

# **MAGISTRATES COURT OF SOUTH AUSTRALIA**

(Criminal)

## **COMCARE V JOHN HOLLAND PTY LTD**

**Penalty Remarks of Magistrate P. Foley**

**3 June 2016**

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Complainant: JENNA HANDY (COMCARE)  
Prosecution: MR M. VOLLER - CDPP  
Defendant: JOHN HOLLAND PTY LTD  
Counsel: MR G. LIVERMORE

Hearing Date/s: 11/12/2015 TO 03/06/2016

File No/s: AMC-14-8082

## **Comcare v John Holland Pty Ltd**

### **Magistrate P. Foley Criminal**

- 1 The defendant, John Holland Pty Ltd has pleaded guilty to two offences of failing to comply with a health and safety duty to ensure, so far as is reasonably practicable, that the health and safety of others was not put at risk, thereby exposing Jonathan Gardner and Lovelina Ramirez to risk, contrary to Section 32 of the Work Health and Safety Act 2011 (Cth) (the Act).
- 2 Count 1 is particularised that between 1 January 2012 and 15 June 2012 the defendant failed to ensure that a work group produced a Task Risk Assessment for the extreme risk activity of installing pipes and conduits as identified in the Urban Superway Activity Method Statement Risk Matrix. It is further particularised that the defendant failed to ensure that the Safe Work Method Statement for the activity: Urban Superway Pier Head Diaphragm Construction included in the activity: installation of stormwater pipe.
- 3 Count 3 is particularised that as between the same dates the defendant failed to ensure the auditing procedures approved for use by Urban Superway were applied to the activity of installing the fibrous reinforced cement stormwater pipe.
- 4 The maximum penalty for each offence is a fine of \$1,500,000. When dealt with summarily the limit of this court is a fine of \$150,000 for each offence.
- 5 The incident resulting in the current prosecution occurred on 15 June 2012. In 2010 the defendant had entered a joint venture with two other companies to design and construct the South Road Superway in South Australia. The joint venture was known as the Urban Superway Project. Unlike the other companies, the defendant is subject to the Act. Section 19(2) of the Act imposes a duty on the defendant to ensure, so far as reasonably practicable, that persons such as Mr Gardner and Ms Ramirez are not put at risk by the work carried out by them.
- 6 The Urban Superway included that part of the elevated roadway supported by a number of piers connecting the Port River Expressway to Regency Road.
- 7 On 11 October 2011 the joint venture sub-contracted the pier construction work to Lis-Con Services Pty Ltd. In essence, the piers are the structures supporting the elevated roadway. Lis-Con's responsibilities included final connection of all stormwater drainage pipes. On 17 December 2011 Urban Superway was given approval to use DN225 fibrous reinforced cement to pass through a fibrous reinforced sleeve in the pier. The pipe was part of the stormwater system proposed to allow surface water on the elevated roadway to get away.
- 8 On 24 February 2012 an Activity Method Statement was created to incorporate the change from stainless steel pipes to a continuous length of DN225. The purpose of that document was to outline the methodology to be used for construction of the pier heads.

- 9 The process of installing pipes and conduits was identified in that document as involving an extreme hazard arising from 'plant/crane rollover', 'manual handling' and 'working from heights'. The same document directed Lis-Con to prepare Task Risk Assessments for construction of the pier heads. Task Risk Assessments were prepared for specific work identified in the Activity Method Statement. However, the Activity Method Statement did not specifically include a Task Risk Assessment for the installation of the stormwater pipes through the external wall of the piers.
- 10 Prior to 15 June 2012 sub-contractors or employees of Lis-Con had installed reinforced cement pipes to other piers on ten previous occasions without incident, commencing on 6 January 2012. The first eight were performed before the Activity Method Statement was approved and the last two after it was approved, but without a Task Risk Assessment having been undertaken for the stormwater pipe installation.
- 11 On 15 June 2012 Lis-Con employees or sub-contractors were installing a fibrous cement stormwater pipe for Pier 11. The workers were inside the pier. The stormwater pipe had been inserted through a hole some 20 to 30 millimetres wider than it and the workers were manoeuvring it to connect with a T-junction. That part of the pipe protruding through the hole from the pier extended between 1.5 m and 2.0 m over South Road, which was some 14.5 m below. At about 5.40 p.m. that part of the stormwater pipe broke off, falling 14.5 m and striking two vehicles stationary at the traffic lights. The window of one vehicle was broken. No-one was injured. The pipe that fell weighed between 36 kgs and 48 kgs.
- 12 A number of possible causes for the pipe breaking were identified. The manoeuvring of the pipe may have caused it to fail, which may have been contributed to by an unidentified weakness or fault in the pipe. However, the risk would have been obviated if the overhanging portion had been cut to the required length.
- 13 Although the Urban Superway Joint Venture had sub-contracted this work to Lis-Con, the defendant's guilty plea to Count 1 acknowledges that it was reasonably practicable for it to require Lis-Con to complete a Task Risk Assessment for the installation of stormwater piping, which was part of the Extreme Risk Activity of installing pipes and conduits.
- 14 An audit procedure for the project was approved on 3 August 2011, and a requirement to conduct audits for, amongst other things, managing safety was approved on 11 August 2011. Over the period of 1 January 2012 to 15 June 2012 no audit procedure was applied to installing fibrous cement stormwater piping. The Urban Superway Joint Venture audit procedure did not identify the lack of a Task Risk Assessment addressing the installation of stormwater pipe and the risks and hazards associated with that activity.
- 15 The defendant's guilty plea to Count 3 acknowledges that it was reasonable for it to ensure that the approved audit procedures were applied to this activity.
- 16 The defendant's guilty pleas to Counts 1 and 3 also acknowledge that the failures exposed two members of the public to the risk of serious injury or death.

