CA on appeal from the Central London County Court (His Honour Judge Smith QC) before Pill LJ, Judge LJ, Lady Justice Hale. 19th November 2002.

LORD JUSTICE PILL: I will ask Lord Justice Judge to give the first judgment.

JUDGMENT : LORD JUSTICE JUDGE:

1. This is an appeal by the claimant with the leave of Hale LJ against the decision of His Honour Judge Smith QC sitting at Central London County Court on 1 March 2002, dismissing his claim for personal injuries, loss and damage against the first and second defendants. The judge upheld the claim against the third defendant, subject to a reduction for contributory negligence assessed at 25 per cent. The third defendant is uninsured and has no relevant assets. He has not appeared and has played no part in this appeal.

2. The primary facts as found by the judge can be related very simply. The claimant was working as a general labourer at 213 Rye Lane, Peckham, London. The first defendant, Mr Lobo owned these premises which were in the process of conversion. The ultimate object was that the ground floor should be used as a retail fish market by London Sea Food Ltd, the second defendant, and the first floor would be used as offices.

3. For present purposes it is accepted that the interests of the claimant against the first and second defendants, and their interests in relation to each other, mean that they can and should be treated as a single entity. I shall refer to them compendiously as the first defendant.

4. The third defendant, Stanley Headley, was a building contractor employed by the first defendant to carry out building repairs and refurbishment at these premises. The claimant started work for him in January 1998. The judge held that at all material times the claimant was employed by the third defendant and not by the first defendant. Having examined the facts, he found that the third defendant "was at all material times exclusively the claimant's employer. He hired him, he controlled how he did his work, and he paid him. He was in every way the claimant's employer. The first defendant, on the other hand, for reasons given above, never became the claimant's employer either on a temporary basis or in any other manner". There is no appeal against that unequivocal finding.

5. In early March the claimant was working on the ground floor. On 17 March he fell from a ladder when in the course of his employment by the third defendant he was trying to fix a waste pipe to a bracket. He sustained three broken vertebrae in his lower back. The ceiling on which he was working was 11' 9" from the ground. The claimant mounted a ladder in order to do the work. The ladder was not supplied by the first defendant. He did not direct that this particular work should be done, and indeed he was not on site at the relevant time.

6. The ladder was an aluminium ladder, unfooted and unsecured when the claimant mounted it. The risks are almost too obvious to state. This accident was starkly simple: the base moved suddenly away and the claimant fell.

7. The third defendant was not present either. He had temporarily left the site for a cup of tea in a cafe across the road. He was away for about an hour and a half. By the time he returned, the claimant had been taken to hospital in an ambulance.

8. Liability against the third defendant as the employer of the claimant was found both on the basis of negligence at common law and breach of statutory duty, and in particular breaches of regulations 6(1)(ii)(b) and 5(2) of the Construction (Health, Safety and Welfare) Regulations 1996.

9. The judge found that as a prudent site owner the fist defendant had visited the site from time to time and that when he saw anything to cause concern he issued instructions so as to reduce any potential risks to anyone on site. For example, he acted in relation to the removal of ladders which were lying about the place and ensured that piles of cement were covered. However, he assumed no responsibility for the supervision of the claimant or any of the third defendant's employees, which he left entirely to him. He relied on the third defendant as the person to whom, as the judge found, he had "properly delegated" the building works. The suggestion that the first defendant should have appreciated that the third defendant was something of a "cowboy operator" was rejected. The judge

held that there was nothing in the way in which the work was performed which should have indicated to the first defendant that the third defendant was "in any way cutting corners, engaging in unsafe practices or putting his employees at risk". On the contrary, the judge held that the first defendant was entitled and right to assume that the third defendant was "a careful and competent building contractor".

10. It was argued before the judge by Mr James on behalf of the claimant that the claim should have succeeded at common law on the basis of the decision in **Kealey v Heard** [1983] 1 WLR 573, and as a separate ground or cause of action under the Occupiers' Liability Act 1957. He also submitted to the judge, as he does to us with permission, that liability was established in any event under regulation 4(2) of the Construction (Health, Safety and Welfare) Regulations 1996, and regulation 10 of the Construction (Design and Management) Regulations 1994.

