IN THE DISTRICT COURT
HELD AT CHRISTCHURCH

CRN 5009040301

BETWEEN **DEPARTMENT OF LABOUR**

Informant

AND **UNITED FISHERIES LIMITED**

Defendant

Hearing: 3-5 February 1997

Counsel: Mr G M Lynch for Informant
Mr J G Matthews and Mr A J R McNee for Defendant

Decision: 10 February 1997

RESERVED DECISION OF JUDGE T M ABBOTT

Introduction

United Fisheries Ltd faces a charge under the Health and Safety in Employment Act 1992 (to which I shall refer as "the Act"), which results from an accident which occurred at an ice-making plant at Lyttelton on 31 July 1995 and which resulted in the death of an employee of one its subsidiary companies, Mr Ronald van Duinen. I record at the outset that, to avoid unnecessary distress to his family, an order prohibiting the publication of

Mr van Duinen's name was made at the commencement of the hearing, and that order applies in respect of any publication of this judgment.

The charge against the company alleges that:

> "... on 31 July 1995 at Lyttelton [it] did commit an offence against sections 16 and 50 Health & Safety in Employment Act 1992 in that [it] failed to comply with section 16 of the Health & Safety in Employment Act 1992, in that being in possession of a place of work, namely an ice tower at No 6 Wharf Lyttelton Port, Christchurch, failed to take all practicable steps to ensure that persons in the place of work were not harmed by a hazard that arose in that place of work."

The charge was heard by me over three days last week. I heard evidence from eight witnesses for the prosecution and from one witness for the defendant, its managing director, Mr Kypros Kotzikas. The health and safety inspector who investigated the accident, Mr Hodgson, produced a number of photographs and other exhibits, and he also produced a video which he took on the day of the accident and then a week later. Finally, I also took the opportunity to take a view of the ice plant, that being on the afternoon of the second day of the hearing.

The Act

It is convenient at this point to review the relevant provisions of the Act, the long title to which is "An Act to reform the law relating to the health and safety of employees, and other people at work or affected by the work of other people". The Act deals in a generalised manner with health and safety issues in places of work, and it replaced a number of statutes which regulated safety standards in particular working environments, including the Machinery Act

1950, which was its predecessor in the context of the present case. As might be expected, the Act therefore imposes duties of a general nature on employers in respect of the safety and health of their employees while at work, and it requires employers to be proactive in identifying and then eliminating, isolating or minimising actual or potential hazards to employees. However, it must also be emphasised that the Act does not impose obligations of an absolute nature on employers or others.

The charge alleges a failure by United Fisheries to comply with its obligation as an occupier of a place of work. Section 16 of the Act provides as follows (after the marginal note "Duties of persons with control of places of work"):

> "To the extent that a person is -
>
> (a) The owner, lessee, sublessee, occupier, or person in possession of a place of work or any part of a place of work (not being a home occupied by the person); or
>
> (b) The owner, lessee, sublessee, or bailee, of any plant in a place of work (not being a home occupied by the person), -
>
> the person shall take all practicable steps to ensure that people in the place of work, and people in the vicinity of the place of work, are not harmed by any hazard that is or arises in the place of work."

As I said in *Department of Labour v Berryman* [1996] DCR 121 at p 128, it is surprising that section 16 does not use the definition of "person who controls a place of work" which is given in section 2(1) of the Act, but I say no more on that point.

The terms "place of work" and "hazard" are also defined in section 2(1), the definitions being as follows:

> " 'Place of work' means a place (whether or not within or forming part of a building or structure) where any person is to work, is working, for the time being works, or customarily works, for gain or reward; and, in relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee), -
>
> (a) Where the employee comes or may come to eat, rest, or get first-aid or pay; or
>
> (b) Where the employee comes or may come as part of the employee's duties to report in or out, get instructions, or deliver goods or vehicles; or
>
> (c) Through which the employee may or must pass to reach a place of work."

> " 'Hazard' means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; and 'hazardous' has a corresponding meaning."

