

CITATION: *Work Health Authority v Whittens Pty Ltd v Kawasaki Heavy Industries Ltd [2020] NTLC012*

PARTIES: Work Health Authority
V
Whittens Pty Ltd
Work Health Authority
V
Kawasaki Heavy Industries Ltd

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22001949 & 21940827

DELIVERED ON: 24 September 2020

DELIVERED AT: DARWIN

HEARING DATE(s): 14 August 2020

JUDGMENT OF: Judge Fong Lim

CATCHWORDS:

Practice and Procedure - Work Health Prosecution – disclosure of offence known to law – defective complaint- particulars - amendment of complaint out of time

Kirk v Industrial Court of NSW [2010] HCA 1

Kidman & Co v Lowndes and Anor [2016] NTCA

Bunnings v Forest Products v shepherd [1998] WASC

Harrison v President of the Industrial Court of Queensland and ors [2016] QCA 89

Broome v Chenoweth [1946] 73 CLR 583

Director of Public Prosecutions v Kypri [2011] VR 157

Work Health and Safety (National Uniform Legislation) Act ss 3 (1)(a), 17,18,19(1) & (2) ,32 and 232

Local Court (Criminal Procedure) Act 1928 [NT] ss 22A, 55, 181-183

Criminal Code [NT] s 43BL

REPRESENTATION:

Counsel:

Complainant: Duncan McConnell

Defendant: Ms Currie for Whittens
Pty Ltd

Mr Hodgkinson SC for
Kawasaki Heavy Industries
Ltd

Solicitors:

Complainant: Worksafe

Defendant: Jackson McDonald for
Whittens Pty Ltd

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Heavy Industries Ltd

Judgment category classification: A
Judgment ID number: [2020] NTLC012
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IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22001949 & 21940827

BETWEEN

Work Health Authority

Complainant

AND

Whittens Pty Ltd

Defendant

Work Health Authority

Complainant

AND

Kawasaki Pty Ltd

Defendant

REASONS FOR JUDGMENT

(Delivered 24 September 2020)

JUDGE Fong Lim

1. The Work Health Authority (“WHA”) prosecutes the Defendants in regard to an alleged failure of both Defendants to properly discharge their duty of care imposed by the Work Health and Safety Act (Uniform Legislation) Act (“WHS Act”).
2. The WHA alleges that the Defendants’ failure to discharge their duty led to a fatal accident which occurred on 29 November 2017. On that day, Carl Delaney (Delaney) fell to his death into a cryogenic tank of Perlite where he suffocated. Perlite is a toxic substance used in the processes at the Inpex onshore facility in the Northern Territory of Australia.
3. The Defendant Kawasaki Heavy Industries Ltd (KHI) was contracted to undertake construction work at the facility and part of that work was to supervise some of the other lower level subcontractors. Whittens Pty Ltd (Whittens) was one of the subcontractors who was being supervised by KHI.

4. Delaney was employed by Whittens. Part of the work being undertaken by Whittens was repairing the inside of a cryogenic tank and that work was undertaken at height and in a confined space. There were safety standards set out in various procedure manuals which applied to working in confined spaces and at height at the site.
5. Any prosecution was required to commence within a year after the completion of the coronial inquiry (Work Health and Safety (National Uniform Legislation) Act (WHS Act). s 232 (1)(b)) The Complaints were laid on 1 November 2019 against Whittens and 4 November 2019 against KHI both within a year of the end of the coronial enquiry however any amendments must be considered in light of the fact that the limitation period has now passed.
6. It is alleged by the WHA that both KHI and Whittens breached a health and safety duty imposed by section 19 and section 32 of the WHS Act.
7. The Defendants both argue the Complaints as originally laid are defective such that they do not disclose an offence known to law. They further submit if the Court were to accede to the Complainant's application to amend the Complaints, the Court would be allowing the pleading of a new charge and that amendment ought not be allowed out of time because of the prejudice to the Defendants.
8. The Defendants also argue even if the Court exercises its discretion to allow the amendment the proposed amended Complaint does not address the fundamental issues and remains in a state where it does not clearly set out the case the Defendants are to face.
9. Counsel for both Whittens and KHI spent time setting out the elements of the offence which must be pleaded and highlighted where they say the Defendants are confused as to the case they have to face. They argued the Complaints against both their clients do not disclose all the elements of the offence.
10. WHS Act s 19 provides :
 - “(1) a person conducting a business or undertaking must ensure so far as is reasonably practicable the health and safety of
 - (a) workers engaged , or caused to engage by the person, and
 - (b) workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking
 - (2) a person conducting a business or undertaking 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”

