

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CRI-2019-004-003176  
[2022] NZDC 21868**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**DONG SH AUCKLAND LIMITED**  
Defendant

Hearing: 15 August 2022  
Appearances: A Everett for the Prosecution  
S Moore for the Defendant  
Judgment: 9 November 2022

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**RESERVED DECISION OF JUDGE P WINTER**

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**Introduction**

[1] The defendant Dong SH Auckland Limited, faces three charges brought against it by WorkSafe New Zealand under the Health and Safety at Work Act 2015 (the Act):

- (a) Charge 1 alleges a breach contrary to ss 48(1), 48(2)(c) and 36(1)(a) of the Act that the defendant, a PCBU, failed in its duty to ensure, as far as reasonably practicable, the safety of its workers who work for the PCBU, in that it exposed workers to a risk of serious illness arising from exposure to asbestos;
- (b) Charge 2 alleges a breach contrary to ss 48(1), 48(2)(c) and 36(1)(a) of the Act the defendant was a PCBU and failed in its duty to ensure, as

far as reasonably practicable, the safety of its workers who work for the PCBU in that it exposed those workers to a risk of serious illness arising from the collapse of a wall; and

- (c) Charge 3 alleges a breach contrary to ss 48(1), 48(2)(c) and 36(2) of the Act the defendant was a PCBU and failed in its duty to ensure, as far as reasonably practicable, the safety of other persons in that it exposed other persons to a risk of serious illness arising from the collapse of a wall.

[2] The charges arise from the demolition of a residential building on 26 Moa Road, Pt Chevalier, Auckland. A property investment company, J & Ling Properties Ltd (J & Ling), purchased 26 Morrow Road for redevelopment. Mr Colin Huo, was a director of the defendant company and an acquaintance of Gou Ling (Ms Ling). Ms Ling is a director of J & Ling. Mr Huo advised Ms Ling on the purchase of the property which was bought for the purposes of a redevelopment. Mr Huo assisted in the inspection of the property at 26 Moa Road at the time of its purchase. During the course of that inspection, he observed some defects in the building.

[3] In order to develop the property J & Ling needed to have the existing building demolished before any redevelopment work could take place. J & Ling had no prior property development experience. J & Ling engaged Dong SH, a project management company to be involved in the design, engineering, construction and project development of the Moa Road property. Dong SH had previous dealings with QEM and worked on earlier projects. The exact nature of their contractual relationship and arrangements in respect of the Moa Road site is disputed.

[4] Prior to the demolition taking place, it was necessary for some preparatory work to be undertaken by the owner of the property. Mr Huo assisted in this, setting up fencing and turning off utilities to the property. Mr Huo was not involved in the preparations undertaken by QEM to ensure that reasonable practicable steps were taken to ensure the site was safe, such as testing for asbestos or planning the demolition. This work was carried out by QEM, as part of its preparation for a quote. This included an inspection for asbestos. There was only one inspection for asbestos.

That was carried out by Mr Haddon of Clearsite but Mr Haddon was not at that time qualified and did not provide the required certificate.<sup>1</sup> The failure to detect asbestos at the site is reflected in the quote QEM prepared and addressed to Dong SH. That quote did not include any consideration of a fee for asbestos removal. However the written quote was never physically delivered to Dong SH.

[5] The demolition work began on 19 December 2017. At 12.50pm on 20 December 2017, WorkSafe received notification from neighbours across the road from the property about their concern regarding the presence of asbestos at the property and what they regarded as the unsafe manner in which the demolition was being conducted.

[6] At 3.30pm on the 20<sup>th</sup> of December, Mr Cheng became concerned about the outside northern wall of the house and ordered the work to halt. Mr Huo subsequently attended at the site around 5pm to inspect the work and discuss the need for another digger to be brought onto the site, in order to brace the wall. Work resumed after 6pm following the arrival of a second digger at Moa Road, however the use of that digger proved to be insufficient to prevent the wall collapsing as a result of the forces transmitted onto it from the demolition work. The wall collapsed and when it did so, it fell onto the neighbour's property, damaging a gas meter attached to the western wall of that dwelling, which then triggered a gas leak. The collapsed wall trapped the wheelchair-bound occupant of that property in the backyard of her dwelling.