I infer that the charge relates to section 16 of the Act because Mr van Duinen was employed not by United Fisheries Ltd but by a subsidiary company, Seafarer Freightlines Ltd. Section 6 of the Act, which relates to the duties of employers in respect of employees, only applies in the context of an employer-employee relationship. However, for present purposes there is no real distinction between the duties which are imposed by section 6 and the duties which are imposed by section 16, that being for reasons which will become apparent later in this judgment.

The Act also imposes duties on employees. Section 19 provides as follows:

> "Every employee shall take all practicable steps to ensure -
>
> (a) The employee's safety while at work; and
>
> (b) That no action or inaction of the employee while at work causes harm to any other person."

While section 6 and section 16 (and other provisions of the Act) impose duties on employers and persons in control of places of work, the relevant offence-creating provision for present purposes is section 50, which provides that every person who fails to comply with any of those provisions commits an offence. Section 53 provides that in any prosecution under section 50 it is not necessary for the informant to prove that the act or default in question was intentional, which means that offences against section 50 are offences of strict liability. Conversely, the more serious offences which are created by section 49 of the Act involve proof of knowledge and recklessness.

Section 16 uses the term "all practicable steps" to define the extent of the obligations which are imposed on occupiers of places of work, and that term is similarly used in other sections of the Act, including (for example) section 6, sections 8 to 10 (which relate to the elimination, isolation, or minimisation of significant hazards to employees), section 17 (which relates to duties of self-employed persons), and section 19. The term "all practicable steps" is defined in section 2(1), as follows:

> " 'All practicable steps', in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to -

(a) The nature and severity of the harm that may be suffered if the result is not achieved; and

(b) The current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and

(c) The current state of knowledge about harm of that nature; and

(d) The current state of knowledge about the means available to achieve the result, and about the likely efficacy of each; and

(e) The availability and cost of each of those means."

It is of course the obligation of the prosecution to prove the elements of the offence with which a defendant is charged. In my view it is therefore for the informant to prove that a defendant has failed to take "all practicable steps" in respect of the obligation which the defendant is alleged to have breached. The fact that, as I have mentioned, section 53 of the Act provides that offences under section 50 are offences of strict liability does not in any way alter or affect that basic principle.

It therefore follows that an inadvertent failure to take all practicable steps to ensure that the appropriate statutory objective is satisfied will constitute an offence, so long as the failure in question can be proved. However, because offences under the Act are public welfare regulatory offences, the defence of total absence of fault, in terms of *Civil Aviation Department v MacKenzie* [1983] NZLR 78, may nevertheless be available to a defendant, even if the breach in question is proved. However, as the offence itself relates to a failure to take all practicable steps to achieve the relevant statutory objective, it seems to me that the *MacKenzie* defence would be available as a defence to such a charge only in limited supervening circumstances. That is because the definition of "all practicable steps" in section 2(1) imports considerations which would generally

be relevant in the context of a defence of total absence of fault, in respect of which the onus is of course on the defendant.

Expressed in another way, if the prosecution proves a failure to take all practicable steps in respect of the relevant statutory obligation, a conviction will result unless the defendant is able to prove, on the balance of probabilities, that the failure to take all practicable steps occurred without any fault on its part or that in the circumstances it acted as any responsible and reasonable employer would have acted. At the risk of repetition, as considerations which are relevant to these issues will generally also be relevant to whether a failure to take all practicable steps in respect of the relevant statutory duty has been proved, the crucial issue will therefore invariably be whether a breach of that duty has been proved.

I make these comments regarding onus of proof issues notwithstanding the suggestion in *Mazengarb's Employment Law* (para 6002.9, page N/26) that the authorities under the predecessors to the Act, which were to the effect that it was for the defendant to prove on the balance of probabilities that it was not reasonably practicable to comply with the particular statutory or regulatory requirement, are likely to continue to apply in the context of the new statutory regime. The leading authority for that principle is *Akehurst v Inspector of Quarries* [1964] NZLR 621, in which Richmond J held that the words "so far as may be reasonably practicable" in section 16(1) of the Quarries Act 1944 introduced an "excuse, or qualification" in terms of section 67(8) of the Summary Proceedings Act 1957, thereby imposing on the defendants in that case the onus of proving that they had observed the particular rule in question to the extent that was reasonably practicable.