11. The elements of the offence are:
 - a. The Defendant was conducting a business or undertaking
 - b. The Defendant owed a health and safety duty to ensure as far as it was reasonably practicable, the health and safety of workers while at work in the business or undertaking
 - c. The Defendant failed to comply with its health and safety duty
 - d. The failure exposed an individual to a risk of death or serious injury
12. Both counsel pointed out section 19 creates two different duties of care in subsections (1) and (2) and it is unclear which of those duties the WHA is alleging has been breached.
13. The WHS Act s 32 creates the offences for breaching a duty of care and the penalties which could be imposed.
14. The Complaint as originally laid against both Defendants is that the Defendant:

“being a person conducting a business or undertaking, having a health and safety duty under section 19 of the Work Health and Safety (National Uniform Legislation) Act, to ensure, so far as reasonably practicable, that the health and safety of workers at work is not put at risk for work carried out as part of the conduct of the business or undertaking, on 29 November 2017 failed to comply with its health and safety duty which failure exposed the worker to whom the duty was owed, to a risk of serious injury or death”
15. The Complaint against Whittens then contained a further 42 paragraphs of particulars.
16. The Complaint against KHI is supported by 16 paragraphs of particulars.
17. Local Court (Criminal Procedure) Act 1928 s22A provides a complaint shall be sufficient if “it contains a statement of the specific offence” with “such particulars as are necessary for giving reasonable information as to the nature of the charge”. The complaint does not have to state all essential elements of the offence but must contain a reference to the section of the law of the Territory creating the offence.
18. The Court has the power to dismiss a complaint that does not disclose an offence known to law and to amend defective complaints.
19. The Local Court (Criminal Procedure) Act ss181-183 provide:

“181 Form of information or complaint

It shall be sufficient in any information or complaint, if the information or complaint gives the defendant a reasonably clear and

intelligible statement of the offence or matter with which he is charged.

182 Information or complaint not to be objected to for irregularity. No objection shall be taken or allowed to any information or complaint in respect of -

- (a) any alleged defect therein, in substance or in form; or
- (b) any variance between it and the evidence adduced in its support at the preliminary examination or at the hearing (as the case may be):

Provided that the Court shall dismiss the information or complaint, unless it is amended as provided by section 183, if it appears to it

- (a) that the defendant has been prejudiced by the defect or variance; or
- (b) that the information or complaint fails to disclose any offence or matter of complaint.

183 Amendment of information or complaint

If it appears to the Court before whom any defendant comes or is brought to answer any information or complaint that the information or complaint:

- (a) fails to disclose any offence or matter of complaint, or is otherwise defective; and
- (b) ought to be amended so as to disclose an offence or matter of complaint, or otherwise to cure the defect, the Court may amend the information or complaint upon such terms as may be just.”

- 20. Both Defendants apply for the Complaints to be dismissed for failure to disclose an offence known to law. The Complainant accepts that complaints are defective in some particularity but reject the proposition that the original Complaints do not disclose an offence known to law. The Complainant makes application to amend both Complaints to clarify some issues and submit after amendment both Complaints give the Defendants a clearer statement of the offence.
- 21. In relation to the application to amend, both Defendants claim the prejudice they face should the amendments be allowed, would be they will be facing a new charge which would have been excluded by the expiry of the time limits set by the WHA.

Issues

- a. Does the Complaint (in relation to both defendants) fail to disclose an offence known to law even taking into account the particulars provided?

- b. Do the suggested amendments remedy the defects or do the amendments plead a new offence which the Defendants are required to answer?
- c. If the amendments are allowed is there a prejudice to the Defendants such that it would be unjust to allow the amendments?