- 17 I am told that this is the first prosecution under this legislation. In my view the factors I must take into account in sentencing are set out in Section 16A of the Crimes Act 1914. Section 16A(1) requires me to impose a sentence appropriate to the severity of the offences, considering all the circumstances. Section 16A(2) sets out a non-exhaustive list of matters which I must, and do, have regard to.
- 18 In the course of submissions my attention was drawn to the case of *Comcare v The Commonwealth* [2007] FCA 662, decided under the Occupational Health and Safety Act 1991 (Cth) in which Madgwick J set out a number of factors relevant to the imposition of a penalty under that Act. My attention was also drawn to cases decided under relevant State legislation – Victoria in particular. In my view those cases provide useful assistance as to how the provisions of Section 16A of the Crimes Act should be considered in this type of matter.
- 19 The defendant is part of the John Holland Group. The Group is an engineering, contracting and service provider to infrastructure, energy resources and transport sectors across Australia, New Zealand, South East Asia and the Middle East.
- 20 The defendant company was established in 1950. The material provided to me indicates that John Holland is involved in projects of State and national significance.
- 21 At the time of the incident the Group employed some 4,450 people. The Urban Superway was a major project in this State. The Group has a significant investment in work, health and safety issues. Following the incident on 15 June 2012 the Group took a number of measures to improve safety, and co-operated with the Comcare investigation. The Group has a significant involvement in the community, including sponsorships and donations. In occupational health and safety audits conducted by Comcare, it has received positive feedback. Finally, and relevantly, the defendant has pleaded guilty to these charges.
- 22 The prosecution drew my attention to three cases under the Occupational Health and Safety legislation where civil penalties had been imposed on John Holland. All three matters involved the death of workers. These are not prior convictions, and while I think it proper to have them drawn to my attention, the size and scale of the defendant's operations and its apparent general commitment to occupational health and safety issues does not lead me to conclude that the three civil penalties demonstrate a course of conduct by the defendant of not taking seriously its statutory occupational health and safety obligations.
- 23 I therefore do not regard them as requiring the imposition of a greater fine than might otherwise be the case.
- 24 Turning to the circumstances of the offending, the Joint Venture sub-contracted construction of the piers to Lis-Con. Lis-Con has particular expertise in this area. Lis-Con also had a responsibility to ensure a construction environment safe for workers and other people. It prepared the Safe Work Method Statement for the Pier Head Diaphragm Construction which failed to identify the risk associated with placing the stormwater pipes into place above South Road. While it had performed this work on ten previous

occasions without incident, and therefore had no prior warning that this could occur, the very nature of what was being done gives rise to an identifiable risk of serious harm or worse to anyone below where the work was being undertaken. In my view this is not a risk only identified with the benefit of hindsight, but should have been picked up in the planning stage of construction.

- 25 The defendant, as part of the Joint Venture, had a statutory responsibility to ensure, so far as practicable, that the safety of others was not put at risk. While the Joint Venture had sub-contracted that part of the construction to Lis-Con, the defendant nevertheless had a responsibility to ensure a Task Risk Assessment had been prepared for the activity of installing pipes and conduits, and ensuring this activity was included in the Safe Work Method Statement. The defendant is a wholly-owned subsidiary of a group of companies with the human and financial resources to do this. Not only did it fail to do this but its audit procedure did not pick up that the risk associated with installing piping above a public road had not been identified in Lis-Con's Safe Work Method Statement/Task Risk Assessment.
- 26 Count 1 concerns the failure by the defendant to, as far as practicable, ensure that Lis-Con produced a Task Risk Assessment/Safe Work Method Statement for the activity of installing stormwater piping.
- 27 Count 3 concerns the ongoing failure of its audit procedure to identify this failing. In this respect there is some overlap in the conduct constituting both offences. I therefore propose utilising Section 4K of the Cth Crimes Act 1914 in imposing one penalty.
- 28 After taking into account the factors I have outlined above, I will record a conviction for both offences and impose one penalty, being a fine of \$130,000.