In Australia the onus on the issue of practicability in the employment safety context rests on the informant. In *Chugg v Pacific Dunlop Ltd* (1990) 64 ALJR 599, which related to section 21 of the Occupational Health and Safety Act 1985 (Victoria), the High Court of Australia reached that conclusion notwithstanding the fact that the legislation, while imposing duties of a general nature, expressed those duties by using the qualification "so far as is practicable".

This issue does not seem to have been addressed in New Zealand since the Act came into force, although the judgment of Hansen J in *Buchanan's Foundry Ltd v Department of Labour* (High Court, Christchurch, AP 48/96, 7 July 1996) seems to proceed on the basis that it is for the informant to prove a failure by the defendant to take all practicable steps, although the defence of total absence of fault also remains available to the defendant.

In my view the change in legislative emphasis from detailed rules governing particular workplace environments to a set of generalised obligations on employers and others means that it would be invidious if a defendant had to bear the onus of proving that all practicable steps were taken in a particular factual situation. As the legislative phraseology has also changed from expressing issues of reasonable practicability in qualified terms to expressing those issues in terms of positive duties which are cast on employers and others, that change also supports the view which I have expressed.

Furthermore, in many cases the evidence for the prosecution will identify both the hazard in question and a method by which the hazard could be eliminated or minimised. In that situation an inference that the defendant has failed to take all practicable steps to achieve the statutory objective in question could appropriately be drawn unless the defendant either is able to point to factors

which negate the inference or calls evidence, which would generally relate to factors such as cost or suitability, which are often within the exclusive knowledge of an employer or an occupier of a place of work, and the effect of which would be to rebut the inference. In other words, the evidence which is adduced by the prosecution will frequently be such as to give rise to an evidential onus on the defendant, which the defendant can discharge only by calling evidence: see *Chugg v Pacific Dunlop* at pp 603-604.

In this context it is necessary to bear in mind that the definition of "all practicable steps" is (the emphasis is mine) "all steps to achieve the result that it is *reasonably* practicable to take *in the circumstances*", having regard to the five particular factors which are then listed. The reference to "in the circumstances" is clearly intended to emphasise that it is the particular factual situation which must govern the assessment which the employer or other person is required to make, and in the context of a prosecution the issue will then generally be whether in those circumstances that assessment was appropriate. However, it must also be noted that the obligation is to take "*all* practicable steps" (the emphasis is again mine), and the fact that the employer or other person may have taken *some* practicable steps to discharge the obligation in question will not afford a defence.

The definition of "all practicable steps" is clearly based on the classic discussion of the meaning of "reasonably practicable" in the judgment of Asquith LJ in *Edwards v National Coal Board* [1949] 1 KB 704, 712, as follows:

> " 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross

> disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident."

With the exception of the reference to the burden of proof, in my view this summary remains apposite for present purposes, although in the final analysis the statutory definition of "all practicable steps" must of course be determinative.

Finally, as Hansen J emphasised in *Buchanan's Foundry Ltd v Department of Labour*, it is necessary to remember that "a certain, complete protection against all potential hazards" is not required of an employer (p 6), nor is it appropriate that a determination as to whether an employer has taken all practicable steps be made with the benefit of hindsight, because that issue "must be judged on the basis of what was known at the relevant time" (p 14), in which respect Hansen J referred to the final sentence of the passage from the judgment of Asquith LJ in *Edwards v National Coal Board* which I have just quoted.

Against the background of that outline of the scheme of the Act and the obligations which it imposes on employers and others, I now turn to the evidence relating to the accident.

The Evidence

The ice-making plant in which the accident occurred is at the seaward end of No 6 Wharf at Lyttelton. The plant is housed in a tower-shaped building, the ice-making equipment being under the roof and there being two storage bins

below. For convenience I shall generally refer to the building as either "the ice tower", which is the term which was used during the hearing, or "the ice plant".

