edge of a flat roof, even without the uneven and awkward nature of the cliplock roofing involved in the present case, there would undoubtedly be a risk of falling through tripping, slipping or losing one's balance for any other reason. Where there is such a risk, especially where the consequences of a fall might be grave, as in the present case, handholds will be needed. In the present case there were no handholds and accordingly the regulation applied.

117 The Trust primarily raised its defence on the basis that the plaintiff was not at the relevant time "engaged in construction work". For the reasons given in relation to reg 73, that submission should be rejected.

118 The third point at which the Trust challenged the application of reg 74 was that it was not "the person in charge of the construction work". In substance, I do not understand there to have been any separate challenge to the proposition that the Trust was "in charge of" the construction work if in fact reg 73 was satisfied and it was carrying out construction work. If it had been held that the Trust was not carrying out construction work, there may have been a separate question as to whether it was nevertheless a person in charge of the work. That issue does not arise in the present case and accordingly need not be addressed.

119 Although the Trust did not explicitly accept that it was the person in charge of the work, if it were the person carrying out the work as the principal contractor, the language of reg 74 would be satisfied, in accordance with the reasoning of Santow AJA in *Almeida* at [126]-[138]. However, having concluded that the plaintiff was not a sub-contractor, it is not necessary to rely upon the full extent of that reasoning.

120 Whether the phrase "the person in charge" might have been intended to import the notion of an individual in charge, rather than a corporate entity was not raised and need not be considered: cf *Darling Island Stevedoring and Lighterage Co Ltd v Long* [1957] HCA 26; (1957) 97 CLR 36. If the Trust were the person carrying out the work, it did not seek to say that Mr Bagnara, rather than it, was responsible pursuant to reg 74.

Conclusions

121 For the reasons noted above, in my view the trial judge was correct in upholding the plaintiff's claims for breach of statutory duty, under both regs 73 and 74 of the Construction Safety Regulations.

122 Pursuant to the *Statutory Duties (Contributory Negligence) Act* 1945 (NSW), contributory negligence on the part of the plaintiff was not a defence to an action for damages founded on breach of statutory duty: s 2(1). That Act was repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), s 4(1) and Sch 3, with effect from 6 December 2002. (The concurrent repeal of s 7 of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) permits the apportionment of liability for contributory negligence to apply to claims for breach of statutory duty.) That repeal did not have effect in respect of proceedings commenced before that date: *Civil Liability Act*, Sch 1, Pt 3, cl 6. The proceedings in the present case were commenced in the District Court in 2001. Accordingly, there is no need to consider questions of contributory negligence.

123 For the same reason, it is unnecessary to consider the claims made by the plaintiff in negligence, which would give rise to the same damages, but a judgment reduced on account of contributory negligence.

124 In relation to costs, it is not suggested that any order should be made other than the usual order in the event that the appeal was dismissed. I note that had a different view been taken, I would have disallowed any obligation on the part of the respondent to pay the costs incurred by the appellant in reproducing the medical evidence, there being no ground of appeal challenging the assessment of damages.

125 In the result, I would propose the following orders:

(1) Dismiss the appeal.

(2) Order the appellant to pay the respondent's costs of the appeal.