Does the Complaint fail to disclose an offence?

- 22. It is trite to say that any Complaint should include all elements of the offence¹ however the statement of the offence in terms of the legislation² can still be sufficient if in ordinary language and “without necessarily stating all essential elements of the offence.”³ if it gives the Defendant a reasonably clear statement of the offence they are to face “with such particulars as are necessary for giving reasonable information as to the nature of the charge”⁴.
- 23. It is accepted by the WHA that both of the Complaints are defective in that they do not specify which of the duties under s19 has been breached and it seeks to remedy that defect by alleging s19(1) in the proposed amended Complaints.
- 24. What is not accepted by the WHA is that the charges as laid, read in conjunction with the particulars, do not disclose an offence known to law.
- 25. At this point it should be noted that particulars required to provide “reasonable information as to the nature of the charge”⁵ should be distinguished from “all details the a defendant may require ... to enable the preparation of his defence”.⁶
- 26. The pleading of an offence by omission is a difficult task. The WHS Act is a statute which focuses on the health and safety of worker through, among other things, the elimination or minimisation of risks arising from work⁷. The Act creates offences by omission, that is it creates a duty of care and then makes it an offence for failing to comply with that duty of care.
- 27. The High Court in *Kirk v Industrial Court of NSW (2010) 239 CLR 531* ruled that an essential element of an offence in relation to an offence of omission is to identify what actions the defendant ought to have taken to comply with its duty and what it failed to do. In *Kirk’s case* the Court was considering the provisions of the predecessor to the WHS Act being ss 15, 16 and 53 of the Occupational Health and Safety Act (OHS Act).
- 28. It is important to note that there is a distinct difference between ss 15, 16 and 53 of the OHS Act and ss 19 and 32 of the WHA. Section 15 (1) of the OHS Act created a general duty of care for an employer to “ensure the health safety and welfare at

¹ Kirk v Industrial Court NSW [2010]

² Local Court (Criminal Procedure) Act 1928 s55

³ Local Court (Criminal Procedure) Act 1928 s22A(2)

⁴ Local Court (Criminal Procedure) Act 1928 s22A(1)

⁵ S Kidman & Co v Lowndes and another [2016] NTCA 5 at para 97

⁶ Local Court (Criminal Procedure) Act s22A

⁷Work Health and Safety (National Uniform Legislation) Act 2011 s3(1)(a)

- work of all of the employers employees”. Section 16 created a general duty of care of the employer to other persons not in the employ of the employer. Section 53 then created a defence to a prosecution under section 15 or 16 that it was not “reasonably practicable” to comply with an obligation or that “ the commission of an offence was due to causes.. .. beyond control of the (defendant) and impracticable for the person to make provision”.
29. On the other hand section 19 in the present Act makes the duty of care subject to what is reasonably practicable to ensure the risk to the health and safety of workers and others from work carried out by the person conducting the business or undertaking.
 30. The difference is that the under the provisions of the OHS Act it was for the defendant to prove it was not reasonable practicable whereas under the WHS Act it is an element of the offence that the person must ensure “so far is reasonably practicable” the health and safety of workers or others. The onus is reversed in relation to the concept of what was “reasonably practicable”.
 31. In *Kirk’s case* the High Court found for a defendant to be able consider whether it had the section 53 defence available to it, then prosecution would have to identify what the defendant had failed to do with enough particularity for the defendant to consider if those actions alleged were reasonably practicable.⁸ The reasoning in *Kirk’s case* has been applied by the Northern Territory Court of Appeal in *Kidman v Lowndes [2016]NTCA 5*⁹ Their Honours were considering a complaint which did not particularise the act or omission relied upon nor provide particulars at all. At first instance the complaint was found to be defective and an order made allowing an amendment to include particulars. Their Honours confirmed the decision at first instance to allow an amendment of that complaint in terms which had yet to be decided.
 32. In the present case the lack of particularity is not the issue, it is whether the particulars provided disclose an offence known to law.
 33. The WHA submitted while the failure to identify the subsection of section 19 is a defect it is not a defect that makes the complaint a nullity because the particulars provided set out for the Defendant the alleged breach of the duty of care and the risk the worker was exposed to by that breach. The elements of the offence which identify the WHA was alleging a breach of the duty of care created by section 19(1) not (2).