The ice tower was constructed in 1984 by Lyttelton Ice Plant Ltd, the shareholders in which were United Fisheries Ltd and another fishing company, Independent Fisheries Ltd. However, since 1989 the plant has been owned by a partnership between United Fisheries Ltd and Independent Fisheries Ltd, each of which occupies one side of the building and has its own storage bin and discharge facilities.

The ice plant operates in the following manner. As I have mentioned, the ice-making equipment is in the roof of the building. Ice is then deposited through tubes into one of the storage bins, where it remains until it is required. The internal wall of each storage bin slopes down towards the exterior wall, forming a channel, in which there is an auger, which is a type of screw conveyor. When it is activated, the auger, which runs the full length of the storage bin, conveys the ice to the end of the bin, from which point an external auger conveys the ice to either a truck or a fishing vessel, which would be respectively either on the wharf or moored alongside.

When the ice tower was constructed the two internal augers were not covered at all. However, in 1985 a plate was installed over the centre portion of each auger. The evidence of Mr Ronald Threadwell, who is United Fisheries' marine superintendent, was that the plate was installed principally for safety reasons, although it also served to prevent the auger motor burning out because of the weight of ice on the auger. Although the evidence was not clear on this point, it may have been at the same time that the vertical internal wall which divides the plant into two units was installed, the original layout being a single storage bin

with two sloping internal walls forming an apex, which meant that ice would fall on one side or the other and would then go down into the auger on that side.

Although Independent Fisheries uses its side of the ice plant principally to supply ice to its own fishing vessel, United Fisheries uses its unit both to supply ice to its own vessels and to sell ice to commercial fishermen. Initially there was a key switching system which allowed users to operate the ice plant, but the current system (which was in place in 1995) involves the use of code numbers and an "on/off" button to activate the power supply to the augers on the United Fisheries side of the plant. The internal auger is then started by depressing one of two foot pedals, which are adjacent to the two doors which give access to the storage bin. The auger operates only when and while one of the foot pedals is depressed, so that the auger stops when the operator takes his foot off the pedal, that apparently occurring virtually instantaneously.

The two doors which I have mentioned are at each end of the United Fisheries side of the ice tower, the external auger being adjacent to the south west door. The doors are kept locked while the plant is not being used, and to obtain access to the storage bin a user must obtain a key from either Mr Threadwell or United Fisheries' transport manager, Mr Jones. The doors enable an operator to gain access to the bin so that ice which has solidified can be knocked down into the auger with a shovel. This is apparently a problem particularly in cold weather or if the ice in the storage bin has been there for several days.

In those circumstances the operator may be able to free the ice by leaning into the bin from the access platform outside the door and knocking the ice down from that position. However, if there is a solid mass of ice over the centre plate or high up in the bin, the operator must climb through the door so that he can then free the solidified ice from inside the storage bin. Because the internal

auger can be operated only by keeping the foot pedal depressed, the operator must release the pedal before entering the bin, and the auger then stops. As each access door is approximately a metre above the entry platform on which the foot pedal is positioned, it is therefore physically impossible for an operator to have his foot on the pedal and be inside the storage bin at the same time.

It is clear from this summary of how the ice plant operates that the system was designed with safety considerations in mind. Although the instruction panels on and adjacent to the doors to the storage bin are somewhat outdated, that being because they refer to the previous key-based activation method, the panels clearly convey the message that the plant is a potential hazard. Under the heading "Danger" the panel on each door to the storage bin gives the following warning and instructions in red capital letters:

> "Exposed auger inside ice bin doors.
>
> Remove key from meter before entering bin.
>
> Operate only one auger foot control at a time."

