

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2020-404-000402
[2020] NZHC 3368**

BETWEEN

WORKSAFE NEW ZEALAND
Appellant

AND

DONG SH AUCKLAND LIMITED
Respondent

Hearing: 14 December 2020

Counsel: KE Hogan and AR Everett for Appellant
S Moore and NJM Devery for Respondent

Judgment: 17 December 2020

JUDGMENT OF DOWNS J

This judgment was delivered by me on Thursday, 17 December 2020 at 12 pm.

Registrar/Deputy Registrar

Solicitors/Counsel:
WorkSafe New Zealand.
Ong & Partners, Auckland.
S Moore, Auckland.
NJM Devery, Auckland.

An early case to reach the High Court under the Health and Safety at Work Act

[1] The Health and Safety at Work Act 2015¹ casts a broad duty on a person conducting a business or undertaking—a PCBU—to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU while they are at work in the business or undertaking.² Breach of this duty attracts criminal sanction.³

[2] Dong SH Auckland Ltd⁴ was prosecuted for breaching the duty in relation to the demolition of a home that went badly wrong. A wall fell onto a neighbour’s home, trapping a wheelchair-bound occupant. Asbestos was discovered too. Quick Earth Moving Ltd⁵ carried out the demolition—and pleaded guilty. WorkSafe New Zealand⁶ said Dong SH was Quick Earth Moving’s supervisor or manager, having allegedly engaged the company to carry out the demolition.

[3] Judge N R Dawson dismissed the charges.⁷ The Judge concluded absent evidence of a contractual relationship tying Dong SH to the demolition, “the charges must fail”.⁸ Dong SH’s actions—for example, “fencing of the site and cutting off the services”⁹—were equally consistent with acts of “friendship” vis-à-vis the site’s developer, J&Ling Properties Ltd.¹⁰

[4] WorkSafe seeks permission to appeal questions of law. It argues the Judge failed to consider relevant matters, and the only reasonable conclusion on the evidence was that the charges were proved. Dong SH resists permission and says the Judge did not err.

¹ The Act.

² Health and Safety at Work Act 2015, s 36.

³ Sections 47–49.

⁴ Dong SH.

⁵ Quick Earth Moving.

⁶ WorkSafe.

⁷ *WorkSafe New Zealand v Dong SH Auckland Ltd* [2020] NZDC 16013.

⁸ At [24].

⁹ At [23].

¹⁰ J&Ling.

[5] These arguments touch on the real question in the case: was the prosecution obliged to establish Dong SH was contractually tied to the demolition? Or, was it sufficient to establish Dong SH, for whatever reason, *did* supervise or manage the demolition? More precisely, in terms of the Act:

- (a) In a prosecution for breach of a safety duty as a PCBU, must the PCBU arise from a contractual relationship?

Alleged facts and charges

[6] J&Ling purchased 26 Moa Road, Pt Chevalier, with an eye to development. This meant the house had to be demolished. Quick Earth Moving began demolition 19 December 2017. The next day, a neighbour or neighbours contacted WorkSafe with safety concerns, including possible presence of asbestos. That afternoon, a wall began leaning ominously. Quick Earth Moving attempted to support it with the arm of a (second) digger. However, the wall collapsed. It hit a neighbour's home, damaging it, and trapping the wheelchair-bound occupant in the backyard. The collapsing wall also severed a gas line. The occupant had to be rescued by the Fire Service. Site samples revealed presence of asbestos.

[7] Dong SH is a project management company. The parties agreed Dong SH was engaged to manage 26 Moa Road's development at some point, but differed as to when:

- (a) WorkSafe said Dong SH had overarching responsibility for the demolition and had engaged Quick Earth Moving as a subcontractor. Dong SH's owner and director, Colin Huo, inspected the site before demolition works began; offered Quick Earth Moving's services to J&Ling for \$25,000; disconnected services to the property; erected a security fence; conferred with Quick Earth Moving when things were going wrong 20 December 2017; and later wrote a letter of apology to the neighbours. WorkSafe said the existence of an oral agreement to supervise and manage the demolition could be inferred from these circumstances.

