

INDUSTRIAL COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: BRETT MCKIE v MUNIR AL-HASANI & KENOSS CONTRACTORS PTY LTD (IN LIQ)

Citation: [2015] ACTIC 1

Hearing Date(s): 23, 24 & 27 February 2015

Decision Date: 23 June 2015

Before: Industrial Magistrate Walker

Category: Decision

Catchwords: INDUSTRIAL – safety duty – compliance – exposure to risk of death or serious injury or illness – control.
CORPORATIONS – Officer.

Legislation Cited: *Work Health & Safety Act 2011 ACT*
Corporations Act 2001 Cth

Cases Cited: *WorkCover Authority (New South Wales) (Inspector Mansell) v. Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIRComm 349
Shafron v Australian Securities and Investment Commission [2012] HCA 18

Texts Cited: Barry Sheriff and Michael Tooma, *Understanding The Model Work Health And Safety Act*, (CCH 2010)

Parties: Director of Public Prosecutions on behalf of WorkSafe ACT (Prosecution)
Mr Munir Al-Hasani (1st Defendant)
Kenoss Contractors Pty Ltd (in liq) (2nd Defendant)

Representation: **Counsel**
Ms Sara Gul (Prosecution)
Self-represented (1st Defendant)
No Appearance (2nd Defendant)

Solicitors
Director of Public Prosecutions (Prosecution)
Self-represented (1st Defendant)
No Appearance (2nd Defendant)

INDUSTRIAL MAGISTRATE WALKER

1. The two defendants are charged with each committing an offence contrary to section 32 of the *Work Health and Safety Act (2011) ACT* ("the Act"). Kenoss Contractors Pty Ltd ("Kenoss") is charged as a corporate defendant whilst Mr Munir Al-Hasani is charged pursuant to section 27 of the Act as an officer of the corporation in his personal capacity.
2. At the time of the prosecution, Kenoss was in liquidation and did not appear.
3. Section 32 of the Act creates a category 2 offence of failing to comply with a health and safety duty which is committed if:
 - (a) *the person has a health and safety duty; and*
 - (b) *the person fails to comply with that duty; and*
 - (c) *the failure exposes an individual to a risk of death or serious injury or illness.*
4. The maximum penalty for an offence committed by a body corporate is \$1,500,000 and for an offence committed by an officer as defined, \$300,000.
5. These are criminal offences. The prosecution bears the onus of proving the offences beyond reasonable doubt.
6. Pursuant to section 12A of the Act, strict liability applies to each physical element of each of the offences under the Act unless stated otherwise in the section containing the offences.
7. Section 27 establishes the duty of an officer. The fact that a person is an officer of the corporation requires proof of that circumstance beyond reasonable doubt.
8. The prosecution alleges that the corporate defendant failed to provide a work environment without risks to health and safety and failed to maintain a safe system of work. In respect to the personal defendant, the prosecution alleges that as he was an officer of the corporation and failed to exercise due diligence to prevent the failings of the corporate defendant.

The Circumstances

9. Kenoss contracted with the ACT Government for road resurfacing works at the intersection of Barry Drive and Clunies Ross Street in Turner ("the Barry Drive project"). In support of that work, two compounds were provided for use by Kenoss, being the main site compound on nearby Froggatt Street, which included a site office, some temporary buildings, as well as housing plant and some materials, and a second, smaller storage site a short distance away at the intersection of Boldrewood Street and Hackett Gardens, both in Turner. The second of the sites was used solely to store materials.