At approximately 1 p.m. on 31 July 1995, which was a Monday, Mr van Duinen and two other employees of Seafarer Freightlines Ltd, Messrs Stephens and Cooney, went to the ice plant to load ice onto a truck. The ice was to be transported to Picton, where it was to be used on the "Austro Carina", a United Fisheries fishing vessel. Mr Stephens, who gave evidence, and Mr Cooney were under Mr van Duinen's supervision, and they were working inside the truck loading the ice into fish crates as it came out of the external auger. Mr van Duinen was responsible for operating the internal auger, which involved ensuring that the ice continued to move into the auger and that any solid blocks or peaks of ice were knocked down into the auger channel. Because the

weather had been particularly cold during the preceding week, the ice in the storage bin had solidified to a greater extent than usual, which meant that Mr van Duinen had to go into the storage bin on several occasions to knock ice down.

Mr Anthony Threadwell is the managing director of Pegasus Bay Fishing Co Ltd, whose store is on the wharf near the ice tower. At approximately 1.30 p.m. on 31 July 1995, by which time Mr Stephens and Mr Cooney had loaded approximately 190 of the 300 cases of ice which were required for the "Austro Carina", Mr Threadwell heard another fisherman calling for him. In response to the call he ran to the ice plant and climbed onto the south east access platform, the door from which was open. When Mr Threadwell looked into the storage bin he saw that Mr van Duinen was jammed under the central plate which covered the auger, with one of his legs being trapped in the auger and the other being between the auger and the central plate.

When he looked into the storage bin Mr Threadwell also noticed that the auger was stationary. However, after checking that the emergency services had been contacted, Mr Threadwell returned to the storage bin to comfort Mr van Duinen, and he then noticed a grey steel bracket, which was near the foot pedal on the access platform. Although he did not see the bracket when he first went to see what was wrong, Mr Threadwell's evidence was that he may have knocked it off the foot pedal when he climbed onto the platform. When Mr Hodgson visited the ice plant with Mr Threadwell on 4 August 1995, the bracket was by the south east corner of the building, and Mr Hodgson took possession of it.

Notwithstanding the actions of Mr Threadwell, Mr Stephens (who cut the belt to the auger drive so that the tension on Mr van Duinen's trapped leg would be released), and the emergency services, Mr van Duinen died in Christchurch

Hospital later on 31 July 1995, the cause of death being in effect loss of blood resulting from the injuries which he sustained in the accident.

The Occupational Safety and Health Service of the Department of Labour (to which I shall refer as "OSH", which is also how it is colloquially known) was notified of the accident by the Lyttelton Police. Mr Hodgson arrived at the scene at 2.45 p.m. on 31 July, at which time Mr van Duinen was still trapped in the auger. Mr Hodgson's initial investigation of the accident resulted in prohibition notices pursuant to section 41 of the Act being issued to both Independent Fisheries and United Fisheries later that day, in terms of which both companies were required to cease using the ice plant until the internal augers were guarded. The prohibition notices were removed on 17 August and 23 August 1995 respectively, in each case following the installation of a fixed guard over the auger.

The guard which Independent Fisheries installed over the auger on its side of the ice plant consists of a single grate at each end of the centre plate, the effect of which is to prevent a foot or a hand from coming into contact with the auger. The grille cost approximately $5,800 to manufacture and install, and, although it is now slower to load ice from the ice plant, the auger operates satisfactorily with the grille in place.

The guard over the auger on the United Fisheries side of the ice plant is slightly different, in that it has double parallel bars and is fixed closer to the auger than is the grille over the Independent Fisheries auger. United Fisheries has also replaced the centre plate with a pitched structure, which is designed to reduce the build up of solidified ice in the central part of the storage bin. However, with the grille in place an operator can also safely work inside the

storage bin with the auger running, and the same applies in respect of the Independent Fisheries side of the plant.

It was clear from the evidence that Mr Hodgson's investigation of the accident was both professional and thorough. Because there were no eye witnesses to the accident, and because Mr van Duinen himself could not be interviewed prior to his death, the investigation focused on the system by which the internal auger on United Fisheries' side of the ice plant was operated.

The evidence of Professor Gough of the Department of Electrical and Electronic Engineering at the University of Canterbury, which was read by consent, was to the effect that the electric motor which drives the auger and the associated electrical control system appeared to be in good working order, although the possibility of a malfunction could not be totally discounted. Professor Gough also found that the foot pedal which operates the auger from outside the south east door was working reliably and that the weight which must be applied to the pedal to activate the switch is at least 2 kilograms. Mr Hodgson's evidence was that if the bracket which Mr Anthony Threadwell saw on the platform on 31 July had been placed on the foot pedal, it would have applied a weight of 2.38 kilograms to the pedal.

