EMPLOYMENT TRIBUNALS

BETWEEN

Appellant		Respondent
HOMEBASE LIMITED	**AND**	**DEAN HARRY BAKER (ONE OF HER MAJESTY'S INSPECTORS OF HEALTH AND SAFETY)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 25TH / 26TH/ 27TH /28TH JUNE 2018

EMPLOYMENT JUDGE MR P CADNEY MEMBERS: MR P BRADNEY
MS C LOVELL

APPEARANCES:-

FOR THE CLAIMANT:- **MR S ANTROBUS QC (COUNSEL)**

FOR THE RESPONDENT:- **MR C ADJEI (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. Pursuant to s 24(2) Health and Safety at Work Act 1974 the Prohibition Notice P200815DHB2 issued on 20th August 2015 is hereby cancelled.

Reasons

1. This is the decision of the tribunal in the case of Homebase Limited (the appellant, referred to in the papers either as Homebase or Home Retail Group (HRG)) v Dean Harry Baker, one of her Majesty's Inspectors of Health and Safety (respondent). Homebase appeal against and seek the cancellation of a Prohibition Notice issued on 20 August 2015. Initially there were two appellants, the other being Survey Roofing Group Limited, which appealed against both an Improvement Notice and a Prohibition Notice arising from the same work, but its appeal has subsequently been withdrawn. As a result we are only concerned with Homebase's appeal against the Prohibition Notice.

2. The tribunal has heard evidence from the Inspector Dean Harry Baker on behalf of the respondent. On behalf the appellant the tribunal read the witness statements Mr Martin Green, Mr Mark Dowdeswell, Mr Anthony Bryant, and Mr Gary Cunnington, and has heard evidence from Mr Christopher Church, Mr Anthony Hardwick, Ms Abigail Miller, Mr Richard Le-Brun and from the appellant's expert witness Mr A Maitra.

Background

3. The background to the incident directly in issue before us lies in an incident which occurred in September 2010, when a fall through a roof occurred at Homebase's store in Redditch. That led to an investigation conducted by Elizabeth Thomas (HSE Inspector) who liaised with Ms Millard on behalf on the appellant. On 3 August 2011 Ms Thomas wrote to Ms Millard at the conclusion of the investigation. We have been referred in particular to paragraphs numbered one and four in that letter:

   1 It was agreed that the Homebase permit to work form should be reviewed and revised as some questions contained on it were a little vague. The clearer the questions on the form the better chance Homebase staff have of making a sound judgement about work that is going on in their store. It was agreed this would be reviewed and revised.

   4 I advised that there should be a system for randomly checking on contractors who work in your stores to ensure the competence and provenance of people on site is as you would expect. This will give you an opportunity to seek evidence of training, review risk assessments method statements provided and ensure safe working methods are being used. You were able to demonstrate that Homebase Ltd takes time to ensure they engage only competent contractors but monitoring and reviewing contractors periodically once they are working for you is a useful way for a client to ensure the levels of competence and safety are as promised by the contractor.

   (Each party invites us to draw different conclusions from the contents of this letter which we will address later. The respondent relies on paragraph 1 as demonstrating

its point that primary responsibility rests with those in the store “making a judgement”. The appellant refers us to paragraph 4 and invites us to conclude that it clearly presupposes an overall system of ensuring the competence of independent contractors together with random checks of their work. It clearly does not presuppose that Homebase itself will retain responsibility for devising a safe system of work on each occasion.)

4. The process by which Survey Roofing became an approved contractor is set out below. There is no dispute that they were approved by Homebase nor that they had been contacted to repair a leak in the roof at the Llanishen store on 20th August 2015. The internal process is set out in the witness statement of Mr Gary Cunnington, a Senior Building Surveyor (Central Services) for HRG, which department is responsible for maintaining the approved contractor list. Once the leak had been identified in store the store would have contacted the helpdesk who had access to the list of approved contractors. Survey Roofing would have been allocated as the primary roofing company in relation to Cardiff and contacted by the helpdesk. This process ensures that only approved contractors are used.

5. The witness statements of Martin Green and Mr Mark Dowdeswell, both of whom are employed as roofers by Survey Roofing Group Limited state that they arrived on site at 11:35 AM on 20 August. They parked in the rear car park, and met with the service desk and the on-site manager. Once they had been showing the location of the leak they completed their RAMS, took internal photographs of the leaking area, and then positioned the MEWP to the left side of the store and cordoned it off. They used the MEWP cage to get access to the roof at a point more than two metres across the surface away from the edge they then exited the MEWP. There were no rooflights on this elevation. They then walked to the area of water ingress and carried out repairs by sealing the fixing sheet which took approximately fifteen minutes. Having finished the work they were about to leave the roof when they received a phone call from their office to come down as an HSE inspector was on site and had formed the view that they were working unsafely.