Whittens

34. Argued the particulars provided in the complaint against it do not identify what reasonably practicable action Whittens had failed to do which breached its duty under section 19(1). Whittens submitted the particulars are prolix and confusing and fail to identify the risk and what they ought to have done to ensure the health

⁸ Para 14 -18 of *Kirk v Industrial Court of NSW [2010] 239 CLR 531*

⁹ Para 94, 101-103 of *S Kidman v Lowndes [2016] 314 FLR 358*

- and safety of the category of workers set out in s 19(1) (a) and (b). It is further submitted that even if the particulars do identify the risk and the defendant's failure they do not identify that failure exposed an individual to a risk of death or serious injury¹⁰.
35. Whittens submitted no reading of the lengthy and confusing particulars allows the Defendant to discern a logical description of the offence it was required to answer.
 36. The WHA responded that the particulars, while lengthy were necessarily so because of the complex contractual arrangements between all relevant parties and the many instances that made up the breach. The WHA referred to
 - a. Paragraph 13 and 19 of the particulars which they say identify the measures which Whittens ought to have taken to eliminate or mitigate the risk
 - b. Paragraphs 22, 23 27, 28, 29, 30, 34,35, 38 and 39 identify the failures to take certain measures which constituted the breaches of the duty of care
 - c. Paragraphs 25, 37, 40, 41 & 42 identify failure on the 29.11.17 which exposed workers, and in particular Delaney, to a risk of serious injury or death and which in fact resulted in the death of Delaney.
 37. Whittens submitted that none of the particulars specifically refer to what were the "reasonably practicable" actions to eliminate or minimise the risk that Whittens should have taken. Whittens also submitted that the particulars do not link any failure to take those actions which led to an exposure to the risk.
 38. In support of this submission Whittens counsel referred to the case of *Bunnings Forest Products v Shepherd*¹¹ in which the WA Court of Appeal made obiter comments about the sufficiency of the complaint which included lengthy particulars alleging many failures which in the opinion of the court were irrelevant to the prosecution. Their Honours commented that had the complaint been challenged on the basis that it did not reveal the manner of the alleged breach, it would have been "fatal to the prosecution absent an amendment".
 39. In *Bunning's case* there were particulars which only amounted to an allegation that there was a risk but did not go any further to link that risk to the duty of care. It is important to note however that the Court acknowledged an amendment to the complaint may have been open to the prosecution if the complaint was challenged at first instance and further that the assessment of the relevance of the particulars was undertaken after evidence was taken in the hearing and can clearly be distinguished from the present case. This Court does not have the benefit of hindsight on the evidence.
 40. In the matter of *Harrison v President of Industrial Court of Qld and ors [2016] QCA 89* the validity of the complaint was considered at the earlier stages of the

¹⁰ WHS Act s32(3)

¹¹ [1998] WASCA

proceeding and their Honours found even though the complaint was unclear and the charge defective and

“presents an extreme example of a pleading that informs the reader of the substance of the matter but at the same time manages almost artfully, to avoid setting out a clear statement of the relevant obligation or its contravention”

it was appropriate to amend that complaint.

41. Their Honours found the complaint could be amended by striking out duplex and unnecessary allegations to leave a clear statement of the offence alleged.
42. Whittens submitted the complaint in its present form does not disclose give a clear statement of the offence alleged nor does the proposed amended complaint.
43. I do not agree with Whittens submissions in relation to the validity of the complaint against it.
44. Even though the Complaint does not specifically refer to section 19(1) it is clear from the language of the Complaint that the offence is referring to a duty under that subsection because it at all times refers to worker/workers and not to persons other than workers.
45. The need to identify which specific worker has been exposed to the risk is satisfied by the reference to Delaney in paragraphs 14 & 15 of the particulars and the date on which he had his accident is referred to in the body of the charge.
46. It is very clear from the particulars that the prosecution arises from the death of Delaney from his fall into the tank of Perlite on 27 November 2017. It is also clear from the particulars that it is alleged there were a series of failures by Whittens through its employees which created a culture of not complying with safety system (as articulated in the particulars) which in turn led to the workers, and in particular Delaney, on 27 November 2017 being exposed to the risk of falling into the tank and dying.
47. The failure to plead the conditions in paragraph 13 were what was “reasonably practicable” is not fatal to the complaint. The Local Court (Criminal Procedure) Act s 22A only requires “particulars as are necessary for giving reasonable information as to the nature of the charge” and it is not necessary to state all elements of the offence. The charge itself refers to “reasonably practicable” and read in conjunction with the particulars I find there is reasonable information in the complaint which, although somewhat lengthy, makes it reasonably clear the offence the Defendant, Whitten, is to answer.
48. What is not clear on the particulars is which set of factual circumstances does the WHA rely upon as the basis for the breach.