Although other possibilities were mentioned during the hearing, including the possibility that ice falling out of the storage bin door may have activated the foot pedal, in my view the only inference which can reasonably be drawn from all the evidence is that Mr van Duinen activated the foot pedal by placing the bracket on it, that he then climbed into the bin to free some solidified ice, and that while in the bin he slipped and fell onto the auger, then being trapped against the centre plate. While I am conscious that such a conclusion, which reflects adversely on Mr van Duinen and on his failure to take prudent

precautions for his own safety, should not be reached unless there is compelling evidence to that effect, all the evidence points to that being the only reasonable inference which can be drawn. Indeed, although it is not determinative, both the prosecution and the defence have put their cases on that basis, although the prosecution case was not limited to that factual scenario.

On 4 August 1995 United Fisheries gave OSH written notice of the accident, which is required in such circumstances by section 25(3) of the Act. In the memorandum which accompanied the notification form, the general manager of United Fisheries, Mr Andre Kotzikas, said that to override the foot pedal switch by placing an object on the pedal, so that the operator could then work inside the storage bin while the auger was running, was not the correct procedure when operating the ice plant and that users of the facility were warned against entering the ice plant while the auger was operating. That was also the evidence of the company's managing director, Mr Kypros Kotzikas.

It is clear from the evidence of Mr Jones and Mr Ronald Threadwell that Mr van Duinen and other users of the ice plant, in particular commercial fishermen, were warned that they should not enter or be in the storage bin while the auger was running. However, it is also clear from the evidence that that instruction was not always observed. On two or three occasions Mr Jones himself was in the storage bin while the auger was running, although on each occasion it was stationary when he entered the bin and was then activated by another worker once Mr Jones was on the centre plate, from which point he would shovel ice into the auger.

Mr Dillon, who is the skipper of a fishing trawler, followed a similar practice, although he said that on occasions he stood with his feet straddling the auger

while it was running and broke up ice so that it would go into the auger. Mr Dillon also said that he had seen other people, although he could not name them, put a weight on the pedal and then climb into the bin to shovel ice while the auger was running.

Mr Anthony Threadwell, who has already been mentioned and who is also a commercial fisherman, said that he would occasionally go into the storage bin to break up ice and shovel it into the auger while another person stood on the access platform and operated the foot pedal. When Mr Matthews asked him if there was any problem with the procedure of switching off the auger, going in to the bin to free up some ice, getting out of the bin, and then reactivating the foot pedal, Mr Threadwell replied that there was no problem with that procedure but that it was "an awful lot slower" than breaking up the ice from inside the bin with the auger running. When a similar question was put to Mr Ronald Threadwell, his answer was to similar effect.

There are two further factors which are relevant in this context. The first is that, although United Fisheries charges for ice on a per tonne bases, the formula which is used for that purpose is based on the number of revolutions of the internal auger. It follows that it is in the interests of a user of the facility to ensure that the auger is full of ice when it is operating, and this applies not only to commercial fishermen but also within the United Fisheries group, because its vessels and subsidiaries all apparently operate on a stand alone cost structure basis. The second factor is that, especially in winter or adverse weather conditions, operating the ice plant is not a pleasant task. As Mr Stephens said, users of the plant try to get the job done as quickly as possible.

Mr Stephens' evidence was also that, if there were four workers loading a truck, one of them would often stand on the access platform and would operate the

foot pedal while another worker was inside the ice tower shovelling ice. He also said that on occasions, if they were short of time and if the ice was flowing well, one of the gang would put a weight on the foot pedal to activate the auger while they all worked in the back of the truck, in which situation there was no one at the storage bin while the auger was running.

