

# Important WH&S Case Update for the Strata Industry

All managing agents should make note of the recent decision of *SafeWork NSW v Maluko Pty Ltd [2023] NSWDC 274* which is explained below and should carefully consider the following :

1. Implementation, assessment, training, induction and management of its own WH&S Policy for being a person conducting a business undertaking (**PCBU**) for its own staff as required under section 20 of the Work Health & Safety Act 2011 (**Act**).
2. A written procedure for being a person with the management and control of the workplace (**PMCW**) under section 20 of the Act for all its clients as required under section 32 of the Property Stock Agents Act 2020.
3. Suitable inclusions in quote requests addressing the Act.
4. Suitable delegation to perform WH&S duties on behalf of clients.
5. Adequate professional indemnity cover for the legal costs, knowing that the substantial penalties under the Act are not permitted to be covered by insurance.
6. Then a whole lot more compliance as required by the Act.

### *SafeWork NSW v Maluko Pty Ltd [2023] NSWDC 274.*

**\*Please note that proceedings are still on foot against the owners corporation and the managing agent but the decision against an employer at the strata scheme has been published which is summarised below.**

### Facts of the Criminal Case (Background)

The parties to the proceedings include:

- Maluko Pty Ltd (**Maluko**) – the Defendant.
- SafeWork NSW (**SafeWork**) – the Plaintiff.

### **Builder**

- Maluko's business involved building and concreting services.
- It operated its business at an industrial complex at 161 Berkeley Road, Berkeley NSW (the **Site**).
- Maluko employed five workers, including Mr Jose Martins to work at the Site.

### **Owners Corporation**

- The Owners – Strata Plan No. 93899 (the '**Owners Corporation**') had retained the services of a strata managing agent (**Managing Agent**).

## Works - Gate

- There was a common property gate fitted with a sensor which caused the electric motor to stop as soon as the gate hit any obstructions, including the stopper. Each unit owner or tenant at the site had a remote control pendant which operated the gate.

## Damage to the Gate

- On the night of 4 June 2020 a van collided with the gate at high speed. The gate remained upright but was bent out of shape, partially pulled off its track and disconnected from its electric motor. The rescue services tended to the vehicles and taped the gate into position.
- Following the collision, the gate was not repaired, replaced, made safe or otherwise attended to.
- On 5 June 2020 a number of occupants, not including Maluko, attempted to undertake makeshift repairs to the gate. These repairs did not remediate the damage to the gate nor eliminate or otherwise address the risk of the gate falling or collapsing.
- From 5 to 12 June 2020 the gate was manually opened at the beginning of each workday and manually closed at the end of the day. The gate was left either completely or partially open during the day. During this period, no risk assessment had been done in relation to the presence of the damaged gate or in relation to its manual operation. There was no Safe Work Method Statement or safe work procedure developed for the manual operation of the gate.

## The Incident

- At about 5.45am on 12 June 2020 Mr Martins an employee of Maluko arrived at the site. His daily routine involved opening the gate and Maluko's workshop prior to the arrival of the other workers. The workshop was inside the site. Prior to 4 June 2020 the gate was operated by a remote control that activated the electric motor.
- Mr Martins drove his vehicle up to the entrance at the site and alighted from his car. The gate was padlocked. Mr Martins unlocked the gate and attempted to manually push it open. Ultimately the gate came out from its guideposts and supporting rollers, whereby Mr Martins attempted to move the gate back into position between the supporting rollers but it became unstable and fell onto him.
- The gate pinned him to the ground until the other workers arrived at the site about 15 minutes later and lifted it off him. Mr Martins suffered fatal injuries as a result of the incident and subsequently died.

## Owners Corporation Conduct following 'Damage to the Gate'

- Following the collision on 5 June 2020, the Owners Corporation reported the damaged gate to the strata management company.
- That same morning on 5 June 2020, the Managing Agent received approval from the elected strata committee member to arrange repairs to the gate and fence, by issuing a work order to iAutomate Gates and Doors (iAutomate) to repair the damage to the gate, but the Owners Corporation did not inform them of any urgency.

- Neither the Owners Corporation carried out or otherwise arranged for an immediate risk assessment to be conducted in relation to the damage done to the gate.