[7] WorkSafe were again contacted when it then became known that no asbestos check had been undertaken at the property. WorkSafe immediately issued a non-disturbance notice to QEM.

[8] The site was subsequently inspected on the 22<sup>nd</sup> of December 2017 by WorkSafe, who were assisted by Dowdell and Associates Limited, a company specialising in building asbestos contamination assessment and removal. Samples were taken at the property by that company, which indicated the presence of asbestos and as a result, a Prohibition Notice was then issued by WorkSafe halting work at the site.

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<sup>1</sup> Health and Safety At Work (Asbestos) Regulations 2016 s 21.

[9] Laboratory analysis subsequently confirmed that the property at 26 Moa Road contained both chrysolite and crocidolite asbestos.

[10] QEM subsequently pleaded guilty to similar charges as those presently faced by the defendant and has been sentenced.<sup>2</sup> QEM's conviction does not limit any culpability that may arise in respect of any other parties involved in the demolition.

[11] At the time of the demolition there was no written agreement between J & Ling and Dong SH, nor was there any written agreement between J and Ling and QEM or between Dong SH and QEM.

### *The law*

[12] WorkSafe alleges that Dong SH was in reality the project manager or head contractor for the property development at 26 Moa Road, which included responsibility for the demolition work undertaken there. Dong SH in turn engaged QEM as a subcontractor, to carry out the demolition work which went wrong in two respects:

- (a) Asbestos on the property had not been identified thereby putting QEM workers at risk; and
- (b) The demolition sequence was incorrectly actioned, resulting in a chimney and brick wall collapsing onto a neighbour's property causing a gas leak, thereby putting QEM workers and neighbours at risk.

[13] Section 36 of the Act, in part 2, subpart 2, places a duty of care on all PCBU's (persons conducting a business or undertaking):

#### **36 Primary duty of care**

- (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

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<sup>2</sup> *WorkSafe New Zealand v Quick Earth Moving Ltd* [2019] NZDC 18190.

- (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.
- (2) A PCBU must ensure, so far as is reasonably practicable, that 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.
- (3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—
- (a) the provision and maintenance of a work environment that is without risks to health and safety; and
  - (b) the provision and maintenance of safe plant and structures; and
  - (c) the provision and maintenance of safe systems of work; and
  - (d) the safe use, handling, and storage of plant, substances, and structures; and
  - (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
  - (f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and
  - (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

[14] Section 34 of the Act further requires that all PCBUs who have a duty in relation to the same matter imposed by or under this Act, must, so far as is reasonably practicable, consult, co-operate with and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter.

[15] Section 48 of the Act provides:

**48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness**

- (1) A person commits an offence against this section if—

- (a) the person has a duty under subpart 2 or 3; and
- (b) the person fails to comply with that duty; and
- (c) that failure exposes any individual to a risk of death or serious injury or serious illness

[16] Regulation 21(3) of the Health and Safety at Work (Asbestos) Regulations 2016 (the Regulations) imposes a duty on all PCBU's with management and control of a workplace to ensure:

- (a) That all asbestos that is likely to be disturbed by the demolition is identified;  
and
- (b) Removed before demolition is commenced.

[17] There are four elements to each charge:

- (a) that the defendant was a PCBU in the meaning of s 17 of the Act;
- (b) that the defendant, a PCBU, failed to comply with a duty of care it owed either to its workers or to the property's neighbours. Workers are defined under s 19 of the Act and includes an employee of a contractor or subcontractor;<sup>3</sup>
- (c) that as a result of that failure, the workers or neighbours (in respect of charging being CRN 210) were exposed to a risk of death, serious injury or serious illness.

### *The issue*

[18] The principal issue to be decided in this case as defined by both parties is whether or not the defendant Dông SH was in fact a PCBU within the meaning of the Act.

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<sup>3</sup> Section 19(1)(c).

[19] Section 17 of the Act defines a PCBU:

**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

[20] The issue of whether or not a formal written contract was necessary has previously been dealt with by the High Court on appeal.<sup>4</sup>

[21] Downs J found that there was no need for a contractual relationship to exist between the parties in order for that party to qualify as a PCBU within the meaning of the Act. At [34] of his decision the court stated as follows:

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 matters 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

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[22] The High Court reiterated that the focus of the Act is on ensuring work place safety.