Apart from Mr Jones' own breaches of the instruction that no one should be in the storage bin while the auger was running, none of these practices were known to anyone in the management of the company, in particular Mr Kypros Kotzikas, Mr Andre Kotzikas, Mr Ronald Threadwell, and Mr Jones himself. It is clear from the evidence that Mr van Duinen did not report any such breaches to Mr Jones, to whom, as the foreman in United Fisheries' transport division, he was responsible. Mr Threadwell was also not aware that either any United Fisheries employees, in particular Mr van Duinen, or any fishermen were going into or were in the storage bin while the auger was running, nor was he aware that anyone was overriding the foot switch. Although when he was interviewed by Mr Hodgson on 2 August 1995, Mr Andre Kotzikas said that Mr Threadwell had made checks and observations to ensure that the correct procedures were being followed by United Fisheries employees and other users of the ice plant, Mr Threadwell's evidence was not to that effect but was that he did not know who was authorised by United Fisheries to operate the ice plant.

In the statement which he made to Mr Hodgson on 2 August 1995 Mr Andre Kotzikas also said that no safety assessment of the ice plant had been made since it was constructed in 1984, although an assessment of actual or potential hazards had been made at that time and appropriate precautionary steps had been taken. Mr Andre Kotzikas said that the company had an "internal

preventative maintenance system", which allowed any employee to report any safety issue relating to any equipment or plant.

The collective employment contract for employees of the United Fisheries group which was in force at the time of the accident, which was dated 16 November 1994, also dealt with safety issues. The relevant clause of the contract was clause 25, which provided as follows (clause 25.4 is irrelevant for present purposes and is therefore omitted):

> "25.1 The parties shall comply with the provisions of the Health and Safety in Employment Act 1992.
>
> 25.2 It shall be the responsibility of every employee covered by this contract to work safely and to report any hazards, accidents or injuries to the employer as soon as practicable.
>
> 25.3 It is a condition of employment that safety equipment and clothing required by the employer to be worn or used by the employee must be worn or used, and that safe working practices and the employer's safety rules be observed at all times."

In this context it was emphasised by the defence during the hearing that Mr van Duinen was the leader of the employees' representatives who negotiated the collective employment contract and that he signed the contract on behalf of the employees of the United Fisheries group. Because Mr van Duinen was, in effect, second in charge of United Fisheries' transport division, Mr Jones being the manager of that division, he was also paid a responsibility allowance as from 25 September 1994, which was the commencement date of the collective agreement. As I have already mentioned, Mr van Duinen was in charge of Mr Stephens and Mr Cooney when they went to Lyttelton to load ice for the "Austro

Carina" on 31 July 1995, and, unless Mr Jones himself was present, Mr van Duinen was in charge of all such trips to Lyttelton to load ice.

There are three further aspects of the evidence which I should mention, although in saying that I should also emphasise that I have considered all the evidence which was given or put before me by way of exhibits during the hearing, and the fact that I have not mentioned a particular point does not mean that I have not considered that point.

Firstly, Mr Dillon said that approximately seven years ago he was employed as a maintenance engineer by another fishing company, Sanford (Sth Is) Ltd, which had its own ice plant at Lyttelton. Mr Dillon said that Sanford's ice tower was almost identical to the United Fisheries/Independent Fisheries ice tower but that it had a grate over the internal auger, which meant that a worker could safely be inside the plant to shovel ice while the auger was running.

Secondly, on 3 October 1994 the issue of guards over augers was raised by OSH in a letter to United Fisheries in respect of its processing plant at Parkhouse Road, Sockburn. The letter in question was addressed to Mr Kypros Kotzikas, and, although he could not remember receiving it, Mr Kotzikas said that there were a number of meetings with OSH representatives at the time regarding health and safety issues.

Thirdly, Mr Hodgson also produced a copy of a 1981 Department of Labour publication which was entitled "The Guarding of Screw Conveyors". As Mr Hodgson said in his evidence, each side of the United Fisheries/Independent Fisheries ice plant is essentially a large hopper over a screw conveyor, an auger being a type of screw conveyor. The 1981 publication, which related to the responsibilities of owners of machinery under the Machinery Act 1950,

remains relevant in the present context, because it emphasised the hazards which a screw conveyor presents to operators and others and the importance of guarding screw conveyors to prevent access to the screw by any part of the body or clothing of an operator or any other person.