10. Kenoss had at the relevant time only one director, Mrs Beverly Brendas. Her husband, Mr Spiros Brendas, was employed as the General Manager. Their son, Mr Dimitri Brendas, was employed as the safety officer. He had no experience or qualification in safety systems.
11. Mr Al-Hasani, a well qualified engineer, was employed as Project Manager. At the time, he was managing a number of projects for the company. Mr Sandeep Thorat was the project engineer for the Barry Drive project. Mr Louis Clarke was the general foreman.
12. David O'Meley Truck Hire was retained by Kenoss on an hourly rate basis to deliver materials as required. The principal, Mr David O'Meley, was contacted by telephone with instructions. He or a nominated driver would then collect and deliver materials. He had never had a site induction nor attended a safety talk prior to attending the site. When he made deliveries the load was dumped on Barry Drive itself. A spotter assisted during the dumping.
13. He employed Mr Michael Booth. Mr Booth had also made a number of deliveries for the Barry Drive project. On the afternoon of 23 March 2012 he attended to make a delivery of road base and took it to the Boldrewood Street site. Mr Louis Clarke, foreman on the job, said that this was Mr Booth's second delivery for the day. As was most common, the first delivery was directly to the site at Barry Drive. Mr Clarke stated that he directed Mr Booth to dump the he second load that day at the "main compound" but that, without direction or obvious reason, he relocated to the small compound.
14. Mr Clarke said that he had told the workers to stop using the small compound because he considered it was dangerous with low hanging electrical wires. He also stated, nonetheless, that he left the site unlocked, initially just during the day but later permanently as he thought that another contractor was going to take over the site.
15. Mr Booth attended the Boldrewood Street compound alone. Whilst there was fencing around the compound, it was not locked. There was a general sign marked "construction site, keep out" but otherwise no warning signage at the compound itself, nor on the lines above it, indicating the presence of live power lines. It is apparent from photographs taken that day the visibility of the lines was obscured by foliage. It was a cloudy day which made the lines less visible. In addition there were wind gusts of up to 54 km/h which would have set the lines in motion.
16. When Mr Booth tipped his load, the bucket of the truck either came very close to, or contacted with, the power lines forming an electrical arc. This is evident because there were burn marks under the tyres which were also partially deflated. Mr Booth must have exited the truck as he was found very shortly thereafter collapsed on the ground. He had been electrocuted. Attempts at resuscitation failed. Mr Booth subsequently died as a result of electrocution and its complications.
17. Clearly there was a significant risk of serious injury or death, which in fact manifested in this case.
18. Mr Al-Hasani and Mr Clarke gave evidence that they had instructed workers not to use the site, however, photographic evidence demonstrated that the site was in fact being used and Mr Clarke's evidence confirmed, on review of the photographs, that must have been so contrary to his instruction. An adjacent resident, Mr Mario Dosen, described observing use of the compound as a "loading yard" with gravel and concrete pipes being moved "every so often".

19. Mr Nicholas Hearn, a Kenoss labourer, gave evidence that he was inducted in to the Barry Drive project and its three sites. As to the overhead power lines he was instructed to “look up and survive”. He stated that there were no signs or “tiger tails” (flags) attached to them. He said that the Boldrewood Street compound was prepared by laying a base and putting up a fence with manually operated gates. Anyone authorised could go to the site however Mr Clarke had decided that the site ought not be used *much* because of the power line danger, an approach which he discussed with the workers. Nonetheless, it was used after this discussion on occasion. Mr Hearn also gave evidence that safety concerns were raised with Mr Clarke but that control over fixing the problems fell to Kenoss management from Mr Al-Hasani through to Mr Spiros Brendas.
20. The risk was obvious, even without safety qualifications. It was certainly well recognised in the construction industry. There was in place at the time a Code of Practice entitled “How To Manage Work Health And Safety Risks” which made specific mention of the issue at page seven. In addition, Work Safe ACT had issued a Guidance Note in November 2010 on “Working Near Overhead Power Lines” which was available to those in the construction industry. Mr Al-Hasani had personally been served with a prohibition notice on behalf of Kenoss regarding working near power lines in August 2008 on another project.
21. Indeed, a Kenoss’ Safe Work Method Statement (“SWMS”) dated 9 December 2011 addressed the issue of construction under overhead power lines and highlighted a number of possible controls. The issue was brought to the attention of Kenoss workers at a Tool Box talk on 25 February 2012 but Mr Booth was not there.
22. Mr Booth attended the Barry Drive project at least thirteen times between 8 and 23 March 2012, evidenced by his employer’s invoices. He was clearly aware of the Boldrewood compound, as he used it, at least on 23 March. There was no sign on the compound itself declaring it a Kenoss site so logically he must have been told by someone that it was.
23. There were a number of relatively simple safety measures which could have been utilised to mitigate or eliminate the risk associated with the power lines above the Boldrewood Street compound. These included:
 - not using that site at all,
 - limiting access to the site, particularly by securing the fence around it,
 - having power turned off if a delivery to the site was required,
 - requiring that any deliveries be accompanied by a spotter,
 - providing appropriate signage as to the particular risk of overhead power lines, consisting of a sign on the gate or fence surrounding the site,
 - placing flags or “tiger tails” on the lines themselves to make them more visible,
 - warning all potential users to the site of the presence of, and risk associated with, the lines at the Boldrewood compound in particular through a site induction.