6. Mr Baker’s evidence is that having left the HSE office in Llanishen he noticed two people working on the roof of Homebase store. He believed that they were working unsafely in that there was no edge protection and the type of roof upon which they were working often contained fragile rooflights. He contacted the company via the telephone number on the van and waited with the store manager Mr Christopher Church for them to come down. Once they had come down there was a conversation between the Inspector and the two roofers about their method of work. It is not essentially in dispute that they told him that the method of work they had adopted, which they believed to be safe, was that they had accessed the roof from more than 2m from the edge and that they were not at any point within 2m of any fragile roofing or rooflights. Mr Baker was of the view which he has maintained throughout these proceedings and this hearing that that method of working is in fact not safe. For the purposes of this appeal it is not necessary for us to make any finding about whether Mr Baker’s view is correct or incorrect given that Survey Roofing Group has withdrawn its appeal. However in evidence Mr Maitra, the appellant’s expert, expressed the view that this was in his view a safe system of work.

7. There is a fundamental dispute as to the extent to which the Homebase employees played (or should have played) any part in overseeing or evaluating Survey Roofing Groups methods of work. The relevant documentation includes Survey Roofing Groups Method Statement/Risk Assessment. This is a pro forma document and the completed form in relation to 20th August 2015 records in relation to methodology that the operatives have signed in at reception/with management, that they have found a safe area to access the roof, protected it and guarded against others following them up, have carried out and recorded a risk assessment, have located and addressed roofing problems and have signed out at reception/with management. The record of risk assessment itself confirms that there is a safe access point, that the risk is identified, and that works area and below the works area have been cordoned off, that the MEWP checklist has been completed, that there is work at height with open edges and rooflights present, that it is possible to keep 2 m away from light/edges, the weather is suitable for working, that the risk of falling debris is met by policing the area below with the second operative. It is signed on behalf of Survey Roofing by Martin Green on 20 August.

8. The process set out in Homebase's document "Safe Working Practice 11-Contractors and the Permit to Work system" includes the following:-

   "The contractor and visitors signing in book and permit to work system is in place to control risks associated with contractors working with our stores, the activities they are undertaking and also to ensure that the contractor is fully aware of any hazards that could affect them i.e. fragile surfaces, asbestos, methane, store work activities etc. It is essential that the leadership team familiarise themselves with the contents of this safe working practice to minimise the risk of injury to colleagues visitors and customers. The following instructions should be followed when dealing with contractors;

   1. The contractor and visitors signing in book must be kept on the customer service information desk.

   2. Within the book is a section on Site-Specific information. This section must be completed by the store manager used time a new book and started reviewed if equipment or processes change.

   3. The leadership team must ensure that colleagues are made aware to call the duty manager when a contractor arrives at the store.

   4. The duty manager must ensure that all contractors complete the signing in book before any work commences

   5. The site-specific information document must be shown and discussed with the contractor by the duty manager.

   6. By signing the book the contractor is confirming that they are aware of the hazards, work methods and necessary control measures that need to be put in place

and that these have been discussed with the duty manager. It also confirms that they are …. suitably trained to carry out the work and will adhere to method statements and risk assessments. All contractors should be arranged centrally and should be working to centrally approved method statements and risk assessments.

8. If as a duty manager you are not comfortable with any aspect of the work undertaken you must contact either the building services helpdesk or the H and S helpdesk before work commences.

10. If the planned activity involves Working at Height… then a PTW must be completed by the duty manager before the work commences…

13. The Duty Manager must sign and date and time the PTW to confirm they are satisfied that all the relevant sections of been completed, necessary controls are in place and they are giving permission for the work to commence. Work cannot commence without the Duty Manager's signature.

14. The contractor must also sign the PTW to confirm that they have discussed all hazards with the Duty Manager and have supplied all required information for the relevant sections of the PTW.

