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The appeal

Mr Sarginson argued that, given the type of steps that due diligence is said to include (set out above), the duties imposed on officers by the HSWA were limited to obligations of governance. That is, the duties imposed upon an officer to ensure the PCBU complies with its obligation are limited to the functions of governance or directorial oversight.

The Court disagreed. It held that the inclusion of the governance-type obligations as part of due diligence was a clear message by the legislature that due diligence extends to officers who are removed from the operations of a PCBU's business. Arguably, the Court said, the description of 'due diligence' to the taking of reasonable steps is aimed at ensuring the responsibility for health and safety extends to those at the apex of large hierarchical organisations. That said, the due diligence duty is contextual and takes into account "the nature of the and the position of the officer and the nature of the responsibilities undertaken by the officer". As such, "the obligation of due diligence on officers will apply across a spectrum of PCBUs, and is designed to apply to a wide range of businesses and organisations, small and large, with both flat and hierarchal structures".

The Court went on to clarify that, while a director in a large company may have a supervisory or oversight role that limits their due diligence to governance-type obligations, this will not be the case in smaller companies.

In smaller companies, officers will likely have a more hands-on role; direct involvement in the PCBU's day-to-day work. In that context, the officer's own activities can have direct health and safety consequences. The failure to exercise due diligence, by engaging in conduct at an operational level that places workers' health and safety at risk, will open an officer up to prosecution. Further, just because they can be prosecuted in their capacity as workers, it does not alter their obligations as officers.

Comment

The High Court's decision is an important clarification of the duty imposed upon 'officers' under the HSWA. It is not limited to governance obligations. Rather, due diligence can include a wide range of steps. In some cases, the duty of 'due diligence' can extend to the steps an officer takes in the day-to-day operation of the PCBU's work.

The decision highlights that context is critical. Officers will need to carefully consider the role that they have in a particular PCBU and the impact that they can have on the hazards and risks associated with its work. Failure to properly discharge a resulting due diligence obligation may result in prosecution. **Hesketh Henry** - Richard Belcher

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All information in this newsletter is to the best of our knowledge true and accurate. No liability is assumed by the author, or publisher, for any losses suffered by any person relying directly or indirectly upon this newsletter. Call our Head Office for advice. Jude 14-15 KJV ¹⁴ Enoch also, the seventh from Adam, prophesied of these, saying, Behold, the Lord cometh with ten thousands of his saints, ¹⁵ To execute judgment upon all, and to convince all that are ungodly among them of all their ungodly deeds
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HIGH COURT RULING ON PROSECUTION APPEAL

Since this ruling is so important, we are devoting nearly all of our newsletter to what it says and the implications for all sites in NZ.

New Zealand February 17 2021

The High Court has clarified the due diligence duty imposed on 'officers' of a PCBU. Due diligence is not limited to obligations of governance, but will depend on the nature of the PCBU and the role the officer occupies in it.

Sarginson v Civil Aviation Authority [2020] NZHC 3199

Introduction

In December 2020, the High Court dismissed two appeals arising from the prosecution of a helicopter pilot involved in a fatal crash. The decision provides High Court authority in relation to four important issues under the Health & Safety at Work Act 2015 (HSWA):

1. Liability of 'officers' of a person conducting a business or undertaking (PCBU);
 2. When a person is 'at work' for the purposes of the HSWA;
 3. Clarification of the elements of the 'recklessness' offence (s 47 of the HSWA); and
 4. The correct calculation of reparation for consequential loss for family members of the victim of a fatal workplace incident.
- This article addresses the first of these topics – the liability of 'officers' under the HSWA. In its decision the High Court rejected the argument that the duties imposed on officers by the HSWA are limited to obligations of governance. Instead, it held that due diligence will depend on the nature of the PCBU and the role the officer occupies in it.

Background

Following a trial in the District Court, Murray Sarginson was convicted of two charges of engaging in conduct that recklessly exposed a person to the risk of serious injury or death (s 47 of the HSWA).

Mr Sarginson appealed those convictions; the Civil Aviation Authority appealed the quantum of the reparation order, for consequential losses, imposed in favour of the victim's family.

One of Mr Sarginson's grounds of appeal challenged the scope of the duties imposed by the HSWA on 'officers'. He argued that the duties imposed on officers by the 2015 legislation were limited to obligations of governance.

Facts Mr Sarginson and the victim, Liam Edwards, had been partners in an earthmoving business, AgWorks South (AgWorks).

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2/4 On Sunday, 30 April 2016, the two men were flying in a helicopter from Mr Sarginson's farm at Athol in Southland to the remote Mount Algidus Station, where AgWorks was working. Mr Sarginson co-owned the helicopter with his nephew.

Approximately one hour into the flight, the helicopter reached the mountains around the MacKenzie Basin and Lindis Pass area. Mr Sarginson, who was flying the helicopter, discovered the area was shrouded in a heavy layer of cloud, which diminished visibility and obscured the ground below.

Mr Sarginson decided to descend. During the descent, Mr Sarginson brought the helicopter to a hover. The helicopter had difficulty sustaining the hover because it was overloaded. The additional weight compromised its balance.

The combination of reduced visibility and compromised balance was disastrous. It caused Mr Sarginson to lose spatial awareness and concentration. As a result, the helicopter struck the side of the hill. Mr Edwards died from his injuries at the scene. Mr Sarginson also suffered serious injuries but later recovered.

Mr Sarginson was convicted of two charges under the HSWA, both under s 47: that as an officer of AgWorks, and as a worker of that business, he, without reasonable excuse, engaged in conduct that exposed Mr Edwards to the risk of death or serious injury, and was reckless as to that risk.

The scope of liability for 'officers' under the HSWA

What duties do 'officers' have under the HSWA?

The HSWA is concerned, amongst other things, with "protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant".

In order to achieve that purpose, the HSWA imposes on a PCBU certain duties. One limb of the so-called "primary duty" (section 36), relevant in this case, is: a PCBU must ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, while the workers are at work in the business or undertaking.

An officer of a PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation. Due diligence includes:

1. to acquire, and keep up to date, knowledge of work health and safety matters; and
2. to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and
3. to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and

The photo overleaf is of the actual helicopter involved in the crash. The photo at the start is of the funeral at Mossburn Southland

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4. to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information; and

5. to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and

6. to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

In exercising due diligence, an officer is required to exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation) the nature of the business or undertaking and the position of the officer and the nature of their responsibilities.

The definition of 'officer' changes depending on the nature of the PCBU. If the PCBU is a:

1 company, it means any person occupying the position of a director of the company (by whatever name called);

2 partnership (other than a limited partnership), it means any partner (like Mr Sarginson in this case);

3 limited partnership, it means any general partner; and

4 body corporate or an unincorporated body

(other than a company, partnership, or limited partnership), it means any person occupying a position in the body that is comparable with that of a director of a company.

The definition also includes any other person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking (for example, a chief executive).

Given the wide definition of 'officer' in the HSWA, it is important to understand the scope of the duties imposed upon a person occupying that position.