Control of the Boldrewood Street compound

24. Mr Al-Hasani placed considerable emphasis on the fact that as far as he was concerned control of the site had passed from Kenoss Contractors to another corporate contractor, Cord Civil Pty Ltd ("Cord"), prior to the incident. For this contention, he relied on his claim that he was informed by Superintendent Brown, an agent of the ACT Government, that Cord had been granted possession of the site as of 14 March 2012. He further stated that on 16 March 2012, in a co-ordination meeting between ACT Government, the superintendent, Cord and Kenoss, that Kenoss were directed to stop using the compound and that Cord's foreman was directed to contact Kenoss in order to organise "removal of the compound".
25. However, the overwhelming evidence is to the effect that Kenoss retained formal control of the site as at 23 March 2012. The site was a small parcel of public land. Mr Hearn explained that road base had been placed on the site to make it suitable for storage of construction materials. That was still in place on 23 March 2012. A government permit was required for use of the area. A permit was granted to Kenoss by Mr Darren Gerard, the Public Use Coordinator of the Territory's Land Use Unit within Territory and Municipal Services ("TAMS"). It was for the period 21 December 2011 to 20 September 2012. Cord could not use the land without being issued with a permit. Issue of that permit would have led to revocation of the Kenoss permit. No new permit had been issued at the relevant time and the Kenoss permit remained current. Staff within Civil Infrastructure and Capital Works for Economic Development, also within TAMS, were unaware of any change to responsibility for the site. Particularly, Mr Nigel Ford, Cord's managing director indicated that the discussion of 14 March 2012 related to a future arrangement between Cord and Kenoss. Kenoss was required to clear and make good the site before new works could be completed. This would have included clearing any remaining materials from the compound and the firm base which had been put in place. The photographs make it evident that that had not been done. There was material other than that which been deposited by Mr Booth that day already in the compound. I am not satisfied that a formal handover had been effected in accordance with contractual arrangements, but even if it had, Kenoss still had practical control over the site and its safety duty continued as at 23 March 2012.
26. It is a tragic irony that the work to be completed on the site by Cord was to relocate the electricity cables below ground.

Elements of the offence

27. There is no issue that Kenoss was conducting a business or undertaking in relation to the road resurfacing project at Barry Drive; this was a \$4.5 million contract.
28. Kenoss clearly had a duty of care to those who visited its sites, including sub-contractors such as David O'Mealey Truck Hire and its employees including Mr Booth.
29. That duty was clearly breached in failing to take adequate measures to address the risk posed by live overhead electric cables. The general risk relating to overhead lines was identified and broadly addressed in the SWMS. However, the specific risk at the Boldrewood Street compound, although identified, was inadequately addressed. The limited measure of restricting Kenoss' employees' use of the site did not satisfy their safety duty. There is no evidence that the risk to other visitors was even contemplated never mind addressed in the multiple simple ways available and identified above.

30. In respect to Kenoss, I find the offence proved.
31. The issues in respect to Mr Al-Hasani, whilst overlapping with those relevant to Kenoss, are different in a material way. The offence relies on establishing whether Mr Al-Hasani was an “officer” of Kenoss as defined, and, if so, whether he acquitted his safety duty by the positive exercise of due diligence as required by s.27(5) of the Act.
32. In the text “*Understanding The Model Work Health And Safety Act*”, Barry Sheriff and Michael Tooma, leading authorities in this area, noted: “*One of the most important reforms of the model work health and safety act is the introduction of a duty of care on officers of companies and other organisations. The introduction of a position duty is new to the workplace health and safety regulatory framework.... In all jurisdictions, officers are merely attributed liability to conduct that is committed by the company, rather than being allocated to duty in their own right*”.¹ They continue: “*The approach taken by the model WHS Act, however, emphasises the corporate governance responsibilities of officers. The personal liability in that context reflects the culpability of company officers in failing to meet the corporate governance responsibilities by preventing the corporate misconduct. Consistent with this rationale, officers under the model laws will have a duty to ensure due diligence. Thus, their attributed liability is transformed into a positive duty to ensure corporate compliance through sound corporate governance.*”²
33. In the event that Mr Al-Hasani is found to be an officer of Kenoss, then he holds a positive duty to exercise due diligence in respect to safety compliance.
34. Subsection 27(5) of the Act requires that:
- "due diligence" includes taking reasonable steps—*
- (a) to acquire and keep up-to-date knowledge of work health and safety matters; and*
 - (b) to gain an understanding of the nature of the operations of the business or undertaking of the person conducting the business or undertaking and generally of the hazards and risks associated with those operations; and*
 - (c) to ensure that the person conducting the business or undertaking 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*
 - (d) to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and*
 - (e) to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and*
 - (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).*