### **Prosecution's Case**

- Maluko plead guilty to the Amended Summons submitted by the prosecution (the '**Prosecution's Case**').
- The Amended Summons plead that Maluko failed to comply with its duty under s 19(1) of The Work Health and Safety Act 2021 (NSW) ('**WHS Act**') "between 5 June 2020 and 12 June 2020".
- Further, the Amended Summons plead that the failure to comply with the duty '*exposed workers, including Jose Martins, to a risk of death or serious injury contrary to s 32 of the WHS Act*'. The "date of offence" is specifically stated to be "*Between 5 June 2020 and 12 June 2020*". The date of 5 June 2020 was the day after the gate was initially damaged after a vehicle ran into it, causing significant damage.
- The Amended Summons plead that one reasonably practicable measure which should have been taken was for Maluko to "*direct its workers, including Mr Martins, not to manually operate the gate while it was damaged and had not been repaired or replaced by a competent person*".
- There were arguments made about whether or not a penalty rate in place as at 5 June 2020 applied, or subsequently whether the increased penalty rate on 10 June 2020 should apply. It was found that the higher penalty rate should apply of being up to \$1,731,500.
- The amended Summons also plead that the following guidance material was not taken into account which was available:

### ***Guidance Material***

67. *The following guidance material was available at the time of the incident:*

1. *The Code of Practice, Managing the Risks of Plant in the Workplace, August 2019 (PX 1, Tab 14). Part 3.6 provides that plant with damage that poses a risk to health and safety should be withdrawn from service until those risks have been controlled.*
2. *The Code of Practice, Managing the Work Environment and Facilities, August 2019 (PX 1, Tab 13). Part 1.1 provides specific guidance to entities having responsibilities under s 19 of the WHS Act. Part 1.3 provides guidance on the need for prompt replacement or repair of damaged fixtures and fittings within the work environment.*
3. *A Western Australian Safety Alert published in August 2019 (PX 1, Tab 15), which provided:*
  - (a) *"When an incident occurs that results in damage to a gate or when it is identified that a gate is not working correctly, the gate should be immediately tagged out and the employer property owner and/or property manager notified."*
  - (b) *"Any damaged or defective gates should be immediately assessed and repaired by a competent person."*
  - (c) *"Until such repairs are completed, measures must be implemented to keep people away from a damaged gate (for example by temporary barricades, exclusion zones, warning signs)."*

- This was a continuing offence and the evidence shows that workers were exposed on several days to the risk, not just on 12 June 2020.
- The maximum penalty for the offence is a fine of \$1,731,500.

Following the determinative issue of whether the maximum penalty applies, the Court considered Maluko's mitigating factors and capacity to pay a fine.

### **Maluko's Defences**

- Mitigating Factors.
- Capacity to Pay a Fine.

#### **1. Mitigating Factors**

- Maluko has no previous convictions.
- Maluko is otherwise of good character. The steps which it took after the incident demonstrate this.
- Maluko is unlikely to re-offend.
- Maluko has good prospects of rehabilitation. It has taken positive steps to guard against the risk of an incident such as this ever happening again. It has brought its documentation and its procedures into line with those which, on all the evidence, should have been in place before this incident occurred.
- Maluko has shown remorse for the offence. It has provided evidence that it has accepted responsibility for its actions and has acknowledged that the death of Mr Martins was caused by its actions.
- Maluko entered a plea of guilty.
- Maluko gave assistance to law enforcement authorities. It cooperated at all times with the prosecutor and provided all documents requested in a prompt fashion.

#### **2. Defences /Capacity Pay a Fine**

- Maluko sought to have its fine reduced on the basis of a limited capacity to pay.

#### **Decision/Penalty**

- Maluko Pty Ltd is convicted and the appropriate fine is \$500,000 but that will be reduced by 25% to reflect the early plea of guilty.
- Order Maluko Pty Ltd to pay a fine of \$375,000 and to pay the prosecutor's costs agreed in the amount of \$44,000.

## Change to the Act concerning the ability for insurance to cover a penalty

Effective from 10 June 2020 following the inclusion of section 272A to the Act it is no longer permissible for insurance products to indemnify the insured for penalties imposed under the Act for incidents occurring after that date.

This is significant as managing agents are often a PMWC, regardless of whether their client is exempt from being a PCBU under section 7 of the Work Health & Safety Regulation 2020 (**Regulation**). Further, this exemption is commonly misapplied and does not apply to owners corporations where common property is used for non-residential purposes, like, short term letting or telecommunications facilities.

### How do we help?

We help management companies:

- a) To understand the relevant complex legislative provisions of the Act and Regulations;
- b) Develop their WH&S policy and written procedure to comply with their PCBU obligations;
- c) Develop their written procedure for being a PMCW for clients; and
- d) Develop their delegation and amendments to quote requests.

It is fair to say that in the strata industry the Act is widely misunderstood and not complied and for the vast majority there is a lot of room for improvement.

If you need a Work Health & Safety policy or assistance with your existing one click the link below to view our flyer and see what we can offer you today!

[Bannermans WH&S Policy Flyer](#)

We have also written to the **Minister for Industrial Relations, and Minister for Work Health and Safety in this regard to seek reform, but any reform typically takes a long time and may not be forthcoming. Please see link below for more information.**

[Submission on the proposed reform in relation to the Work Health and Safety Act 2011 and Work Health and Safety Regulation 2017](#)

**Prepared by Bannermans Lawyers**

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