- (b) Dong SH said (through Mr Huo’s testimony) Mr Huo recommended J&Ling use Quick Earth Moving, and only as a friend of J&Ling’s director, Ling Gao. In other words, this was a personal recommendation, not more. Dong SH said Mr Huo’s site activity also reflected his friendship with Ms Gao, and it had no contractual obligation in relation to the project until after the botched demolition.

[8] These arguments framed competing contentions about whether Dong SH was a PCBU in relation to the demolition work as alleged in the (three) charges:¹¹

- (a) Being a PCBU having a duty to ensure, so far as reasonably practicable, the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking, namely project management work involving demolition, did fail to comply with that duty, and that failure exposed other persons to a risk of serious injury or death arising from the collapse of the wall between 24 Moa Road and 26 Moa Road.
- (b) Being a PCBU having a duty to ensure, so far as reasonably practicable, the health and safety of workers who work for the PCBU, while the workers were at work in the business or undertaking, namely demolition work, did fail to comply with that duty, and that failure exposed the workers to a risk of serious illness arising from exposure to asbestos.
- (c) Being a PCBU having a duty to ensure, so far as reasonably practicable, the health and safety of workers who work for the PCBU, while the workers were at work in the business or undertaking, namely demolition work, did fail to comply with that duty, and that failure exposed the workers to a risk of serious injury or death arising from the collapse of the wall between 24 Moa Road and 26 Moa Road.

The decision

[9] The Judge summarised the charges and evidence. He concluded WorkSafe had established a PCBU responsible for the demolition had a duty to ensure, as far as reasonably practicable, the health and safety of those involved. He also concluded that duty had been breached with attendant risk of death, serious injury, or serious illness. This left “whether Dong SH was a PCBU”.¹² The Judge then considered the much-abbreviated arguments at [7](a) and (b). He said:¹³

¹¹ Health and Safety at Work Act, s 48.

¹² *WorkSafe New Zealand v Dong SH Auckland Ltd*, above n 7, at [16].

¹³ At [22]–[24].

No arrangements were recorded in writing between any of the parties until three days after the collapse of the wall when J&Ling emailed Dong SH. For Dong SH to be found to be a PCBU pursuant to the Act in relation to the demolition work then that can only be established by inference from the evidence available. The onus of proof lies upon WorkSafe and the standard of proof requires this court to be sure that the charges are proved beyond reasonable doubt.

Mr Huo remained adamant throughout that he had merely acted as a facilitator between his friend [Ms] Gao and QEM, a company whom he knew did demolition work and he had worked with previously. His fencing of the site and cutting off the services to the property were also done out of friendship. His evidence was to the effect that while he may well have had an expectation of being engaged by J&Ling because of his friendship with Ms Gao and the apparent trust she showed in him, Dong SH had not been appointed in any contractual sense until three days after the wall collapsed.

WorkSafe have been able to point out many characteristics that might be expected if Dong SH was at that time a project manager or head contractor. Many of those characteristics are also compatible with Mr Huo's explanation of assisting and caring for a friend. In the absence of a written contract or reliable evidence of an oral contract of J&Ling engaging Dong SH to a position where it becomes a PCBU with respect to the demolition work the charges must fail. WorkSafe have not proved beyond reasonable doubt that J&Ling had engaged the services of Dong SH by the time the demolition took place. In particular, that the payments to QEM were made direct from J&Ling, and that J&Ling emailed Dong SH after the wall collapse appointing them to act for J&Ling indicates that Dong SH had not normally been engaged at that time.

[10] It followed WorkSafe had “not proved beyond reasonable doubt ... Dong SH was engaged in any role in respect to demolition work at 26 Moa Road so as to prove [it] was a PCBU within the meaning of the Act”.¹⁴

[11] The charges were dismissed.