11. I shall briefly examine the first ground of appeal, on which leave to appeal was refused. In **Kealey v Heard** the claim succeeded on the basis that the site occupier was not in effect exempted from the duty to take reasonable care of those who came to his premises in order to work at them merely because he employed a reputable contractor. As Mann J (as he then was) explained, "If a person chooses to build by the method selected by the defendant then he ought to provide at least some form of superintendence either by himself or by another in order that his common law duty may be discharged".

12. In my judgment, however, it is inappropriate and unnecessary to treat potential liability at common law, as explained in **Kealey,** as distinguishable from the common duty of care owed by an occupier of premises under the Occupiers' Liability Act 1957 unless a distinct simultaneous duty also arises: for example, from the relationship of employer and employee. In **Kealey** Mann J founded his decision on the much earlier case of **Marney v Scott** [1899] 1 QB 989, 990, in which the duty was expressly defined in the context of the obligation owed by "the occupier" of the property. Hardly surprisingly, and in my judgment rightly, in the text of Clerk & Linsell (18th ed) at 1033, **Kealey** is treated as an authority of relevance under the Occupiers' Liability Act.

13. In the present case, on the judge's findings, the first defendant's duty to the claimant in negligence was confined to compliance with the common duty of care under the 1957 Act. After his attention had been drawn to **Ferguson v Walsh** [1987] 3 All ER 777, and **Fairchild v Glenhaven Funeral Services Ltd** [2001] EWCA Civ 1881, the judge held that this part of the claim was doomed to failure. In my judgment, the judge was plainly right to reject liability at common law.

14. Taking it at its highest, the duty the first defendant owed the claimant did not require him to take precautions to see that the ladder on which the claimant was mounted was footed or secured while the claimant was working from it; or indeed to ensure that the third defendant had given express instructions to the claimant that he should not use the ladder when it was unfooted, or for that matter to discover from each of the third defendant's employees whether he appreciated the risks of mounting and working from an unfooted ladder.

15. I turn to the grounds of appeal on which permission was given. Mr James contended that relevant breaches of statutory duty were established against the first defendant which provided a cause of action distinct from any action which might be taken at common law. They arose under both the 1994 regulations and the 1996 regulations.

16. Regulation 4(2) of the 1996 Regulations provides: *"It shall be the duty of every person (other than a person having a duty under paragraph (1) or (3)) who controls the way in which any construction work is carried out by a person at work to comply with the provisions of these Regulations insofar as they relate to matters which are within his control."*

In principle it is clear that the obligation to perform the duty provided by the regulation cannot be avoided by abdicating responsibility. If compliance is required, it is not an answer to contend that the duty was ignored and thus did not arise. The requisite level of control before the duty does arise, however, is linked to the way in which construction work is carried out and it is confined to construction work within the individual's control. For this purpose the obvious person who controls

the way in which construction work on site is carried out is an employer. The employer owes express duties under regulation 4(1). That, therefore, identifies the starting point. But someone who is not an employer may also be bound by the statutory obligation under regulation 4(2). Whether the appropriate level of control over the work is or should be exercised by an individual other than an employer so as to create the duty to comply with the obligations under regulation 4(2) is, in my judgment, a question of fact. It is not answered affirmatively by demonstrating that an individual has control over the site in a general sense as an occupier, or that as the occupier of the site he was entitled to ask or require a contractor to remove obvious hazards from the site. The required control is related to control over the work of construction.

17. The judge in this case made express findings that the first defendant did not "in any way control the way in which re-running the waste pipe was carried out by the third defendant", which he held was entirely the third defendant's responsibility, and rightly and properly left by the first defendant to him. The judge also held that the arrangements for proper footing and security of the ladder were not in any way within the first defendant's control. Therefore liability under regulation 4(2) was rejected. That seems to me to be a conclusive decision of fact.

18. It is, however, contended on behalf of the claimant that the judge's approach overlooked the statutory obligations imposed on the first defendant by the 1994 regulations. It was submitted that if any such obligations were imposed, control for the purposes of regulation 4(2) was established. Indeed in what, I suspect, must have been a forensic flourish, it was at one stage submitted that it was sufficient for the claimant to establish that the first defendant enjoyed power to control the site. As the language of regulation 4(2) refers to control rather than power to control, that submission added words to the regulation that are not there and cannot reasonably be read into it. Accordingly it went too far.

