

Judgment clarifies workplace notices requirements

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Clarification on key matters governing improvement notices and prohibition notices issued under the Health and Safety at Work Act 2015 (HSW Act) have been provided in a recent Auckland High Court case decision handed down by Justice J Courtney.

Also the subject of discussion at the MLAANZ New Zealand branch conference on April 11, the case was brought by Maritime New Zealand (MNZ) against Glass Bottom Boat, after the latter had successfully appealed two such notices in the Auckland District Court.

A sightseeing tour operator, Glass Bottom Boat was in January 2017 issued with a prohibition notice from entering Goat Island Channel (near Warkworth) and an improvement notice requiring a risk assessment and implementation of controls for risks identified.

Those notices followed MNZ investigating complaints received in both December 2016 and January 2017 regarding alleged “close calls” between the operator’s vessel, the Aquador, and recreational and commercial water users in the channel.

Following Judge M-E Sharp overturning those notices in March 2018 on the grounds the “decisions were unreasonable”, MNZ initiated the High Court appeal on the grounds the District Judge had erred by:

- Failing to conduct the appeal on a de novo basis (ie, whereby the appellate court approaches the case

afresh and does not start from the presumption that the decision under appeal is correct).

- Holding that the MNZ inspector was required to identify a specific breach of the Act in issuing the improvement notice.
- Wrongly interpreting the word “unreasonable” in Section 135 of the Act.
- Wrongly identifying the relevant statutory duty on Glass Bottom Boat.
- Finding that because there had been no previous accidents there was no “imminent or immediate” safety risk justifying the issuing of a prohibition notice under Section 103 of the Act.
- Holding that there was requirement for natural justice in the issuing of such notices.

In a decision issued on February 5 this year, Justice Courtney ruled that all six grounds of appeal failed, dismissed the case and awarded costs to Glass Bottom Boat.

Oceanlaw solicitor Hayley Campbell said the sense the inspector had acted unreasonably in issuing the notices to her firm’s client has ultimately been vindicated.

“You’ll note at para 75 of the District Court decision the Judge comments that the file notes regarding the compliance action ‘certainly indicate it likely that the respondent had predetermined the outcome’,” Ms Campbell told the *Shipping Gazette*™.

Ms Campbell acknowledged the

safety value of prohibition notices, but emphasised that a key learning from the case was that prior to their being issued, an inspector “must satisfy the test provided in Section 105”.

“They don’t need to have a breach of the Act to issue the notice, but the inspector must have a reasonable belief there is a serious risk to the health and safety of a person from an imminent or immediate exposure to a hazard.

“I think since the District Court decision MNZ and WorkSafe New Zealand have formed a memorandum of understanding so they hopefully have a similar approach to these things in the future.

“MNZ guidance on issuing prohibition notices provides that when they are observing an operation and identify a risk they are supposed to assess that risk against what the benchmark would be if the operator was taking all reasonably practicable steps to mitigate and eliminate all risks. The gap between what they have actually observed and the benchmark will dictate what enforcement action they take.

“That won’t always be a prohibition notice — that is only at the highest end.”

Another learning was that process was important, even in administrative decisions.

“The High Court found the defects in the process weren’t cured by the right to a de novo appeal — that only cured the administratively-deficient part of it.”

Additionally, Ms Campbell said the decision enforced that improvement notices must have an identifiable contravention or likely contravention, so that improvements can actually be made.

“You need to have a specific breach of the Act or a likely breach before an improvement notice can be issued. MNZ argued the inspector did not need to identify what the breach was, but the High Court held that you did need to identify it — because if you didn’t have that identification then there is no measure against which you can see if you are improving or had reached the required standard.



Oceanlaw solicitor Hayley Campbell.

“The operator still tried to comply with the improvement notice, even though he had filed the appeal. But we felt they were trying to shift the goal posts on our client all the time — it was really difficult to find out what he needed to do to satisfy them.”

Ms Campbell said a decision was awaited in regard to the costs award. She clarified that this would relate to legal costs only and not any business disruption compensation, as the prohibition notice was no longer in force.

In regard to MNZ’s decision to initiate an appeal and not accept the District Court’s ruling, Ms Campbell said based on the significance of the issues to MNZ, “it wasn’t that surprising”.

MNZ made it clear that they were taking the High Court appeal for their benefit — to improve their systems and clarify what it was that they were supposed to do. So it was a bit unfortunate for the operator in this case that they just got dragged along and had to bear the brunt of it.”

MNZ chief executive and director Keith Manch told the *Shipping Gazette*™: “MNZ accepts the decision of the High Court to dismiss its appeal. We remain committed to taking action to ensure that work on ships in New Zealand is safe and healthy.”

Commenting from the ship operator’s perspective, New Zealand Shipping Federation executive director added: “High Court decisions provide considerable certainty, but we feel a bit sorry for the company that had to bear the cost of the court action.”

Turbulent phase for Damen Shipyards

Damen Shipyards Group has posted a net loss of €17 million for 2018, the first loss in 15 years by the Dutch shipbuilder.

Damen reports that its financial situation stems from a sustained period of difficulty in a number of maritime sectors and investments it has made in its future.

Notably, despite rising oil prices, the offshore hydrocarbon sectors continue to present tough trading conditions.

The harbour towage sector, a key market for Damen, is also underperforming as competition in the marketplace exerts downward pressure on prices and tug operators seek to consolidate their operations.

While project activity has increased recently for the group’s repair and conversion division, profit generated remains low as the group is absorbing operating losses at its acquired companies Verolme, Curacao and Mangalia Romania.

A further factor is the current lower than usual levels of activity at Damen Schelde Naval Shipbuilding. The group’s CEO, Réne Berkvens says, “Despite significant investment, over a sustained period, aimed at participation


in various projects, for example the Dutch submarine and German MKS 180 programmes, awards have not yet been forthcoming.

“Defence & security projects are a critical factor, not only for the success of Damen, but also for the navy and for the maintenance of a domestic defence industry within the Netherlands.”


Despite the difficult market conditions, the shipyards group has continued to book a large amount of projects — worth in the region of €1.9 billion in 2018.

Mr Berkvens adds, “Turnover is generally healthy. The difficulty is that, despite high levels of activity, profit is under pressure from a combination of factors including vessel oversupply in some markets, fierce competition and increasing labour costs in certain regions.”

Damen, with multi-market penetration, has proven resilient to turbulent market conditions in the past. At the present time, numerous maritime markets do show signs of promise including cruise, inland shipping, public transport, yachting and offshore renewables.



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