*The prosecution argument*

[23] The allegation made against the defendant by WorkSafe is that Dong SH was acting in a role akin to a project manager or head contractor, for the redevelopment of the property at 26 Moa Road. That role included the work undertaken in respect of the demolition of the existing building on the property. As the defendant was

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<sup>4</sup> *WorkSafe New Zealand v Dong SH Auckland Limited* [2020] NZHC 3368.

undertaking that role the defendant was by definition a PCBU and as such the defendant was subject to the duties and sanctions imposed by the Act.

[24] The prosecution relies on the following evidence to establish that the defendant was acting as a PCBU:

- (a) In November Mr Huo, the defendant's director, was told by J & Ling to carry out the development;
- (b) Mr Huo had been paid to manage the project, and his normal management fee was 10%;
- (c) The owner of 26 Moa Road left all aspects of the project, including the demolition to Mr Huo;
- (d) Mr Huo attended an onsite inspection of the building where its location and decrepit state were noted by him;
- (e) The defendant by its director confirmed this was agreed over the phone and not by way of a written contract; and
- (f) Mr Huo was the defendant's sole director.

[25] The defendant's role as head contractor is evidenced by:

- (a) The defendant engaged QEM;
- (b) The arrangements show that QEM and its agents believed they were acting for the defendant or its agent, Mr Huo;
- (c) QEM had no contact with J & Ling and operated solely on the defendant's instructions;
- (d) The defendant's agent carried out the roles of a project manager, turning up to supervise when an issue with the demolition arose and preparing the site for demolition, including disconnecting the services;



- (e) Mr Huo was contacted directly by QEM following the collapse of the wall at the property and it was Huo who informed J & Ling of the incident;
- (f) QEM apologised to Mr Huo for the incident and Mr Cheng, who was employed by the defendant, sent an apology to the neighbours;
- (g) Mr Huo and Mr Cheng attended a meeting with WorkSafe inspectors on 12 February 2018. They told WorkSafe inspectors that they had arranged for the power and water to be disconnected on site and that Dong SH had arranged for fencing to be put up around the property. That was further confirmed during a formal interview conducted on 10 March 2018; and
- (h) All of Mr Cheng's communications used the company email address. Those emails were signed by Mr Cheng and were written on behalf of the company. Mr Huo indicated that Mr Cheng was able to represent the company's position regarding this matter during the course of the interview carried out with WorkSafe on 19 March 2018;

[26] The prosecution argues that both Mr Huo and Mr Cheng's actions and state of mind can be attributed to the defendant as employees/directors under the provisions of s 160/161 of the Act. Section 160(2) provides:

If, in any civil or criminal proceedings under this Act ... it is necessary to establish the state of mind of the person, it is sufficient to show that an officer, employee, or agent of the person, acting within the scope of his or her actual or apparent authority, had that state of mind.

[27] Accordingly, the defendant's conduct as evidenced by the state of mind of its officers, was such that the defendant was a PCBU and had all the duties and resulting liabilities that arise from that position.

[28] As a PCBU the defendant accordingly owed a duty to ensure the health and safety of QEM's workers while they were at work in the business or undertaking of demolishing the existing structure at 26 Moa Road. It also owed a duty to ensure that the health and safety of 26 Moa Road's neighbours was not put at risk from the work

carried out as part of the conduct of the business or undertaking it was carrying out at the property.

*The defence argument*

[29] The defence submits that Dong SH was not a PCBU for the following reasons:

- (a) As at 20 December 2020 the defendant was not engaged at 26 Moa Road and that site was not then part of the defendant's business or undertaking;
- (b) Neither was the defendant a head contractor or project manager for the redevelopment of the Moa Road property until such time as it had accepted the terms of the written contract to do so, which occurred only after the collapse of the wall on 23 December 2020;
- (c) Since the defendant was not the head contractor or project manager the workers who had been engaged in the demolition at 26 Moa Road were not the defendant's workers for the purposes as defined under s 36(1)(a);
- (d) Any work undertaken by Mr Huo was undertaken solely in his personal capacity as a personal friend of Ms Ling and not as an agent for the defendant company;
- (e) The invoice generated by QEM was in fact not intended to be for the defendant or Mr Huo. That invoice was simply rendered as part of an automated process which was part of QEM's business systems and was intended solely for J & Ling; and
- (f) The defence argues that the admissions obtained during the interview conducted between Mr Huo, Mr Cheng and WorkSafe on 19 March 2018 contravenes the Chief Justice's Practice Note on police questioning.<sup>5</sup>

