



# SEMAPHORE

Newsletter of the Maritime Law

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## Decision in Case Against Former Ports of Auckland CEO

### Maritime New Zealand (MNZ) v Gibson

The much anticipated judgment of the District Court in *Maritime New Zealand (MNZ) v Gibson* was delivered on 26 November. Mr Gibson is the former chief executive of Ports of Auckland (PoAL). He was found guilty of breaching his duties as an officer under ss 44 and 48 of the Health and Safety at Work Act 2015 (HSWA). The trial was held over almost two months and is one of the first New Zealand cases to consider the scope of officer duties under HSWA for the chief executive of a large organisation. It follows the recent Australian decision of *SafeWork NSW v Doble* that also considered officer duties under the equivalent Australian legislation and that was released during the trial. MNZ submitted that the *Doble* decision was wrongly decided. While not directly analogous, the *Doble* case did have many similarities but the Australian and New Zealand Courts approached the issue in quite different ways – and came to different conclusions.

### **Factual Background**

In August 2020, a stevedore was killed while on night shift when a shipping container fell from a crane. PoAL had a policy that workers should not be located within three container widths of an operating crane. The stevedore was working in this “exclusion zone” as directed by the ship leading hand when he was tragically crushed by the container.

MNZ investigated the incident and laid charges against both PoAL and Mr Gibson as an officer under s 44. PoAL accepted the charges and was convicted under s 48 of HSWA.

Under s 44, an officer of a person conducting a business or undertaking (PCBU) must exercise the care, diligence and skill that a reasonable officer would exercise in the same circumstances, taking into account (without limitation) –

- (a) the nature of the business or undertaking; and
- (b) the position of the officer and the nature of the responsibilities undertaken by the officer.

The charges against Mr Gibson alleged that he failed to exercise the care, diligence and skill that a reasonable officer should exercise:

1. to take reasonable steps to ensure that PoAL had available for use and used, appropriate resources and processes to eliminate or minimise risks of the business or undertaking, including by having –
  - a. clearly documented, effectively implemented and appropriate exclusion zones around operating cranes;
  - b. clearly documented, effectively implemented and appropriate processes for ensuring coordination between lashers and crane operators;
2. to take reasonable steps to verify the provision and use of those resources and processes.

The charge laid under s 48(1) alleged that, by failing to comply with his duty under s 44, Mr Gibson exposed PoAL's stevedores to a risk of death or serious injury – namely, the risk of being struck by objects falling from operating cranes.

The Court found Mr Gibson guilty in relation to particulars 1(a) and 2 and found him not guilty in relation to particular 1(b).

### *Particulars 1(a) and 2*

The Court found that there was a practice, particularly on night shift, of stevedores engaging in unsafe practices or cutting corners and that non-compliance was a regular feature, including stevedores not following the three-container-width rule. PoAL had been alert to these issues since at least 2014 and it was the responsibility of PoAL's officers, including Mr Gibson, to ensure that adequate systems were in place to monitor compliance and to understand work as actually carried out. On this basis, the Court concluded that PoAL's systems were inadequate in identifying work as done and reporting it to senior management and the executive team.

Crucial in the finding was that the Court considered Mr Gibson was ultimately responsible for health and safety at PoAL. He was found to be a "hands on" chief executive in relation to port operations and health and safety issues in many practical ways and retained responsibility for monitoring and reviewing the performance of his subordinates and PoAL's system.



*Nana Jacobson*

The Court then referred to several specific failings of PoAL for which he considered Mr Gibson was responsible:

- the lack of progress in creating clearly assigned responsibilities and accountability for the executive team and senior managers (as had been recommended in an audit report from KPMG in 2018);
- the failure of the Health and Safety Steering Committee to fulfil its role of providing a high-level forum for review and improvements of PoAL's health and safety policies;
- the failure to complete annual health and safety strategy plans for the financial years ending 30 June 2020 and 2021;
- the lack of focus on ensuring the progression of critical risk management in a meaningful and timely way; and
- the failure to implement hard controls relating to the three-container-width rule or exclusion zones around cranes.

Additionally, Mr Gibson had been on notice from late 2018 that PoAL had demonstrated ongoing difficulties in adequately monitoring work as done on the wharves. The Court found it was his responsibility, as chief executive, to ensure that appropriate systems and processes were put in place to address PoAL's failures in that respect.

The Court ultimately concluded that Mr Gibson had the capacity and the ability to influence the conduct of PoAL in relation to its failures and that he was in a position to ensure that processes and policies were put in place to address those failures, before they occurred. Mr Gibson was required to take active steps to obtain adequate information about the nature of the work being undertaken, the risks

associated with that work, the controls which were in place to address those risks, and as to what additional steps or controls were necessary to remove or minimise those risks.

PoAL's systems should have made Mr Gibson aware of the nature of the risk which existed and how that risk needed to be addressed and it was Mr Gibson's role to ensure that the company's systems did so.

Additionally, based on the facts – because was not a hands-off or remote chief executive, and was therefore not operating significantly removed from PoAL's day-to-day operations – he would have been personally aware of the relevant risks and what controls were or were not in place to address those risks.

### **Risk of Death or Serious Injury?**

Under s 48(1) HSWA, MNZ was also required to prove that Mr Gibson's failure exposed stevedores working at the Fergusson Container Terminal to a risk of death or serious injury, namely the risk of being struck by objects falling from operating cranes.

The Court found that a reasonable chief executive would have recognised the shortfalls in PoAL's management of exclusion zones and would have ensured PoAL utilised appropriate resources and processes to address those shortfalls. Mr Gibson did not do so and this made it materially more likely that PoAL would breach its duty of care to ensure that stevedores were not exposed to the risk of death or serious harm.

### **Comment**

This is an important decision for the New Zealand health and safety landscape. It provides a summary of principles relating to the exercise of an officer's duty of due diligence. While many are non-contentious, the scope of some obligations is potentially broad and significant, including a requirement for officers to have knowledge at an operational level.

The fact that PoAL had breached its primary duty of care in this case to ensure the health of safety of its workers was not itself sufficient for a conclusion that Mr Gibson failed in his duty. Officers have separate and independent duties to exercise due diligence to ensure the PCBU meets its obligations.

However, many of the failures of PoAL were effectively attributed to Mr Gibson by virtue of what the Court considered to have been his role in the company. In contrast, in *Doble*, the Australian Court considered that a managing director could not be expected to know everything that is going on at any given moment, and distinguished between duties of the company and the officers' duty of due diligence. In *Doble*, the hands-on approach by Mr Doble supported to the courts' assessment that due diligence was being exercised.

The Court in *Gibson* also emphasised the Mr Gibson's hands-on role in PoAL including in health and safety. However, this appears to have supported the opposite finding, implying Mr Gibson's obligations were greater because of that approach. One of the purposes of imposing duties on officers was to promote positive engagement with health and safety. The decision raises the question of whether this may discourage chief executives of similarly large and structured organisations to take a more hands-on role in health and safety matters. Clearly that would be counterproductive.

### **Bio**

Nana Jacobson is a solicitor at McElroys and part of the McElroys marine team. She assists the firm in a range of areas but has a particular interest in the health and safety space. This year Ms Jacobson assisted in the successful defence of Mr Goodhew in *Maritime New Zealand v Goodhew*. She hopes to continue to develop her skills in the health and safety space, specifically in the marine area. Prior to working at McElroys, Ms Jacobson was engaged by a boutique law firm in Wellington specialising in Māori legal issues.

This decision will be read closely and its impact on the health and safety landscape in New Zealand yet to be determined. In the meantime, it will put many chief executives on high alert.

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