9. Following the issue of the prohibition notice on 15 August 2015 Ms Miller emailed Mr Baker enclosing a number of documents and setting out what was described as a commentary, which essentially sets out the process adopted by Homebase after 2011:-

    1. *Work at Height Risk Assessment and the Contractors and Permit to Work SWP taken together evidence that "roof work" is to be performed by competent contractors who will be subject to a Permit to Work. The revised wording of the permit to work, the method of communicating site specific hazards and the system of vetting the competency of contractors were introduced in August 2011 following recommendations received from the HSE - see attached correspondence with HSE in August 2011.*

    2. *Individual stores are not able to appoint contractors. The appointment of contractors is controlled centrally through the procurement process. This ensures that only approved contractors can be appointed and paid.*

    3. *Approved contractors are the subject of competency vetting prior to being placed on the approved contractors list and are subject to competency vetting on a three-year rolling cycle. Survey Roofing were an approved contractor and have been engaged by Home Retail Group for approximately 10 years. They were last vetted by Construction Safety Solutions Ltd, on behalf of Home Retail group, in December 2014.*

    4. *Survey Roofing had attended the Llanishen store on 22 July 2015 to perform "gutter clean, roof survey". On that occasion the signing in procedure was*

followed and Martin Green of Survey Roofing was issued with Permit to Work number three.

5. *On 20th of August 2015 Survey Roofing attended the Llanishen store regarding a "roof leak". Again the signing in procedure was followed and Martin Green of Survey Roofing was issued with permit to work No 5.*

6. *Survey Roofing produced a Method Statement/Risk Assessment dated 20th of August 2015 for the roof leak work. Notably it appears to identify the risks set out in the prohibition notice served upon Homebase.*

7. *Homebase's position that it is in control of contractor activity in the following respects:*

(a) To vet the competency of contractors. Survey Roofing have been the subject of a rigorous vetting process.

(b) To issue the contractor with a permit to work in certain situations. The work that Survey Roofing were to perform involved work at height therefore a permit to work was issued.

8. *Homebase's position with regards to this particular matter is;*

a) Roof work is designated to be a contractor activity hence the engagement of Survey Roofing to perform the work on 20 August and previously on 22nd July.

b) Survey Roofing acknowledge by signing the Permit to Work that they had been informed of any hazards such as rooflights. Survey Roofing had attended the Llanishan store previously to survey the roof and were therefore well aware of the hazards associated with working on the roof and the rooflights are clearly visible from within the store.

c) Survey Roofing produced a Method Statement/Risk Assessment which identified that open edges and rooflights were present. The Method Statement/Risk Assessment cross-referenced the Permit to Work.

d) It is a matter for Survey Roofing as a specialist contractor to stipulate what control measures are put in place to control the hazards identified in their risk assessment.

9. *The approach advocated above adopts the recommendations of the HSE following review of Home Retail Group's Health and Safety management system in relation to control of contractors in August 2011.*

The position of Homebase is that it did all that was reasonably practicable to discharge the duties under Sections 2 and 3 of the Health and Safety at Work etc Act 1974 and that it discharged the duties imposed by the Work at Height

Regulations 2005, insofar as such duties apply to Homebase in the particular circumstances culminating in the service of the Prohibition Notice on Homebase.

10. The "commentary" set out above encapsulates the appellant's case before us, which in summary is that:- it appoints specialist contractors to carry out specialist work such as roofing work. It does not have, and it would increase the risk for it to attempt to acquire, any specialist expertise in house. It has a process which involves vetting the specialist contractors and ensuring by the permit to work system that the specialist contractor has assessed the risk risks involved in doing the work. By this process it satisfies the "reasonable practicability" test.

11. The first stage of the process is the appointment of a specialist contractor. Survey Roofing Group were approved contractors. The process by which they come to be approved for carrying out roofing work is a vetting procedure. The evidence of Mr Bryant who was not required to give evidence and whose evidence is not challenged is that he is the Managing Director of Construction Safety Solutions Ltd which is engaged by the appellant to vet the competency of their contractors within the construction sector. Vetting is a three stage process. The first stage is a desktop review of the contractor's documentation. This was most recently carried out at Survey Roofing's office on 16 December 2014 with the score being 95/100, which was sufficient. The stage two assessment which was also performed on the same day Survey Roofing also passed. The stage three assessment is a site-based audit which was performed on 13 April 2015. Again Survey Roofing passed. As a consequence of that three stage assessment process Mr Bryant states that he did not have any reservations about the company remaining on HRG's approved contractor list as a roofing contractor.