49. It is accepted by the WHA the particulars could be amended to make things clearer and proposed amendments seek to clarify the offence not plead a new charge.

Are the particulars duplicitous?

50. A further complaint Whittens make about the particulars is that they are duplicitous because they plead a series of failures by employees of the Defendant to comply with certain standards and then also plead the incident on 27 November 2017. The WHA argue that is not duplicitous as those series of failures created the circumstances where the Defendant has omitted to ensure the safety of its workers by not enforcing the work system developed to guard against the risk of workers, Delaney in particular, falling into the tank of Perlite and suffocating.
51. The set of circumstances which are particularised are the various times the defendant did not enforce safety standards which in turn created a culture of non compliance with those standards and culminating in the incident of 27 November 2017.
52. The WHA submitted the Complaint does not allege several breaches it alleges a single series of contravention of safety standards which constitute a breach which on 27 November 2017 exposed Delaney to the risk of falling into the tank of perlite and dying by suffocation.
53. It is allowable for the prosecution to allege more than one contravention arising out of the same factual circumstances¹². The question in this matter is whether particularising the series of failures was particularising a systematic failure leading to exposure to risk or should each instance be laid as a separate offence.
54. The duty is to do all that is reasonably practicable and reasonably practicable is defined in the WHS Act s18 as
- “That which is reasonably be able to be done, or was at a particular time, reasonably able to be done”.
55. That section contemplates actions to be taken on a particular time as well as systems that can be put in place to operate over a period of time. If a company has identified a risk at its workplace and put systems in place to guard against that risk but has not enforced those systems the failure to enforce those systems could be the basis for a prosecution.¹³
56. It would be an untenable situation if a continuing failure to comply with work safe systems could only be the basis for prosecution on each and every one of those failures over time as individual offences.

¹² WHS Act s 233

¹³In *Kirks Case (supra)* The High Court in its analysis of what could constitute a breach refers to identification of “a particular act or omission or a set of acts or omission” see paragraphs 74 of the judgement

57. Nonetheless the particulars as laid in the original and proposed complaint do include a plea of alternative circumstances¹⁴ and the WHA has accepted there may be need for the WHA to be put to its election¹⁵.

Vicarious liability for employees' omissions

58. Whitten also submitted the prosecution relies on a form of vicarious liability for the omissions of its employees and that cannot be the basis for a prosecution under section 32.

59. This argument is flawed when considering the WHS Act s12A states that Part IIAA of the Criminal Code applies to offences under the WHS Act. The Criminal Code s43BL provides:

“If a physical element of an offence is committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority the physical element must also be attributed to the body corporate”.

60. In the present case it is clear that the physical element of the offending is an omission and therefore it is the omissions of the employees named in the particulars¹⁶ can be attributed to Whittens as the body corporate who has employed them.

Amended Complaint

61. Given the above it is my view that the proposed amended Complaint does not particularise a new charge as the substance of the breach is contained in the original particulars even though clumsily described. The proposed amended complaint seeks to clarify the factual circumstances the WHA allege support the charge.
62. The WHA acknowledged that the particulars in the original Complaint needed clarification and submitted the proposed amended complaint makes it clearer that the WHA is relying upon a series of omissions by the defendant's employees which together led to a breach of its duty of care over a period of time. That breach exposed its workers to the risk of falling into to the tank of perlite and dying of suffocation. In particular the Defendant's failures lead to the accident on 27 November 2017 resulting in Delaney's death and that was a stark example of the risk becoming reality in relation to the worker Delaney.
63. The Defendant submitted the amendment ought not be allowed as it is duplicitous and the prejudice to the defendant is that it would be required to face a charge laid out of time. No other prejudice is identified.