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<sup>5</sup> Practice Note – Police questioning (s 30(6) of the Evidence Act 2006) [2007] 5 NZLR 297 at [3].

## Discussion

[30] The primary issue to be determined in this case is whether or not the defendant was a person carrying out a business or undertaking (PCBU) within the meaning of the Health and Safety at Work Act 2015 (HSWA).. The remaining three elements required to be proved by the prosecution are not in serious contention. As recorded in the agreed summary of facts adduced under s 9 of the Evidence Act, it is accepted there was no written agreements between the parties, that is the owner, the head contractor or the subcontractor in respect of the works carried out at 26 Moa Road at the time in question.

[31] As previously noted, while a finding that there was a contractual relationship between the property owner and the defendant and the defendant and QEM might be a clear basis for finding that the defendant had duties under the HSWA on site, a contractual relationship is not an element of the charge. The prosecutor is not required to establish that there was a formal contract nor is there a need to establish a title for the role the defendant played on site in order for the Court to be satisfied that the defendant Dong SH was a PCBU in relation to the project at 26 Moa Road.

[32] It is argued by the prosecution that the state of mind and conduct of Mr Huo (the defendant's sole director) and the defendant's secretary and employee, Mr Vincent Cheng are attributable to the defendant company under the Act.

[33] Mr Cheng's involvement in the company can be confirmed because he was involved in email correspondence in relation to this matter that have been sent and received from the email address vincent.dong.sh.akl@gmail.com and signed on or behalf of Mr Cheng. The prosecution submits those emails were written on behalf of the company.<sup>6</sup>

[34] Mr Cheng was present at a meeting on 12 February 2018 with WorkSafe inspectors which was also attended by Mr Huo. Mr Cheng acted as an informal interpreter for Mr Huo on that occasion. Further, Mr Cheng also attended a formal interview conducted at WorkSafe New Zealand's offices in the Auckland CBD. At

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<sup>6</sup> Exhibit Bundle Tabs 3, 4, 5, 6 and 9.

one stage during the course of that interview, Mr Huo indicated that he intended to leave and suggested that Mr Cheng could answer questions on his behalf in his absence.<sup>7</sup> At another point in the interview when Mr Huo was being questioned regarding the conditions at the Moa Road site, Mr Huo suggested that Mr Cheng would be better suited to answer that question.

[35] During the course of the same interview the defendant confirmed that Mr Huo had been on site and talked to QEM about safety and help and if one digger was not enough they should obtain another digger. Mr Huo said he had attended the site for about 20 minutes and he had brought soft drinks for the workers and instructed them about safety issues.

[36] The defence argues that the evidence obtained during the course of the interview on 19 March 2018 was improperly obtained and therefore should be excluded under the provisions of s 30 Evidence Act 2006. The thrust of the defence argument in this respect focuses on the practice note issued by the Chief Justice on 16 July 2007 which operates as a gloss in respect of arguments brought under s 30 Evidence Act 2006. Paragraph 3 reads as follows:<sup>8</sup>

Questions of a person in custody or in respect of whom there is sufficient evidence to lay a charge must not amount to cross-examination.

[37] Defence counsel has drawn my attention to the decisions in *R v Follas*<sup>9</sup> which discussed where cross-examination of an interviewee can lead to unfairly obtained evidence being adduced and *Phillips v Port of Auckland Ltd*<sup>10</sup> which criticised the use of leading questions during an interview process which can lead to unintended answers being obtained.

[38] In *R v Chetty*<sup>11</sup> the Supreme Court emphasised that the touchstone under s 30 of the Evidence Act in relation to matters contained in the Chief Justice's Practice Note on Police Questioning is fairness. The decision in *Chetty* is clear authority for the

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<sup>7</sup> Dong SH interview Tab 7 at p 55.