12. One of the witnesses upon whom the appellant places considerable significance is Mr Richard Le-Brun. He is the Head of Service (Public Protection) for the London Borough of Harrow which has been the primary authority for HRG since 2012. The purpose of a primary authority is to ensure that a nationwide organisation does not have to adhere to different standards in different parts of the country but effectively can rely upon the primary authority to approve or disapprove of its systems. In this case following the service of the prohibition notice the regulatory aspects of dealing with the case were transferred to the London Borough of Harrow. Mr Le-Brun's evidence is that following the issue of the Prohibition Notice that he reviewed HRG's policy and procedures including in relation to control of contractors and roofing work and work at height. He states (paragraph 8 of his witness statement)

"*As a consequence of performing the review I was satisfied, firstly there was a robust independent vetting exercise of the contractors and in particular the vetting was specific to HRG procedures, for example the Safe Working Practice number 11. Secondly only competent contractors are placed on the approved supplier's list. Thirdly the contractor is required to produce a risk assessment and the method statement for the work to ensure system of work was safe and that the necessary control measures were identified and incorporated into the safe system of work. Fourthly the signing in procedure at the stores required input from both HRG employees store and the contractors. The signing in procedure prompts the HRG*

employee at the store to consider a permit to work in certain situations one of those being work at height. Fifthly the permit to work is a collaborative document between the store and the contractor. It requires the contractor and the store to record that a risk assessment and method statement are in place for the work to be performed. Lastly once the work activity is complete the permit to work signed by both parties and records the contractor leaving site."

At paragraph 10 he states "*The HRG contractor control policy and procedures did not envisage that HRG employees such as a store manager would interrogate the specialist contractors risk assessment or method statement because he or she would not have the competency to do so. If the HRG representative would seek to influence and/or control the contractor system of work that could lead to an unsafe situation arising because of his or her lack of competence.*"

At paragraph 13 he concluded "*My review of the contractor control policy post the Prohibition Notice ultimately led me to issuing Assured Advice to HRG in February 2016 signifying that I was content that the policy and procedures would deliver safe systems of work in respect of contractor activity. The procedures that were the subject of the assured advice had not materially changed since service of the prohibition notice. Notably the appendices referred to in the assured advice were in place prior to the service of the prohibition notice on 20 August 2015*."

13. In addition to his evidence as to his post Prohibition Notice assessment of HRGs regulatory compliance HRG relies on the assured advice itself "Assured Advice Control of Contractors – Minor Building Maintenance Projects Home Retail Group Sites" that was in force at the time. It sets out twelve steps which relate to the appointment of contractors and the obligations upon the contractor in respect of the specific works. It describes the effect of Assured Advice, "*The primary authority provides the business with assured advice on fulfilling its regulatory obligations. This advice must be followed where the business operates, for example if a Primary authority issues advice those procedures preventing slips and trips are sufficient to fulfil its legal obligation, then another authority cannot insist that an alternative approach is used in its area.*" It goes onto describe HRGs process as "*reasonably practical*" and confirmed that, "*compliance has been demonstrated by the Partner Business and is routinely undertaken throughout the partner business organisation….. That it is satisfied that compliance is the correct interpretation of Health and Safety Legislation.* "

14. In addition to the evidence of Mr Le-Brun Homebase place significant emphasis on the evidence of its expert Mr Maitra. They submit that his expertise in this field is unquestionable. He was from 1998 to 2005 the HSE's national expert on work at height, he worked with the team that drafted the Work at Height Regulations 2005, contributed to the guidance on them, was the first Chairman of the Advisory Committee for Roof Safety and was the lead author of a number of their publications. His expertise is not simply that of an expert in Health and Safety regulation generally but precisely the point in dispute in this case.

15. In respect of the alleged breach of Regulation 4 he expresses the view that the duty owed was to appoint competent contractors (para 14) and that Homebase "took all reasonably practicable steps to assess SRGL's competency and had no reason not to retain SRGL on their approved contractor list" (para 16) and that "..Homebase Ltd discharged its duty in appointing a competent contractor "(para 17).

16. In respect of the duty to provide information to the contractor via the PTW system he concluded "… Homebase Ltd did, through its PTW system discharge its obligation in respect of providing information to contractors." (para 24)

17. In respect of planning the work he concluded that there was no obligation to do more than appoint a competent contractor (para 27), and that given their absence of expertise had they done so they would have created not lessened any risk.(para 28)

18. In respect of the duties under Regulation 6 and 7 he expresses the view that as retailer he would not expect them to possess the relevant knowledge and that the law does not require them to do so. He expresses similar opinions in respect of regulations 8, 9, and11.

19. In respect of "control" his evidence in summary is that the extent of Homebase's control extended only to the appointment of competent contractors (paras 41,42); and that the question of the extent of Homebase's control can only be judged against the question of how much control it "could reasonably be expected to exercise"(para 43). Given that Homebase was not competent to stipulate specific safety requirements it was reasonable of them not to attempt to do so (paras 44/45). Overall he expresses the view that "..there was nothing else they could reasonably have done to ensure that suitable arrangements were put in place to ensure that work could be carried out safely.." (para 49); and that inspectors expectation that they should have exercised a greater degree of control was "unrealistic" (para 50).