¹ CCH Australia 2010, p. 29

² CCH Australia 2010, p. 31

35. As project manager responsible for the Barry Drive project, Mr Al-Hasani was fully aware of the Boldewood Street compound and indeed, on his own evidence, of the risks associated with the live overhead power lines above it. He did not exercise due diligence in respect to safety compliance. His failures in that respect were multiplicitous. They include, for example, as to sub-section s27(5)(c), the SWMS was general in nature and inadequate to address the particular risk evident at the Boldewood compound. Mr Booth was not aware of it. Simply directing that the site not be used by large machines (if in fact such a direction was given) is patently inadequate, particularly given the involvement of others in the project, such as Mr Booth in his capacity as a delivery driver. A further example of the lack of due diligence, as to sub-section 27(5)(e), was the readiness of Mr Al-Hasani to a relinquish responsibility for the identified risk to the foreman, with no process in place to ensure compliance.
36. As was observed by Staunton J in *WorkCover Authority (New South Wales) (Inspector Mansell) v. Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIRComm 349 at [131], due diligence:
- “is not done by merely hoping others would or could do what they were told, but also ensuring they have the skills to execute the job they are required to do and then ensuring compliance with that in accordance with the safe standards established. Compliance requires a process of review and auditing, both formal and random, in order to ensure that the safe standards established are in fact being adhered to and under ongoing review”.*
37. However, the requirement to exercise “due diligence” pursuant to section 27 only arises if Mr Al-Hasani was as “officer” of Kenoss. This position is defined in the Act by reference to section 9 of the *Corporations Act 2001* (C’th). Some positions in a corporation are clearly identified as falling within the definition, for example, a director or a liquidator. Others are defined by the description in sub-section 9(b) as a person:
- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or*
- (ii) who has the capacity to affect significantly the corporation's financial standing; or*
- (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation)...*
38. In *Shafron v Australian Securities and Investment Commission* [2012] HCA 18 at [23] to [26], regarding the first limb of sub-section 9(b), the full Court of the High Court observed:
- “First, the inquiry required by this paragraph of the definition must be directed to what role the person in question plays in the corporation. It is not an enquiry that is confined to the role that person played in relation to the particular issue in respect of which it is alleged that there was a breach of duty”.*
39. The Court, highlighting the issue of participation in decision-making, observed that it did not require joint decision-making and concluded:

“the notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed”.

40. In respect to the three aspects of the definition of an officer in sub-section 9(b) of the *Corporations Act*, their Honours observed:

“.. Each of the three classes of persons described in par (b) of the definition of “officer” is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition...”
41. They are clearly disjunctive provisions such that satisfaction of any one of them is sufficient to characterise a person as an officer, although I note that the prosecution relies on the first limb in particularising the charge.
42. In the corporations context in *Shafron* their Honours recognised that the broader definition of officer still requires that regard be had to the role of the individual in the corporation as a whole not limited to their role in respect to the particular matter in which it was alleged there was a breach of duty. I note that I am unaware of any decision as to the interpretation of the concept of officer as described in sub-section 9(b) applied to the work health and safety context. However, as the definition is imported from the corporations law into the work health and safety context through the Act, it appears that the interpretation of the concept of an officer should to be viewed through the prism of the organisation as a whole rather than a particular function in which the individual was engaged.
43. Mr Al-Hasani provided an organisational chart for the Barry Drive project in the Project Quality Plan. In it, he sits at the head as project manager. Immediately below him is Mr Dimitri Brendas, the (unqualified) systems manager and occupational health and safety representative. Also below, and reporting directly to Mr Al-Hasani, are the surveyor, Mr Michael Bereza, the project quality engineer, Mr Sandeep Thorat, and the general foreman, Mr Louis Clarke. Reporting to the foreman are suppliers and subcontractors. No reference is made to other directly employed workers. This document is clearly relevant to the project but not to the corporation’s wider organisational structure.
44. Mr Al-Hasani gave evidence about that wider structure. He referred to Mr Spiros Brendas as “El Supremo”. He stated that he reported up to Mr Spiros Brendas and Ms Beverly Brendas. He was asked *“But there was nobody else on top of you between you and Spiros and Beverly?”* He replied *“Yes, there are others because I could not tell Mr so and so to pay Mr so-and-so. I could not hire Mr so-and-so without people in the accounting department and the administration department. I have no power to even go and buy a glass of water”.*
45. He agreed that in terms of the Barry Drive project, that the project engineer, Mr Sandeep Thorat, reported to him and that he reported to Mr Spiros Brendas. He agreed that he was project manager for a \$4.5 million project. When asked if he made decisions about budgets he replied *“not really”*. By way of further clarification, he noted that the tender was accepted by government but that management had to agree with the prices he worked out for the job. If management was not happy, then they would refuse to tender for the project or require that he increase the price quoted.
46. When it was put to him that Mr Spiros Brendas’ signature did not appear on many documents in relation to the company, he responded that *“the three missions of the*

company are signed by the general manager". It was put to him that Mr Spiros Brendas had little to do with the paper running of the company on a day-to-day basis but Mr Al-Hasani responded *"but if a machine goes from this side to this side. If he has not approve (sic) it, it does not go"*. He was asked if this was as a result of verbal approval with Mr Al-Hasani who responded *"not between me and him. He goes by past everybody. He does it himself"*.