<sup>8</sup> Practice Note – Police questioning (s 30)(6) of the Evidence Act 2006) [2007] 3 NZLR 297.

<sup>9</sup> *R v Follas* HC Rotorua CRI 2009-077-1516, 22 November 2010 at [51] – [59].

<sup>10</sup> *Phillips v Ports of Auckland Ltd* [2014] NZERA Auckland 516553172 at [40].

<sup>11</sup> *R v Chetty* [2016] NZSC 68, (2018) 1 NZLR 26.

proposition that a police officer is not precluded from some degree of insistence despite denials by a suspect.<sup>12</sup>

[39] I do not accept counsel's criticism that the interview conducted with Mr Huo where Mr Cheng was also present, lacked impartiality and employed repetitive questioning. In particular counsel submits that this form of interviewing led to a misunderstanding of the word "engaged" as it applies to the defendant's understanding in respect of the present prosecution.

[40] The questions that were framed using the word "engaged" appear at pages 8, and 10 of the transcript. At page 8 the interviewer asks the following question, "And of the companies you "engaged" to do the demolition you always engage Quick Earth Moving Limited?" Mr Huo's answer to that, whilst not well articulated, was in the affirmative. There is no indication that Mr Huo did not fully understand the nature of that question during the course of the interview. That is confirmed by Mr Huo's responses to the question. It is clear that Mr Huo understood exactly what was being asked of him because he goes on to explain the role of Dong SH as a project management company.

[41] Whilst a simpler word may in hindsight have been more desirable, Mr Huo had the services of a qualified interpreter to assist him as well as input from Mr Cheng. Mr Huo's understanding of the term "engaged" is confirmed at page 10 where Mr Huo answers (through the interpreter) that the company has engaged architects and engineers for the purposes of undertaking its construction projects, rather than using its in house employees. By way of further example, when asked at page 48 by the interviewer whether it was true that Quick Earth Moving did not supply any demolition plans, an asbestos survey or engineering reports to Dong SH, Mr Huo replied (through the interpreter) as follows, "They told me over the phone that they had engaged a specialist who come and take a look."

[42] I do not accept the defence submission that the interview breaches the Chief Justice's Practice Note in respect of leading questions. The interview was not conducted in an oppressive or unfair way. As previously stated, the interviewer's

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<sup>12</sup> At [24].

questions were translated consecutively by the interpreter. The tone and style adopted by the interviewer was measured and courteous. At certain points during the course of the interview Mr Huo seemed sufficiently confident enough to take control of the process, indicating for example that he might leave the rest of the interview to his subordinate, Mr Cheng. Having watched the interviewer, I formed the impression that Mr Huo was able to understand questions and provide answers with confidence.

[43] As previously noted, at one point he even contemplated leaving the interview because he said he was too busy to continue answering the questions that were being asked of him and he needed to reply to phone calls that he was receiving on his mobile phone. He told the interviewer when offered a break if he wanted one, that he did not need one.<sup>13</sup>

[44] As I have found that the evidence contained in the interview conducted on 19 March 2018 was not improperly obtained, it is not necessary for me to consider the provisions of s 30 Evidence Act 2006. However, had I been required to undertake the balancing exercise mandated in s 30(3) of the Act, I would have found the evidence of the interview to have not been admissible.

#### *Nature of a PCBU*

[45] In determining whether or not the defendant was a PCBU, it is necessary to consider the purpose of the Act. Section 3 provides as follows:

##### 3 Purpose

(1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—

(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

(b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and

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<sup>13</sup> At pg 37.

(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.

(2) In furthering subsection (1)(a), regard must be had 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 or from specified types of plant as is reasonably practicable.

[46] The underlying thrust of the Act is therefore to ensure that workers are able to operate safely and that the work undertaken should not cause danger to others and achieves compliance with those aims through the enforcement of the standards outlined in the Act. That is the precise reason that Downs J in the High Court, found on appeal, that contractual arrangements are not necessary for the attribution of PCBU status to a “person.”<sup>14</sup> What must be established is whether or not such a person was supervising or was in control of the workspace. The existence of a contract merely serves to make this explicit. This is because the focus of the Act is to ensure the safety of those affected by the work undertaken.