20. The evidence of the Inspector in relation to the question of the reasonable practicability of Homebase becoming more actively involved in identifying the risks and the means of reducing them was to the entirely opposite effect of that of Mr Le-Brun and Mr Maitra set out above. He contends that the work of an independent specialist, in this case specialist roofworkers, can be separated into two quite distinct constituent parts. The first is the work they are engaged to carry out on the roof. This he accepts is specialist and it is not reasonable or practicable to require the appellant to be involved in identifying the risks or control measures engaged in any specific piece of work. The second is the identification of safety risks, particularly the identification of safe means of access and safe methods of working. This he contends is not specialised or difficult. He contended that with half a day to a day's training all of the appellant's store managers could have been trained to an adequate standard, and that had they been so trained they would and should have been able to identify that SRG's working methods were not safe. Alternatively similar training could have been provided to those on the helpdesk or H and S desk to provide advice to the store managers on a case by case basis. It was therefore reasonably practicable for Homebase to possess sufficient knowledge internally to engage with the

identification of safe methods of work and not simply rely on the contractors own assessment.

21. The statutory provisions which are alleged to have been breached are sections 2 and 3 of the Health and Safety at Work Act 1974; and regulations 4, 6, 7, 8, 9 and 11 of the Work at Height Regulations 2005. Section 1 of the Health and Safety at Work Act provides that "*It shall be the duty of every employer to ensure so far as is reasonably practicable the health safety and welfare at work of all his employees*." The duties set out in sections 2 and 3 which it is not necessary to detail here are absolute duties subject only to the qualification of "reasonable practicability" set out in section 1. The Work at Height Regulations 2005 provide at regulation 3B that "*The requirements imposed by these regulations on an employer shall also apply to any person other than a self-employed person in relation to work by a person under his control to the extent of his control*." As set out above the Prohibition Notice was originally served both on Homebase the current appellant and Survey Roofing Group Limited which also initially appealed. That that appeal was subsequently withdrawn and there is no argument before us that it was inappropriate to issue the prohibition or improvement notice against Survey Roofing Group. It follows that, in relation to them it is either accepted or at least that there is no specific argument to the contrary, that it was within the discretion of the Inspector to issue the prohibition notice and that insofar as Survey Roofing Group Limited is concerned that the prohibition notice was correctly issued. As is set out below the dispute before us essentially turns on the two concepts of "reasonable practicability and "control".

22. The essence of the dispute between the parties can be simply stated. The respondent's case in essence is that it fulfils the duties it owes if it has a system in place which permits it to be reasonably satisfied that it has engaged a reputable independent contractor which is capable of performing the work safely. It is not obliged to make its own assessment of what is required to be done to complete the work safely. This it says would result in the absurd proposition that it was required either to replicate the assessment of the independent contractor or to direct the independent contractor how to carry out the work safely. The respondent's case in essence is that this precisely what the statute and regulations require them to do.

Legislative Framework

23. Whilst the legal principles are not in dispute there are a number of concepts in the legislative framework to which we have been taken and which we have applied.

24. The power to serve a Prohibition notice is contained s22 HSWA 1974 and can be exercised by the Inspector if s/he forms the opinion that the activities carried on by or under the control of the person in question involve or will involve the risk of serious personal injury (NHSWAs 22(2)). There are a number of relevant statutory provisions which include the HSWA itself and the regulations passed under it. There is no dispute sections 2 and 3 of the SWA and the Work at Height Regulations 2005 are relevant statutory provisions.

25. An appeal against a Prohibition Notice is made to the Employment Tribunal (s24(2) HSWA. The ET may cancel or affirm the notice, and if it chooses to affirm it can modify its terms. (Neither party submits that we should affirm but modify the notice. The appellants case is that it should be cancelled, the respondents that it should be affirmed without modification).