19. I turn to consider the 1994 regulations. Generally speaking (and it is not unimportant in the present context), regulation 21 of the 1994 regulations provides that breaches of these regulations do not normally give rise to civil liability. It was, however, pointed out, and rightly, that if the first defendant were in breach of regulation 10 of the 1994 Regulations, then this was one of the two provisions for which civil liability was not excluded. Regulation 10 provides*: "Every client shall ensure, so far as is reasonably practicable, that the construction phase of any project does not start unless a health and safety plan complying with regulation 15(4) has been prepared in respect of that project."*

20. It was also submitted that as the first defendant had not appointed a planning supervisor and a principal contractor, he was in breach of regulation 6. Such a breach, however, is not susceptible to an award of damages on the basis of civil liability. Nor for that matter is any breach by a principal contractor of his obligations under regulation 15(4).

21. With that introduction I must come back to this case. It was accepted before the judge, and in the skeleton argument prepared on behalf of the respondent, that the claimant had established a breach of regulation 10. I record my reservations about whether this case did indeed fall within the ambit of construction work as defined in regulation 2. But as the point was accepted before the judge, and us, it is not necessary to attempt any broader or more wide-ranging analysis of the relevant statutory provisions. Accordingly, we must proceed on the basis that a health and safety plan complying with regulation 10 was not provided by the first defendant either at the start or indeed at any stage of the project, certainly prior to the claimant's accident, and that this amounted to a breach of regulation 10. In my judgment, regulation 10 did not create, nor were plans prepared for the purposes of regulation 10 required to create, the sort of element of control of the site envisaged by regulation 4(2) of the 1996 regulations. Regulation 4(2) of those regulations, and regulation 10 of the 1994 regulations, are certainly concerned with different aspects of safety on sites, but they are concerned with distinct aspects of safety. Accordingly, in my judgment, a failure to comply with regulation 10 of the 1994 Regulations does not of itself create the circumstances of control which are the prerequisite to any duty arising under regulation 4(2).

22. In the context of regulation 10 there is one further point for consideration. The judge rejected the claim for damages, despite the admitted breach. He concluded that the breach was not in any way causative of the claimant's injury. It is submitted on the claimant's behalf that this decision was wrong; the

judge's approach was too narrow; a health and safety plan in accordance with regulation 10 would have been likely to prevent the accident, if only by increasing awareness of risk and danger.

23. Carried to its logical conclusion, the argument seems to me to mean that in effect any breach of duty by an otherwise competent contractor may be attributed to the client who has failed to comply with regulation 10 and so becomes liable in damages.

24. Our attention was drawn to the Council Directive 92/57/EEC of 24 June 1992, which includes provisions relating to on-site outdoor work stations and the provision of scaffolding and ladders. We also looked at two booklets "*Health and Safety in Construction*" and "*A guide to managing health and safety in construction".* However, nothing was drawn to our attention from either of those publications to suggest that a health and safety plan, properly prepared by a client under regulation 10, was required to deal expressly with obvious and elementary safety precautions. I can see no reason to accept the submission that specific guidance as to the footing and security of ladders should have been included in such a safety plan. In my judgment, the argument overlooks the essential simplicity of the accident for which in their different proportions the employer and the claimant were both held culpable. I myself doubt whether even the most meticulous safety plan should ever be required to make such detailed provisions. But, more important, on the evidence before him the judge held that the breach of regulation 10 was not causative of the claimant's accident and consequent loss. The judge pointed out that such a plan could have added nothing to the third defendant's obligations under regulations 5 and 6 of the 1996 Regulations. These regulations are concerned with the provision of safe places of work and safe access to them, to prevent falls, and the safe use of ladders. Given that the employer had disregarded not only the statutory obligations owed to his employee, but the obvious and simple precaution to ensure that his employee would be safe when mounted on a ladder, the judge was entitled to hold as a question of fact that the necessary causative link between the proved breach and the consequent injury was not established.