Proposed questions of law, permission to appeal and gist of argument

[12] A prosecutor or defendant may, with permission, appeal a question of law in a ruling by the trial Court, here the District Court.¹⁵ WorkSafe says the Judge erred in concluding Dong SH was not a PCBU in relation to the demolition work. It frames two questions:

¹⁴ *WorkSafe New Zealand v Dong SH Auckland Ltd*, above n 7, at [25].

¹⁵ Criminal Procedure Act 2011, s 296.

- (a) Did the Judge err in failing to consider relevant matters in determining that Dong SH did not qualify as a Person Conducting a Business or Undertaking (PCBU), in respect of the relevant work, under [the Act]?
- (b) Did the Judge err in omitting to draw what was the only reasonably possible inference available on the evidence namely Dong SH was a PCBU in respect of the relevant work?

[13] On behalf of WorkSafe, Ms Hogan says the appeal raises a novel point of construction in relation to the statutory concept of a PCBU; and this would benefit clarification given the breadth of the attendant duty and ongoing, like prosecutions. Permission should be given accordingly.

[14] In relation to each question, Ms Hogan invites attention to many aspects of the evidence I do not repeat. This because Ms Hogan's central, unifying contention is that a person who manages a demolition project for another as their friend "is under the same obligations as someone who is not a friend", hence the Judge erred in dismissing the charges.

[15] On behalf of Dong SH, Mr Moore says permission for the appeal should not be granted because WorkSafe's proposed questions are factual ones masquerading as questions of law, and Quick Earth Moving has been convicted. So, the public interest does not require an appeal. Mr Moore also says the Judge did not err on the particular facts.

[16] Permission is appropriate for the reasons Ms Hogan advances. Concern about the proposed questions is met by amendment, leaving the question posed at [5](a).¹⁶

Analysis

[17] The Act's "main purpose" is to provide "a balanced framework to secure the health and safety of workers in workplaces by":¹⁷

- (a) 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; and

¹⁶ Criminal Procedure Act, s 299. This is not to conclude the questions posed by WorkSafe are not questions of law; these appear to mirror *Brown v R* [2015] NZCA 325, (2015) 30 FRNZ 471.

¹⁷ Health and Safety at Work Act, s 3(1).

- (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
- (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
- (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
- (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
- (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

[18] The Act emphasises the importance of the first purpose by requiring regard to “the principle” that “workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work”.¹⁸

[19] The Act creates the “Primary duty of care” foreshadowed at [1].¹⁹ A PCBU must ensure, so far as is “reasonably practicable”, the health and safety of:²⁰

- (a) Workers who work for the PCBU, while the workers are at work in the business or undertaking; and
- (b) Workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

[20] The phrase “reasonably practicable” is defined:

22 Meaning of reasonably practicable

In this Act, unless the context otherwise requires, **reasonably practicable**, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—

- (a) the likelihood of the hazard or the risk concerned occurring; and

¹⁸ Health and Safety at Work Act, s 3(2)

¹⁹ Section 36.

²⁰ Section 36(1).

- (b) the degree of harm that might result from the hazard or risk; and
- (c) what the person concerned knows, or ought reasonably to know, about—
 - (i) the hazard or risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[21] The Act creates other health and safety duties.²¹ It is not possible to contract out of any duty;²² or transfer any duty to another.²³ Unsurprisingly, a person may have more than one duty;²⁴ and more than one person may have the same duty.²⁵

[22] A duty imposed by the Act requires the person:²⁶

- (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

Moreover, the person must comply with these obligations to the extent they have, or would reasonably be expected to have, ability to influence and control.²⁷

[23] Breach of a duty attracts criminal sanction. The Act creates a suite of offences.²⁸ The most serious concerns reckless endangerment. It attracts a maximum penalty of five years' imprisonment, and a fine of \$600,000 for an individual who is a PCBU or an officer of a PCBU.²⁹ The next most serious is the offence with which Dong SH was charged: failing to comply with a duty, thereby risking death, serious

²¹ Health and Safety at Work Act, ss 37–43.