"Chevron"

26. Prior to the case of *HMIHS v Chevron North Sea Ltd [2018] UKSC7* the task for the tribunal was to determine whether it would have served the notice on the basis of the information which was known or ought reasonably to have been known following such investigation as ought reasonably to have been undertaken by the Inspector at the time. Following *Chevron* the correct test is now *".. on an appeal against a Prohibition Notice… the employment tribunal had to decide whether, at the time when the notice had been served, a risk of serious personal injury existed; that the inspectors opinion about the risk and the reasons why he had formed it and served the notice, could be relevant as part of the evidence shedding light on whether the risk existed, but there was no good reason for confining the tribunal's consideration to the material that had been, or should have been available to the inspector; that the tribunal was entitled to have regard to what the risk in fact was, and, if the evidence showed that there was no risk at the material time, then notwithstanding that the inspector had been fully justified in serving the notice, it would be modified or cancelled as the situation required…*" (Headnote – Our underlining)

27. The primary burden of proof rests on the Inspector to show that the breach alleged has occurred (for completeness sake there is no requirement that the risk has eventuated *R v Board of Trustees of the Science Museum [1993] I WLR 1171*). If the requirement is subject to the qualification of reasonable practicability it is for the appellant to show that it has done all that was reasonably practicable

Purposive Approach

28. The underlying purpose of the HSW 1974 is preventive both in respect of employees and members of the public and a purposive approach to interpretation "..*which renders.. the act effective in its role in protecting public safety should be adopted" (Railtrack v Smallwood [2001] EWCH 78 para 90)*

Risk

29. The word risk *"..is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against." (See R v Chargot [2009] 1 WLR1 para 27 and Baker v Quantum Clothing Ltd [2011] 1 WLR 1003 para 66)*

Undertaking

30. The fact of engaging an independent contractor does not in and of itself take the work being performed outside the "undertaking" of the owner/occupier (*R v Associated Octel Ltd [1996] 1 WLR 1543*)

Reasonable practicability

31. We have been referred to the speech of Lord Mance in Baker v Quantum Clothing [2011] 1WLR 1003 in which he adopts with approval the "broad interpretation" of "reasonable practicability" as set out by the House of Lords in *Marshall v Gotham and Co Ltd [1954] AC 360* (set out at paras 2.11.1 to 2.11.3 in the appellant's skeleton argument).The appellant goes on to refer us to the speech of Lord Dyson at para 129 and 134 in which he aligns the concept of reasonable practicability with what "a reasonable and prudent employer" would or would not have done in the same circumstances. In summary the appellant submits that the correct test for us to apply "..*is therefore what a reasonable and prudent retail occupier of shop premises would do when engaging external roofing specialist to carry out work on the premises*" (Skeleton Argument para 2.13). Homebase submits in essence that it satisfies this by appointing independent contractors having made an appropriate assessment of the competence of the independent contractor, which it contends that the process for appointing independent contractors set out above does.

32. Whilst the respondent does not dispute the correctness of the legal analysis it contends in essence (as is set in in greater detail in our conclusions) that it is not sufficient to appoint independent contractors whatever steps had been taken to vet them and that "reasonable practicability" included and required the respondent to assess the proposed method of work of the independent contractor on each occasion that work was performed. This position is summarised at para 81 of the respondent's submissions "*Contrary to Homebase's claims, it was reasonably practicable for it to have discussed and checked Survey's method of work so as to ensure that the roof works were properly planned and carried out in a safe manner. This could have been done by engaging a third party or employee who understood roof work to do this*." (our underlining).

Control

33. It is not in dispute that the WAH Regulations impose duties on Survey Roofing Group Ltd who were of necessity carrying out work at height. However the appellant does not accept that it owed any such duties. The basis for that submission is regulation 3 which sets out by whom the duty is owed. Reg 3(2) imposes the duty on Survey Roofing Group as the employer of those carrying on the work; Reg3 (a) applies the duty to a relevant self-employed person and Regulation 3 (b) to any other person "..*in relation to work by a person under his control to the extent of his control"*. The appellant contends that the only mechanism by which it could owe any duty given that it is not carrying out the work itself, nor instructing its employees to do so, is if it possessed the requisite degree of control required by Regulation 3 (b). Homebase

relies on the judgment of Lady Justice Hale in McCook v Lobo [2002] EWCA 1760 ".. 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." This principle was applied to the WAH Regulations in *Tafa v Matsim Properties Ltd [2011] EWHC*.

34. The Notice of Appeal sets out a number of grounds of appeal:-

a) At the time of the service of the notice the roofing/work at height being performed by the appellant's contractor Survey Roofing Group Limited… had ceased and therefore there was no risk of serious personal injury. By virtue of this condition precedent having not been made out the notice is fundamentally flawed.

b) The Inspector was plainly wrong in the provision of law and, in particular the nature and extent respective duties owed by the appellant and its contractor in terms of devising and implementing a safe system of work so far as is reasonably practicable.

c) The Inspector did not have reasonable grounds to conclude that the appellant was in contravention of the statutory provisions recited in the notice…

(d) The inspector did not follow and/or sufficiently apply the HSE Enforcement Management Model in concluding that service of the notice was appropriate. (This ground was not in the event pursued))

e) No contravention of the statutory provisions cited in the notice has occurred.

f) Notwithstanding the above points, the notice is too vague and imprecise to enable the appellant to know how compliance is to be achieved and when compliance has been achieved. This point is of significance from a practical point of view as the Notice prevents any roof work being performed at the Homebase store in Llanishen "unless the said contravention and matters have been remedied."