[47] It is contrary to the purpose of the Act to enable those whose responsibility it is to ensure safety to be able to seek to avoid liability because of a lack of formalisation of their roles.

[48] In the present case, as previously discussed, it is accepted there was no written contractual arrangements which formally placed the defendant in the role of a PCBU. There was no written contract in effect at the time of the demolition. Instead, the

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<sup>14</sup> *WorkSafe New Zealand v Dong SH Auckland Limited*, above n 4 at [25] and [29].

prosecution submits that there is more than ample evidence before the Court to establish that the defendant was in a position of supervision and control of the site at the material time.

[49] The conduct of a director or employee acting within the scope of their actual or apparent authority can be attributed to a company pursuant to the provisions of s 161 of the Act. Mr Huo was the sole director of the defendant company. He therefore had substantial authority over the company's actions.

[50] I find that the evidence previously referred to is sufficient to establish beyond reasonable doubt that Mr Huo was acting in his capacity as a director of the company to provide Ms Ling with commercial advice. This was so in respect of his discussions with her in respect of the purchase of the property which was focused on the development potential. It is also confirmed by his subsequent actions which are all focused on aiding J & Ling in the development process. It is clear that throughout the development process his discussions concerning the property were of a focused commercial nature, for the following reasons:

- (i) Mr Huo told the WorkSafe investigator, Jenny Opie, on 12 February 2018, that the owner of the property had asked the defendant company in November 2017 to manage the site.<sup>15</sup> That included the management of the subdivision of the site, resource consent, and engaging an architect and builder;
- (ii) Mr Huo admitted in the formal interview with WorkSafe that the owner of the property was one of his friends and that the owner's intention was to demolish the existing building on the property and build a new dwelling and as a result the owner left all parts of the work to him "from the demolition to the design and construction and the final completion"<sup>16</sup>; and

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<sup>15</sup> Notes of Interview, at pg 47, line 18.

<sup>16</sup> Notes of Interview at pg 34.



(iii) Mr Huo attended an on-site meeting with the owner in his capacity as a director of the defendant company and inspected the condition of the building before the demolition took place and before the purchase had been settled. Mr Huo noted the house was old and unoccupied. He identified that the building was dilapidated and there were a lot of cracks in the structure and it looked as though the building was about to collapse.

[51] I reject the defence argument that these actions are not sufficient to establish that the defendant was a PCBU. The facts show that Mr Huo's role went beyond mere conveyance of information or referral on behalf of the owner. The defence argues it was the owner who selected QEM as the contractor to carry out the demolition at the property. Although the owner did select QEM, that did not alter the defendant's role of otherwise managing the project. This was clearly left to the defendant.

[52] It is immaterial that the defendant did not fit a defined role such as the head contractor or the project manager. As previously discussed, the High Court in its decision has already established that a formal arrangement is not necessary for that purpose. The defendant acted on the owner's behalf in organising and monitoring the development of the property whilst the owner was overseas. The defendant was responsible for preparing the site for demolition. QEM clearly treated the defendant as the owner's representative in all matters relating to the on site work that it was required to carry out during the time period relevant to this prosecution.

[53] I therefore find it proved as a fact that the defendant adopted the role of or similar to a project manager and/or head contractor in relation to the demolition work carried out at the site. The specific label attached to the defendant's role is not a material element in establishing that the company did in fact have a duty under the Act.

[54] The defendant had a duty to ensure the health and safety of QEM's workers while they were at work in the business or undertaking of demolishing the property.

[55] The defendant also had a duty to ensure the health and safety of the neighbouring properties to the site at 26 Moa Road. It was the defendant's obligation to ensure the neighbours were not put at risk from work carried out as part of the responsibilities that the defendant undertook by virtue of its role. It was also the defendant's responsibility to ensure the presence or otherwise of asbestos at the site was determined prior to the demolition being undertaken. As previously discussed, this was not complied with.