²² Section 28.

²³ Section 31.

²⁴ Section 32.

²⁵ Section 33.

²⁶ Section 30(1).

²⁷ Section 30(2).

²⁸ Sections 47–49.

²⁹ Section 47(3).

injury or serious illness.³⁰ The least serious requires only proof of a failure to comply with a duty.³¹

[24] Central is the concept of a PCBU. A PCBU is defined this way:

17 Meaning of PCBU

(1) In this Act, unless the context otherwise requires, a person conducting a business or undertaking or PCBU—

(a) means a person conducting a business or undertaking—

(i) whether the person conducts a business or undertaking alone or with others; and

(ii) whether or not the business or undertaking is conducted for profit or gain; but

(b) does not include—

(i) a person to the extent that the person is employed or engaged solely as a worker in, or as an officer of, the business or undertaking;

(ii) a volunteer association;

(iii) an occupier of a home to the extent that the occupier employs or engages another person solely to do residential work;

(iv) a statutory officer to the extent that the officer is a worker in, or an officer of, the business or undertaking;

(v) a person, or class of persons, that is declared by regulations not to be a PCBU for the purposes of this Act or any provision of this Act.

(2) In this section, volunteer association means a group of volunteers (whether incorporated or unincorporated) working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

[25] Related definitions include “person”, which includes the Crown, a corporation sole, and a body of persons whether corporate or incorporate,³² and “worker”:

³⁰ Health and Safety at Work Act, s 48.

³¹ Section 49.

³² Section 16.

19 Meaning of worker

- (1) In this Act, unless the context otherwise requires, a **worker** means an individual who carries out work in any capacity for a PCBU, including work as—
 - (a) an employee; or
 - (b) a contractor or subcontractor; or
 - (c) an employee of a contractor or subcontractor; or
 - (d) an employee of a labour hire company who has been assigned to work in the business or undertaking; or
 - (e) an outworker (including a homeworker); or
 - (f) an apprentice or a trainee; or
 - (g) a person gaining work experience or undertaking a work trial; or
 - (h) a volunteer worker; or
 - (i) a person of a prescribed class.
- (2) For the purposes of subsection (1),—
 - (a) a constable is—
 - (i) a worker; and
 - (ii) at work throughout the time when the constable is on duty or is lawfully performing the functions of a constable, but not otherwise:
 - (b) a member of the Armed Forces is—
 - (i) a worker; and
 - (ii) at work throughout the time when the member is on duty or is lawfully performing the functions of a member of the Armed Forces, but not otherwise:
 - (c) a PCBU is also a worker if the PCBU is an individual who carries out work in that business or undertaking.
- (3) In this Act, a **volunteer worker**—
 - (a) means a volunteer who carries out work in any capacity for a PCBU—
 - (i) with the knowledge or consent of the PCBU; and
 - (ii) on an ongoing and regular basis; and
 - (iii) that is an integral part of the business or undertaking; but

- (b) does not include a volunteer undertaking any of the following voluntary work activities:
 - (i) participating in a fund-raising activity;
 - (ii) assisting with sports or recreation for an educational institute, sports club, or recreation club;
 - (iii) assisting with activities for an educational institute outside the premises of the educational institution;
 - (iv) providing care for another person in the volunteer's home.

[26] A workplace is defined too:

20 Meaning of workplace

- (1) In this Act, unless the context otherwise requires, a workplace—
 - (a) means a place where work is being carried out, or is customarily carried out, for a business or undertaking; and
 - (b) includes any place where a worker goes, or is likely to be, while at work.
- (2) In this section, place includes—
 - (a) a vehicle, vessel, aircraft, ship, or other mobile structure; and
 - (b) any waters and any installation on land, on the bed of any waters, or floating on any waters.

