

Safety Matters – Special Edition

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Gretley Appeal

On Tuesday 5 December 2006 a Full Bench of the Industrial Court of New South Wales (Walton VP, Marks J and Boland J) handed down its decision in the *Gretley Appeal* [2006] NSWIRComm339.

The decision involved an appeal from her Honour Justice Staunton at first instance which sets out the factual background and initial findings about liability. The decision at first instance is summarised in our November 2004 edition of *Safety Matters* (<http://www.bdw.com/publications/safety/safety11-2004.pdf>).

At first instance, two companies, Newcastle Wallsend Coal Company Pty Ltd (NWCC) and, its parent, Oakbridge Pty Limited (OPL) were found guilty of breaches of the *Occupational Health and Safety Act 1983* (NSW) (OHS Act). The main contravention was found to be a failure to plan and properly research the location and extent of old flooded workings (the abandoned Young Wallsend Colliery Workings) into which Gretley Mine operators holed and were killed by an inrush. It was also found that there was a failure to do a risk assessment of development work in the relevant panel.

Three individuals were found guilty at first instance – one mine manager (Mr Romcke) who had signed an application in 1994 for approval to carry out the relevant development work but who had left prior to the accident in November 1996; the mine manager (Mr Porteous) who had taken over from the previous mine manager and who had in 1995 signed a variation application to the original application; and the mine surveyor (Mr Robinson).

In order to make the applications, reliance was placed on plans

(sheets 2 and 3) provided by the then Department of Mineral Resources (DMR) which incorrectly showed the location of the old abandoned workings.

This *Safety Matters Special Edition* provides an update on the appeal decision and summarises points likely to be of more interest to our clients.

Appeal by OPL and NWCC

OPL and NWCC challenged the expert evidence relied on by the prosecutor at first instance. Expert evidence was called to establish that a competent surveyor, reviewing the plans provided by DMR, would have concluded that the depiction of the old abandoned workings on those plans could not be relied upon to accurately show the location and extent of the old workings.

OPL and NWCC challenged this expert evidence on a number of bases, in particular, on the basis that the experts had formed their views only with the benefit of hindsight.

The Appeal Bench rejected the arguments of OPL and NWCC about the expert evidence. The Appeal Bench was satisfied that the expert evidence could be relied on to establish that a competent surveyor should have doubted the plans provided by the DMR and that further consideration and investigation was required. The Full Bench quoted one of the experts who said "the accuracy of old plans must always be questioned until proved". The Full Bench found it

In brief

- The *Gretley Appeal* provides much awaited guidance in relation to whether a person is "concerned in the management of the corporation." Where a person's role is akin to that of an advisor or consultant and does not involve managing or directing the business, it is unlikely the Court will find the person is "concerned in the management of the corporation".
- The *Gretley Appeal* also serves as a reminder of the strict nature of the obligations under the OHS Act. Directors and persons concerned in the management of the corporation must ensure they personally take steps and implement measures to ensure the corporation complies with its safety obligations. Failure to do so can give rise to personal prosecution against the director or person concerned in the management of the corporation.

would have been necessary to search out other sources of information that may have been available to resolve anomalies and inconsistencies in the plans provided by the DMR.

Risk assessment

The Appeal Bench found that it was NWCC's responsibility to ensure the health and safety of persons and that a risk assessment was an essential pre-requisite to doing this. The failure to undertake an adequate risk assessment meant that NWCC simply relied on sheets 2 and 3 as a sole source of information about the location of the old workings. An adequate risk assessment would have identified the risk as a catastrophic one (meaning the death of any miner). This would have meant that the location of the old workings had to be certain and this, in turn, would have led to greater circumspection in the reliance placed by NWCC on sheets 2 and 3.

As to risk assessment, the Full Bench also said that the process of risk assessment in an underground coal mine should necessarily involve a continuous dialogue between and amongst those responsible for safety including every person working underground as well as managers, surveyors and others that carry out a statutory responsibility for safety.

Based on evidence given by a number of the workers, it was found that, while they were aware that the panel was heading towards old workings, they were not told or given instructions by mine officials in relation to the old workings. They were not told, for example, that the workings were full of water and they were not told to be vigilant for signs of water. It was found that NWCC had "paper systems" dealing with emergency procedures and the like but they were not implemented and maintained in NWCC's daily operations. It was also found that, had an assessment of risks in the event of inrush been carried out, it would have been necessary to advise miners about the old workings, that

they were full of water and to be on the look out for signs of water.

When did the risk of inrush arise?

At first instance, Staunton J had found that the risk of inrush arose in September 1994 when the first application was made to DMR for approval to do the relevant development work. The inrush occurred on 13 November 1996.

The Appeal Bench found that the risk of inrush arose on 29 October 1996, namely, the date on which the barrier between the Gretley Mine and the abandoned workings was less than 50 metres (NWCC had always intended to leave a barrier of 50 metres). However, even though Staunton J was in error in finding that the risk arose in September 1994, this did not affect liability for various reasons including that it was found that the risk arose as a result of the proven failures of OPL and NWCC.

Was a defence available to OPL and NWCC?

The Appeal Bench found that OPL and NWCC could not make out a defence. In effect, the Appeal Bench found that it was reasonably practicable for both corporations to comply with the OHS Act and the commission of the offence was due to causes over which they had control and against the happening of which it was practicable for them to make provision. In particular, the Appeal Bench thought it was "undeniable" that the risk of inrush was reasonably foreseeable.