25. In my judgment, for these reasons, this appeal should be dismissed.

LADY JUSTICE HALE:

26. I agree. Mr James' argument on behalf of the claimant under the 1996 Regulations came down to this. The first defendant as the client should be regarded as "a person who controls the way in which any construction work is carried out by a person at work" for the purposes of regulation 4(2) of those 1996 Regulations because a principal contractor would have been such a person. A client is required by regulation 6 of the 1994 Regulations to appoint a principal contractor. Therefore the first defendant should not be better off, or rather the claimant should not be worse off, because the first defendant did not do this.

27. However, there is no civil liability for breach of regulation 6 of the 1994 Regulations. It is expressly excluded by regulation 21 of those regulations. It would be strange therefore for a breach of that regulation to be prayed in aid in support of an alleged breach of a different regulation MADE in 1996.

28. Regulation 4(2) of the 1996 Regulations to my mind depends entirely on the question of factual control. Of course if a person has factual control and chooses not to exercise it, they cannot thereby escape liability. But there will still be the question of fact as to whether such control exists. In the circumstances of a client who is contracting with an apparently reputable contractor to conduct construction work in his premises, there is little reason to doubt the straightforward factual finding made by the judge that the client was not in control of the way in which the claimant was doing his work. Nor do I think that a breach by the client of regulation 10, in regard to a health and safety plan, can alter that position.

29. For the reasons given by my Lord, I would agree with the judge that a breach of that regulation did not cause this particular accident. I too would dismiss this appeal.

LORD JUSTICE PILL:

30. I also would dismiss the appeal for the reasons given by Judge LJ. I would respectfully commend the clear and comprehensive way in which the judge dealt with the issues of fact and of law in this case. The only liability to the claimant was that of his employer, the third defendant. The absence of

employer's liability insurance is to be deplored. I also agree that this is not an appropriate case in which to deal comprehensively with the effect of regulation 10 of the Construction (Design and Management) Regulations 1994, or of the consequences of a breach of that regulation, and I make no comment upon it.

31. The judge was entitled to find (a contrary finding would have been surprising) that there was no causative link between the absence of the health and safety plan contemplated by regulation 10 and the accident which in fact occurred.

(There followed a discussion on costs)

LORD JUSTICE PILL:

32. The successful respondent (the first defendant) seeks his costs of the appeal. Mr James for the unsuccessful appellant has drawn attention to a short letter written by his solicitors to the respondent's solicitors on 6 June 2002 suggesting that there be mediation. The respondent's solicitors did not respond.

33. Mr James has referred to **Dunnett v Railtrack** [2002] 1 WLR 2434, and has submitted that the failure to respond to that letter and the failure to agree to an attempt at mediation should mean that the respondent is deprived of some or all of his costs. It is also submitted that the late delivery of the skeleton argument by the respondent should be reflected in the costs order. That is a submission which we reject.

34. As to the first submission, we see no force in it in the particular circumstances of this case. There were a number of issues before the judge both of fact and of law. The first defendant had a resounding success before the trial judge. He has also had a resounding success before this court. That is not to doubt that there were arguable points which have been raised, and well raised, on behalf of the appellant, but this was not a case, in my judgment, where there was scope for mediation by way, for example, of a number of areas where costs might at least have been reduced by discussion, the issues limited, or where there was sufficient room for manoeuvre to make mediation a venture which might have real prospects of success in achieving compromise. This was a case, in my judgment, where in the circumstances the respondent was entitled not to agree to mediation. His solicitors should, however, have replied to the letter, first, as a matter of courtesy and, second, because of the risk in which he may find himself of having to explain to the court why he did not do so and the risk that a **Dunnett** type order might be made.

35. The learned Lady Justice who granted permission in this case did not suggest alternative dispute resolution. That is wholly unsurprising. This is not a case where the respondent should be deprived of his costs. There will be an order for costs in his favour. A section 11 order is sought which in the circumstances we make. Any question of the appellant's liability will be deferred for consideration by the Costs Judge.

ORDER: (Not part of approved judgment) Appeal dismissed with costs; any liability of the appellant to be deferred for consideration by the Costs Judge; taxation of the appellant's costs under Community Legal Services Funding Regulations.

MR MARK JAMES (instructed by Marsons, Kent DA6 7DU) appeared on behalf of THE APPELLANT
MR KEITH KNIGHT (instructed by Messrs Shah & Burke, London NW10) appeared on behalf of THE RESPONDENT FIRST & SECOND DEFENDANTS