[56] I find that the prosecution has proved beyond reasonable doubt that the defendant, whilst acting in its capacity as a PCBU, failed to comply with its s 36 obligations, exposing individuals to a risk, death or serious injuries under s 48. Accordingly I find it proved that the defendant failed to comply with its duty to ensure that QEM workers, health and safety, in relation to the identification and removal of asbestos including failing to engage a competent person to identify and remove any asbestos containing material from the property.

[57] Although QEM did engage a third party, Mr Haddon, to examine the property for asbestos, it was established during the course of the evidence that Mr Haddon did not have the appropriate qualifications at the necessary time, to undertake that examination. As a result, the appropriate necessary certificates to confirm that the property was free of asbestos were not obtained. The lack of a proper process to determine the presence of asbestos was confirmed in the evidence of Mr Ricky Steven Jones.

[58] The potential presence of asbestos was an issue the defendant was aware of prior to the demolition. The site-specific safety plan prepared at some point does not mention asbestos and the quote prepared by QEM workers specifically sets out that QEM was not responsible for asbestos removal.<sup>17</sup>

[59] Mr Jones's expert evidence was that documentation should have been prepared concerning the presence or otherwise of asbestos and there be a plan for its removal if present. In order to identify whether or not asbestos was present it would be necessary to have a fully intrusive demolition survey identifying asbestos in the property which

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<sup>17</sup> Exhibit Bundle, Tabs 11 and 12.

should have been completed by a licensed asbestos surveyor.<sup>18</sup> Further, it was Mr Jones's evidence that there are processes set out in the Asbestos Regulations 2016 and approved codes of practice, which were both publicly available. These confirm that a suitably competent person should complete any asbestos survey. That was not done in this case. Neither was an asbestos removal certificate prepared. Mr Jones was able to identify from the photos provided in Tab 10 of the Bundle of Exhibits that the outside cladding of the property at 26 Moa Road would have signalled a red flag for a competent project manager to test for asbestos. I have therefore no difficulty in finding charge 1 (CRN 214) proved beyond reasonable doubt.

[60] In relation to charges 2 and 3 (CRN 210 and 213) which relate to the defendant's duty to ensure as far as reasonably practicable the safety of its workers, arising from the collapse of the wall and likewise the safety of other persons at risk from the collapse of the wall, namely the handicapped next door neighbour at 28 Moa Road. I find that the prosecution has proved to the necessary standard, that it was reasonably practicable for Dong SH to assess the risks associated with demolition for the purpose of sequencing and mitigate those risks. I find that the evidence shows the defendant was aware of the following matters:

- (a) the proximity of 26 Moa Road to its neighbours;
- (b) the dilapidated state of the property;
- (c) the defendant was aware that QEM had not previously undertaken similar demolition jobs before;<sup>19</sup>
- (d) the defendant sought no information relating to QEM's planned demolition sequence or health and safety procedures;
- (e) no specific safety plan detailing how the building was to be demolished and the risks involved as well as a mitigation of those risks was prepared as it should have been;<sup>20</sup>

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<sup>18</sup> NOE at pg 27 line 9-14.

<sup>19</sup> NOE Mr You at pg 4, line 12.

<sup>20</sup> NOE Jones at pg 29 lines 23-24.

- (f) no structural assessment was carried out prior to the demolition (the house at 26 Moa Road should have been demolished using a top-down methodology involving the removal of the roof section first and then the chimney, preferably by hand) prior to the removal of the house structure and walls; and
- (g) the demolition should have been stopped by the defendant once the structural weakness of the wall was established during the course of the demolition project.

[61] The defendant was required as a PCBU to eliminate or minimise the risks associated with the demolition of the property to both the workers on site and the property's neighbours. Clearly the defendant failed to comply with these duties. It was only by good fortune that workers on the site as well as the elderly disabled next door neighbour were not injured or worse, as a result of the collapse of the external wall of the property at 26 Moa Road.

[62] Accordingly, I find the prosecution have proved all of the remaining elements of the offences with which the defendant has been charged. The defendant will be convicted in respect of each of the three charges that it faces.

Dated at Auckland this 9th day of November 2022.

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**Judge P Winter**  
**District Court Judge | Kaiwhakawā o te Kōti ā-Rohe**  
Date of authentication | Rā motuhēhēnga: 07/11/2022