¹⁴ Paragraph 23 of particulars

¹⁵ John Holland Pty Ltd v Industrial Court of New South Wales [2010] NSW Court of Appeal at paragraph 72

¹⁶ See paragraph 17 & 18 of the particulars

64. Given I have found the original charge is valid and does disclose an offence known to law I do not find that the amendment would place the Defendant in the position that it would be facing a new charge out of time. Therefore there is no real prejudice to the Defendant and it is my view an amendment should be allowed in the form of the proposed amended complaint to clarify what is alleged against the Defendant subject to an election to be made by prosecution as to upon what set of factual circumstances they are relying.
65. The election the WHA must make is which set of factual circumstances it wishes to rely upon to constitute Whittens failure to comply with its duty of care. The choice is a series of failures on the 27 November 2017 or a series of failures in period before that led to a breach culminating in the incident on 27 November 2017.

KHI

66. KHI adopted the submissions made by the counsel for Whittens in relation to the validity of the complaint against it.
67. In relation to the failure of the WHA to allege the relevant subsection of section 19 the argument is the same. The charge uses the words referenced in section 19(1) and do not refer persons other than a worker or worker and therefore can only be a charge in relation to section 19(1). While technically there is a failure to reference the specific statutory offence the charge is identified in its wording and therefore the charge is not a nullity.
68. The real question in the relation to this Defendant is, do the particulars disclose the factual circumstances which support the elements of the offence which consequentially give the Defendant a reasonably clear and intelligible statement of the offence of which they have been charged?
69. The WHA conceded that unlike the complaint against Whittens the original complaint against KHI did not identify the risk which it says the Defendant failed to do all things reasonably practicable to guard against. It relies on an inference to be drawn from paragraphs 11, 13, and 14 of the particulars.
70. KHI submit that a charge that requires the Defendant to work out by inference what offence it has been accused of ought not to be sanctioned by the court.
71. Inference does not give the Defendant enough information which constitutes a reasonably clear and intelligible statement of the case they are to answer. If Defendant is left to infer what is alleged it may prepare its case on the basis of an incorrect inference. A Defendant cannot be required to be guess what the Complainant intends. The criminal process is an accusatorial process and it for the accuser to specify with sufficient particularity the charge the defendant is to face it

- is also the accuser's role to ensure the court is informed of the offence it is required to deal with and understand what evidence may or may not be relevant.¹⁷
72. A charge must articulate the risk to which the worker was exposed to allow the Defendant to understand the basis of the charge.¹⁸ The complaint did not state the risk and that is accepted by the WHA. The proposed amended complaint addresses that issue by specifically stating the risk in paragraph 9.
73. The Defendant also submitted the particulars read with the charge do not provide the reasonably clear and intelligible statement which they are entitled to from the prosecution.
74. It is immediately obvious from the particulars that the breach/s alleged by the prosecution are described as more than a breach on 29 November 2017, as pleaded in the original charge.
75. Unlike the charge against Whittens the particulars refer to breaches by particular employees of KHI on different days and in different ranges of days.
- a. in relation to the allegation of a failure by the employee Daiki Tanaguchi it is alleged the failure by that employee happened "on or about 29 November 2017"¹⁹
- b. in relation to the allegation of the failure by the employee Chi Chung Kwan it is alleged "in or about November 2017 and leading up to 29 November 2017"²⁰
76. It is also of note that the proposed amended complaint alleges a period of time "between 5 November to 29 November 2017" in the body of the charge yet none of the particulars refer to that period specifically.
77. It is relatively clear from the particulars that the charge relates to KHI's failure to effectively supervise Whittens and its employees to ensure compliance with the safety standards which were contained in the Safe Work Method Statements relating to Whittens work²¹.
78. It is also clear that Delaneys' accident was particularised as a manifestation of the risk to which the workers were exposed through KHI's failure to discharge its duty of care. It is also clear from the particulars that Delaney fell within the definition of "worker" as an employee of a subcontractor to KHI.²²
79. What is not reasonably clear is over what period of time or upon what date is the alleged breach of duty is supposed to have occurred. Is the breach one act or omission on 29 November 2017 or a series of acts or omissions leading up to