35. Homebase's skeleton argument sets out in summary the points of appeal:-

5.1 The activity that was prohibited had in fact ceased by the time the Notice was served and the Inspector was wrong to conclude there was any ongoing risk of serious personal injury such as to warrant prohibiting any future roof work at the store whatsoever.

5.1.1 Contrary to the opinion expressed by the Inspector to justify the service of the Prohibition Notice against Homebase but there was a safe system of work in place at the Homebase store (that was generic to all Homebase stores for the carrying out of roof work as per its SWP 11;

5.1.2 That system represented that which was reasonably safe and acceptable according to industry standards as per guidance under the Construction Design and

Management Regulations 2015 and practice more generally: see expert report of Mr Avjit Maitra. Homebase have also received assured advice from their "Primary Authority", the local authority responsible for their regulation as a nationwide business that the system is acceptable as it stands; see statement of Richard Lebrun;

5.1.3 That system represents all that would be reasonably practicable to expect from a retail occupier of shop premises when engaging specialist and competent roofing contractors carry out the roof work;

5.1.4 It was not reasonably practicable to expect a retail occupier such as Homebase to expected store management staff to do more than was contemplated by the system in place as per SWP 11 and the Permit to Work procedure;

5.1.5 It was not reasonable to expect store management staff perform their own detailed assessment of the control measures should be taken to carry out roof work safely, so as to formally approve those measures advised by the specialist contractor as being necessary and sufficient.

(a) Such an approval process would not be likely to be an effective control measure in any event given the limited degree of expertise and competence in terms of carrying out roof work safely to be expected of the local management of a retail store.

(b) It would not be reasonable to expect such an approval process to be conducted in advance by specialist external safety consultancy or by Homebase's own safety Department in relation to each and every call out for minor roof repairs, inspections and maintenance.

36. In addition the respondent refers specifically to paragraph 23 of the judgement of Lady Black in Chevron (above). There is no process by which an Inspector can withdraw a Prohibition Notice even if subsequently convinced that it should be. The only method of cancelling a notice is to appeal. However, if on appeal the tribunal is bound to judge the issue against the knowledge (or imputed knowledge) of the inspector at the time there may be no means of correcting a significant injustice. The respondent submits that unless the notice is cancelled it will suffer precisely the injustice adverted to in that paragraph. The essential dispute between the parties in respect of a number of those arguments centres around the question of the extent to which Homebase are required and if they are required how they are to achieve the necessary level of expertise to judge for themselves whether the measures recommended by the independent contractor are sufficient to ensure compliance with the relevant legislation. For the reasons set out above the appellant submits that the suggestion that they are either required or able to do so is unrealistic.

37. The respondent submits that there are in essence three ways in which the appellant could comply with the obligations imposed on it. Firstly as is set out in relation to the criteria as to the selection of independent contractors that the respondent has access to specialist external advice and it would therefore be open to an individual store

manager to be given access to that specialist external advice so as to obtain a second specialist opinion as to the measures proposed by the independent contractor. Secondly and alternatively the appellant has internal departments which either have or could reasonably expected to acquire the necessary expertise so that individual store manager could obtain specialist internal advice on the specific measures proposed by the independent contractor. Thirdly the independent store managers could themselves be given sufficient training to enable them to interrogate the independent contractors and form their own expert view as to whether the measures proposed was sufficient.

38. Homebase submits that these propositions are untenable, and is contradicted by the evidence in this case. There are three people who can reasonably regarded as experts in the field, the Inspector, Mr Maitra and Mr Le-Brun and there is no agreement between them as to whether the safety measures proposed and implemented by Survey Roofing Group Ltd were in fact in themselves sufficient (it was Mr Maitra's evidence that they were), and no agreement as to whether Homebase's system was sufficient. If there is a fundamental disagreement between experts in the field as to whether a particular method is safe or unsafe and does or does not satisfy the statutory requirements, how is it possible that with half a day to a day's training a layperson could acquire sufficient knowledge and expertise to make any judgement. The respondent's contention that the requisite degree of knowledge could be acquired by the store managers themselves or employees on the Helpdesk/H and S desk is unsustainable. Similarly the alternative formulation that store managers could have had access to external expert advice is illogical and impractical, and is to require Homebase to have a system of vetting expert independent contractors and then a second group of independent experts to vet the work of those individual contractors on a case by case basis which makes no practical or commercial sense..