Personal defendants

Under the OHS Act, where a corporation contravenes the OHS Act:

"Each director of the corporation, and each person concerned in the management of the corporation, shall be deemed to have contravened the same provision unless he or she satisfies the court that:

- a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention; or
- b) he or she, being in such a position, used all due diligence to prevent the contravention".

Person concerned in the management

The two mine managers and the mine surveyor argued respectively that they were not persons "concerned in the management of the corporation".

On appeal, Mr Porteous, the mine manager at the time of the incident, was found to be a person concerned in the management of both NWCC and OPL. This was for various reasons including that he was an employee of OPL with the title of General Mine Manger which position had a wider role than that of Statutory Mine Manager. He had also been appointed as Statutory Mine Manager and, under section 37(1) of the *Coal Mines Regulation Act 1982* (NSW), he had the widest possible charge and control of the mine, all persons employed in it and all operations of the mine.

As General Mine Manager, he participated in general mine managers' meetings held on a quarterly basis under the parent company management structure.

At those meetings, direction and policy for mines within the group was set and he presented detailed reports in relation to Gretley, for example, in relation to anticipated and actual yield performance, marketing strategies, future mine developments, financial projections, industrial relations and implementation of occupational health and safety audits.

On appeal Mr Romcke, the previous mine manager, was found to be a person concerned in the management of NWCC but not of OPL. As Statutory Mine Manager at Gretley, it was found that Mr Romcke was a person directly concerned in the management of NWCC in respect of the failures proven against NWCC. While the Appeal Bench said that it was a matter finely balanced, it found that there was not sufficient evidence to support a finding that Mr Romcke was concerned in the management of OPL. What assisted here was that Staunton J at first instance was not persuaded to take into account Mr Romcke's participation in general mine manager meetings and safety audits during the time after he had left Gretley Mine. The Appeal Bench agreed with this approach.

The Appeal Bench did not consider however that Mr Robinson, the mine surveyor, was a person concerned in the management of NWCC or OPL. It was found that Mr Robinson's

role was not managerial but rather more akin to that of an advisor or consultant to mine management in relation to surveying. Mr Robinson was more in a support role than a role that involved managing or directing the business of the two corporate defendants. Mr Robinson's position did not involve the exercise of a managerial function but rather of highly specialised skills. Also, Mr Robinson did not participate in general mine managers' meetings and, as well as being subject to the direction and instruction of the Mine Manager, he reported to the Production Manager. On this basis, the conviction against Mr Robinson was quashed.

What was the end result?

While the Appeal Bench considered that there were errors in the way Staunton J approached the assessment of penalty, at the end of the day, they found that those errors did not produce the wrong result. Accordingly, NWCC and OPL were both fined \$730,000 making a total of \$1.460 million.

Although the Full Bench considered it to be at the top end of the range, the Full Bench did not vary the penalty imposed on Mr Porteous at first instance – it remained at \$42,000.



Under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), where a charge is proved, the court has a discretion not to proceed to conviction and to dismiss the charge. The Appeal Bench accepted that section 10 should be applied in the case of Mr Romcke. Accordingly, even though charges were proved against Mr Romcke, he was discharged without conviction. This was done because the Appeal Bench considered that there had been errors made by Staunton J as described above in relation to the time when the risk arose and in relation to Mr Romcke's involvement with OPL (he was not a person concerned in the management of OPL). The Appeal Bench found that Mr Romcke's involvement in the actual commission of the offence was significantly limited and his criminal culpability was diminished by virtue of the fact that he left the role of mine manager with NWCC in October 1994.

Conduct of the prosecutions

In a dissenting judgment, Marks J made various observations about the conduct of the prosecutions. In his opinion, the proceedings constituted an undue waste of resources of the court, an undue impost on the finances of the State of New South Wales, an undue expense burden on all of the defendants and, arguably, reflected adversely on the administration of significant beneficial legislation (the OHS Act).

Whilst the majority judgment held that it did not consider the laying of the charges as vexatious or oppressive or for some improper or ulterior purpose, Marks J referred to the unnecessarily complex, extensive and repetitive nature of the charges and the manner in which they were framed. He also referred to the refusal to allow the corporate defendants to plead guilty upon discontinuance against the individual defendants and denial by the prosecutor of mitigating factors in favour of the defendants during the sentencing process (in relation to co-operation with DMR during the investigation).

Marks J said that the proceedings, in his view, constituted more than prosecution and amounted to persecution of defendants. He suggested that the prosecution of offences under the OHS Act be undertaken by the Director of Public Prosecutions.

Observations and lessons

There are a number of observations and lessons that arise from the *Gretley Appeal* judgment. They include the following:

- Consider the need to carry out a risk assessment wherever risk of injury exists. Not only should this reduce/eliminate accidents or incidents, if carried out effectively, it should act as a strong legal risk minimisation measure.
- Ensure managers and employees understand the risk assessment process and are properly trained

and educated in the carrying out of risk assessments.

- Ensure risk assessments involve, and relevant control measures are communicated to, the employees who are to carry out the work the subject of the risk assessment.
- Ensure risks and control measures are communicated to management to enable them to turn their mind to risks of mining activities and what, if any, further initiatives or control measures may be needed. This will help to establish "all due diligence".
- Review organisation structures and associated contracts of employment, position descriptions and delegations to ensure that each position reflects whether or not it is a managerial position as opposed to, for example, a position that exercises particular skills in support of a management position.
- Take steps as a manager to be independently satisfied of the veracity of reports, plans and information needed to be relied on in order to make decisions about mining activity. This highlights the need to question and double-check information provided to managers by those in supporting roles.

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