¹⁷ John L Pty Ltd v The Attorney General for the State of NSW [1987]163 CLR 508 at 519

¹⁸ Kirk v Industrial Relations Commission of New South Wales [2010]HCA 1 at 30

¹⁹ Paragraph 15 of original complaint and paragraph 18 of the proposed amended complaint

²⁰ Paragraph 16 of Original Complaint and 20 of proposed amended Complaint

²¹ Paragraph 11 of the Original Complaint and 14 of the proposed amended complaint.

²² Section 7 of the WHS act.

29 November 2017 or a series of acts or omissions on 29 November 2017? The original complaint alleges 29 November 2017 and the proposed amended complaint alleges between 5 November and 29 November 2017.

80. For the reason that neither the risk nor the breach had not been identified in the original complaint (including the particulars) the complaint is defective and without extensive amendment, is a nullity.²³ For the WHA to now allow the WHA to identify the risk and breach of duty by amendment would be an amendment to bring a new charge.
81. While there is no legislative restriction to an amendment which would have the effect of laying a new charge the Court should be reluctant to allow such an amendment.²⁴ If the amendment was allowed then there is real prejudice to the Defendant requiring them to face a charge laid out of time and thereby defeating the time limit. The Court must consider whether that would be unjust in the circumstances.

Duplicity

82. Like the proposed amended complaint in the Whittens matter and the proposed amended complaint against KHI does include particulars of facts and circumstances which are pleaded as “further and in the alternative” and if that set of factual circumstances are not the “same set of factual circumstances”²⁵ as alleged earlier in the complaint then they should be the basis for a separate charge and ought not be included as supporting the single charge.
83. The failures by Daiki and the failures by Kwan to undertake certain actions are not alleged as a set of failures which together make up the breach of duty they are particularised in the alternative therefore if an amendment were allowed the WHA would have to elect between these sets of circumstances.

Should the WHA be granted leave to amend the complaint?

84. Unlike the amendment proposed in the Whittens matter it is my view that the proposed amended Complaint against KHI does lay a new charge. It changes the date upon which the WHA alleges the breach has occurred from a single date to a period of time and the particulars do not link any alleged failure of KHI to that period of time.
85. The alleged breach by Daiki is a breach on 29 November 2017 and the alleged breach by Kwan is over a different period of time, 2 November 2017 – 29 November 2017.

²³ Director of Public Prosecutions v Kypry [2011] VR 157 at 163 at paragraph 16 per Nettle CJ

²⁴ Kypry’s case at page 165 paragraph 23 per Nettle CJ

²⁵ Section 233 of the WHS Act.

86. The proposed amended Complaint now identifies the risk and the breach which it did not in its original form.
87. The prejudice to this Defendant to allow the amendment would be to require KHI to face a new charge which charge is out of time and that should not be acceded to by this court. An amendment which defeats the time limitations period places the Defendant in jeopardy of serious prejudice requiring them to face a charge which in other circumstances would be excluded by virtue of a limitation period. That is not to say the amendment ought not be allowed if the Defendant had sufficient information before it to identify the offence for which he is charged.²⁶
88. In the case against KHI it is my view the original complaint did not provide the defendant with enough information which allowed them to ascertain the case they were to face and the proposed amendment is more than a clarification of the charge it is a laying of a fresh charge. In those circumstances it is my view it would be unjust to allow the amendment - the Complainant's application to amend the complaint fails and the KHI application to strike out the Complaint succeeds.
89. I will hear the parties on costs and consequential orders.
90. Dated this day of 2020

Judge Fong Lim
LOCAL COURT JUDGE

²⁶ Broome v Chenoweth [1946] 73 CLR 583 per Dixon J at 601.