39. In our judgement Homebase is correct that any requirement to possess the internal or capacity to assess and vet the methods of work of an independent contractor goes beyond that envisaged by the Inspector. Even if, however, the Inspector is wrong about the ease with which such knowledge and expertise can be acquired, that still does not answer the question of whether Homebase is required to acquire it. The respondent points to a number of sources as indicating that it is not sufficient simply to allow the independent contractor to assess the risk itself. The respondent relies on a number of other sources to the same effect, but its point is made simply by reference to Homebase's own documentation. Firstly the system Homebase has in place is based upon that set out in the letter of 3rd August 2011 (paragraph 3 above). Paragraph 1 of that letter presupposes that Homebase's staff will be exercising judgement as to the independent contractors control measures. Secondly SWP11 at paragraphs 8 and 13 requires that Homebase's staff exercise their own independent judgement of the suitability of the control measures. The respondent submits that both these documents correctly reflect Homebase's legal obligation to themselves ensure the safety of those potentially put at risk by the works. Put simply whilst the documentation correctly identifies their obligations, in practice, as is confirmed by the evidence of the respondent's witness they simply sub contracted their own obligations to the independent contractor.

40. Homebase submit that as a result of the Assured Advice and Mr Le-Brun's conclusions following the issue of the Prohibition Notice, that the system they have adopted, which is identical to that which led to Survey Roofing Group carrying out the works on the roof of their Llanishen store in August 2015, has not changed and continues to be approved by the primary authority; and that as a result they are able to use precisely the same system for every other store they operate with the exception, unless the prohibition notice is cancelled, of the Llanishen store itself. They assert that this is self-evidently an absurd situation if it continues.

41. In summary Mr Le-Brun remains of the opinion that the Assured Advice is correct and that the system Homebase has in place satisfies the requirement of reasonable practicability and that the system and complies with the requirements of Health and Safety legislation; and in effect certifies that this is the case, for the benefit of other local authorities. Mr Maitra agrees and contends that to require Homebase to do more would be to increases not lower the risk of unsafe work practices being adopted. The Inspectors evidence, again as set out above, is that it is reasonably practicable for the store managers to be trained and to actively engage in the identification both of the risks and the control measures; and even if he is incorrect that the same could be achieved by training specialist staff within Homebase or engaging outside specialists.

42. We have not found this question easy to resolve. On the one hand whilst the system the respondent has in place for appointing independent contractors is clearly sophisticated and thorough, in essence their case comes very close to asserting that simply by appointing an independent contractor that they are absolved of liability, which is self-evidently not correct. On the other hand their point about the absurdity of the result if the notice is not cancelled is a good one. If the process they adopt is considered satisfactory for every other property they manage what happens if they are not permitted to use the same process in Llanishen? What process should they adopt? This point is central to ground of appeal (f) above.

43. We have in the final analysis concluded that we accept the evidence and submissions of the respondent. In particular we accept the evidence of both Mr Le-Brun and Mr Maitra as set out above. In our judgement this case falls squarely within the principle set out in Chevron (above). It may have been reasonable for the Inspector to have concluded that Survey Roofing Group's system of work was unsafe, and that as he had no means of knowing the extent to which Homebase's systems did or did not contribute to that failure, that it was reasonable at the time to issue all the Notices. However, we have the evidence that both the primary authority and an expert in the field are of the view that Homebase's system and processes did meet the test of "reasonable practicability" and that they had discharged the obligation owed under the HSWA.

44. In respect of the question of control under the WAH regulations we accept that as a matter of fact having engaged Survey Roofing Group in the circumstances in which they did and with the system for engagement set out above that Homebase did not

have the requisite degree of control to trigger the duties under the WAH regulations. In particular we do not accept the inspector's contention that it is possible or desirable to divide the work being carried out by the independent contractor between the work itself and the safe means of doing that work. In our judgement they are necessarily part and parcel of the overall task for which they are engaged.

45. It follows that we accept that the grounds of appeal (b) (c) and (f) are well founded and are in and of themselves sufficient for us to take the view the Prohibition Notice should be cancelled, and it is not in those circumstances necessary to formally determine the remaining grounds of appeal.

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EMPLOYMENT JUDGE Cadney

Dated: 10 December 18

Judgment entered into Register
And copies sent to the parties on

.....11 December 2018.....

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for Secretary of the Tribunals