47. Mr Al-Hasani agreed that he participated in management meetings, maintained the company's virus protection and a backup of computer files, liaised with customers to identify their requirements and ensure they were met, that he was engaged with safety and environmental plans, Safe Work Method Statements and emergency procedures, that he implemented project plans and supporting plans, that he briefed, managed and supervised performance of the project team, that he monitored projects progress and keep the general manager advised of it, that he advised customers of significant changes in project staffing, that he informed the systems manager of project matters pertaining to the continuing and improved operation of the management system, that he managed customer supplied items and materials, selected subcontractors and material suppliers, that he arranged sub-contractors in the purchase of materials but did not authorise their employment, that he maintained a register of material testing equipment, some as delegated and signed off by him, that he managed variations in contractual price, that he verified conformance with documented processes in the project plan, that he assessed and took action on potential non-conformance and customer complaints, that he reviewed and approved project documents, verified and signed off on completion of projects. He agreed that sometimes he would make decisions as the project manager and sometimes he would participate in making decisions with Mr Spiros Brendas and Ms Beverly Brendas. He said sometimes he had to make decisions on his own. He said that Kenoss' business was not limited to construction work as it also had a development business in another corporate entity. In short, Mr Al-Hasani agreed that he undertook all of the work one would expect of a project manager.
48. He noted that Kenoss had a number of other projects ongoing at the time of the Barry Drive project and he was project manager for all of the major projects which Kenoss was undertaking. It was put to him specifically *"you were obviously making decisions or participating in making decisions that affected either the whole or a substantial part of its business? And he replied "yes, I was"*.
49. There is no evidence from within the corporation as to where Mr Al-Hasani sat within it or his level of influence, other than from those who sat below him in the chain of command. Despite there being a director and a general manager, the role of those, beyond what can be assumed within the statutory role of a director, are unknown. Mr Al-Hasani's evidence was that he answered to these two positions and that Mr Brendas as was *"El supremo"*. That evidence is unchallenged. Whilst he conceded that he was participating in decision-making within the organisation as put to him squarely within the terms of sub-section 9(b) of the Corporations Act definition of an officer, his concession is not conclusive of the issue. There were clear limits on his participation delineated by his role as project manager as detailed in his responses in cross-examination.
50. The prosecution has not established that Mr Al-Hasani had control or responsible for the business or undertakings of the company; rather he had operational responsibility for delivery of specific contracts which had been entered into. His role was to

implement these projects. The limited evidence before me establishes that Kenoss was essentially a “family business”, with a husband and wife director and general manager and a relatively flat management structure. In it, Mr Al-Hasani sat close to the top of that structure but there is no evidence that he made, or participated in making, decisions which affected the whole, or a substantial part of the business of the corporation, other than his concession of that effect without context. He could identify potential employees but was not responsible for hiring and firing them. His evidence was that he could not commit corporate funds. There is no evidence that he had direction over the type, or the specific contracts, which were to be pursued by Kenoss. He did prepare tenders for particular work but he did not sign off on them. There is no evidence as to matters such as who determined the corporate structure, who established company policy as to the type of business to be pursued and which projects were to be entered into. It is not apparent whether Mr Al-Hasani attended board meetings or met any of the corporation’s legal obligations, such as ASIC returns or establishing quality assurance compliance. What is established is that Mr Al-Hasani’s participation in the business process was operational; whether it went beyond that to being organisational is speculative. It is not clear that he made decisions, or participated in making decisions, that affected either the whole or a substantial part of Kenoss’ business

51. Mr Al-Hasani had responsibility as an employee but he is not charged in that capacity. I am not satisfied beyond reasonable doubt that his role rises to the level of an officer within the corporation and for that reason the charge in respect of Mr Al-Hasani is dismissed.

I certify that the preceding fifty [51] numbered paragraphs are a true copy of the Reasons for Decision of her Honour Industrial Magistrate Walker.

Associate:

Date: 3 August 2015