[27] In identified circumstances, the conduct and state of mind of an officer, employee or agent constitute the conduct and state of mind of a person.³³

[28] Four things about all this stand out. First, the breadth of duties created by the Act. Second, the Act's emphasis of its purpose, including through creation of the principle that workers and others should be given the highest level of protection. Third, the breadth of the concept of a PCBU. Specified exemptions alleviate a wide-ranging definition. Fourth, the Act's emphatic rejection of form in the advancement of purpose.

[29] To elaborate the last point, it matters not if the duty holder is an individual, a company or a body corporate; whether the worker is an employee, contractor or

³³ Health and Safety at Work Act, ss 160–161.

subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company assigned to work in the business or undertaking, or so on and so forth. It matters not whether the person is conducting a business *or* undertaking (terms undefined, but inherently broad); or whether the person conducts the business alone or with others. Indeed, it matters not whether the business or undertaking is conducted for profit or gain.³⁴

[30] These features leave no room for the conclusion a PCBU must arise a particular way, still less the conclusion a PCBU must be contractually tied to the activity in question. Were it otherwise, the Act would be frustrated. So too potentially, workplace health and safety.

[31] To return to the case, the issue for the Judge was not whether Dong SH had contractually agreed to manage or supervise the demolition; rather, whether, for whatever reason, Dong SH *was* managing or supervising the demolition, hence a PCBU in relation to the demolition.

[32] Mr Moore does not contest this analysis. Rather, he argues the Judge did not elevate as an ingredient of the offences the need for a contractual relationship implicating Dong SH. Mr Moore observes the Judge began his analysis by asking the correct question, “whether Dong SH was a PCBU”.³⁵ Mr Moore argues the Judge’s many later references to the need for a contract reflect no more than the way WorkSafe put its case in terms of the evidence, and the Judge did not err on the particular facts.

[33] The Judge posed the correct question initially, as Mr Moore observes. The Judge said Mr Huo might have been acting as a friend.³⁶ The Judge then said Dong SH might not have been “appointed in any contractual sense until three days after the wall collapsed”.³⁷ He observed, without “a written contract or reliable evidence of an oral contract ... engaging Dong SH to a position where it becomes a PCBU, the charges *must* fail”.³⁸ The Judge added, “WorkSafe have not proved beyond

³⁴ Health and Safety at Work Act, s 17(1)(a).

³⁵ *WorkSafe New Zealand v Dong SH Auckland Ltd*, above n 7, at [16].

³⁶ At [23].

³⁷ At [23].

³⁸ At [24] (emphasis added).

reasonable doubt that J&Ling engaged the services of Dong SH by the time the demolition took place”; and “Dong SH had not been formally engaged at that time”.³⁹ Contrary to Mr Moore’s submission, the Judge did treat a contractual relationship as an element of the offences, or at least tantamount to an element of the offences (attracting the criminal standard or proof), when it was not.

[34] The existence of a contractual relationship would, of course, have been an easy way in which the charges could have been proved. If a company enters an agreement to supervise or manage the demolition of a home, clearly, it is a PCBU in relation to that undertaking, for, it has agreed to just that. However, this is not the only way the charges could have been proved. Again, what mattered is whether Dong SH *was* managing or supervising the demolition, not why or how it came to be allegedly doing so. This distinction became blurred. In fairness to the Judge, this may well reflect the way the parties presented their cases. WorkSafe seems to have emphasised the existence of an alleged contractual relationship; Dong SH the friendship thesis.

[35] The appeal must be allowed.

Result

[36] The (amended) question of law is:

- (a) In a prosecution for breach of a safety duty as a PCBU, must the PCBU arise from a contractual relationship?

[37] The answer is no.

[38] The appeal is allowed. A re-trial is ordered.

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Downs J

³⁹ *WorkSafe New Zealand v Dong SH Auckland Ltd*, above n 7, at [24].