Against the background of that summary of the evidence, I now turn to consider the issues.

The Issues

Three issues require determination in the context of the charge. Firstly, was the ice plant, and in particular the storage bin, a place of work when Mr van Duinen became trapped in the auger on 31 July 1995? Secondly, if it was, has the informant proved that United Fisheries failed to take all practicable steps to ensure that Mr van Duinen was not harmed by a hazard in that place of work? Thirdly, if the answer to the second question is in the affirmative, is it a defence to the charge that Mr van Duinen acted in breach of the duty which section 19 of the Act imposes on all employees? However, although I have expressed the second and third issues as separate issues, they are in many respects two sides of the same coin.

The "Place of Work" Issue

In his submissions Mr Matthews contended that the storage bin in the ice plant was a place of work when the auger was not operating but was not a place of work when the auger was operating. He pointed out that the storage bin was a confined area where employees and other users of the ice plant were not permitted to be while the auger was running, and he contended that what

Mr van Duinen apparently did was to go into the bowels of a highly dangerous machine for no good reason and for no benefit to his employer.

In essence, Mr Matthews' submission was that there is no reason why a place cannot be a place of work in some circumstances but not a place of work in other circumstances, and he contended that in this context "work" must be a task which is prescribed by an employer, not an activity which an employee unilaterally elects to undertake.

However, the fact that an employee may disobey an instruction which has been given by his or her employer does not mean that the employee is no longer working, or that the employment contract has thereby automatically terminated, although the breach of the instruction may give the employer the right to terminate the employment contract. In that factual scenario an employee is still working, although contrary to instructions, and the employee is still entitled to be paid for his or her time and effort.

In my view Mr Matthews' submission also overlooks the plain meaning of the words which are used in the definition of "place of work" in section 2(1) of the Act. The definition includes "a place ... where any person ... is working ... for gain or reward". Furthermore, the definition of "at work" in section 2(1) is "present, for gain or reward, in the person's place of work".

As I said in *Department of Labour v Berryman* (at p 133), the meaning of "place" in the present context is "a particular portion of space" or "a portion of space occupied by a person or thing" (*Concise Oxford Dictionary*, 8th ed). The phrase "place of work" must therefore in my view have a temporal meaning, namely that it is a portion of space where a person is while at work. What the person is doing at the time in question, and in particular whether he or she is

complying with any directions which have been given by his or her employer, is irrelevant in the present context.

Finally, bearing in mind that it is a feature of the human condition that employees do not always act in a common sense or rational manner, it would in my view be totally contrary to the purpose of the Act if the obligations which the Act imposes on employers and others were to apply only if employees act in strict compliance with their employment obligations. In this context, the provisions of section 5 of the Act must be borne in mind (section 5(2)(c) is of little relevance for present purposes and is therefore omitted):

> "(1) This Act's principal object is to provide for the prevention of harm to employees at work.
>
> (2) For the purpose of attaining its principal object, this Act -
>
> (a) Promotes excellence in health and safety management by employers:
>
> (b) Prescribes, and imposes on employers and others, duties in relation to the prevention of harm to employees."

I therefore reject Mr Matthews' submission that, when Mr van Duinen went into the storage bin of United Fisheries' ice plant on 31 July 1995, it was not his "place of work". In my view the bin remained Mr van Duinen's place of work, notwithstanding that he went into it while the auger was running and therefore acted in breach both of an instruction which he had been given by his employer and of his duties under section 19 of the Act.

The "All Practicable Steps" Issue

In his submissions Mr Matthews postulated the question which must be answered in the context of this issue and the related section 19 issue as follows:

> "Is the employer liable, when, without any reason which benefits the employer, an employee deliberately overrides an operating system and by that means alone puts himself at risk, in circumstances where the employer does not know of the practice in question and the worker is trained in safety matters and holds a position of responsibility?"

Mr Matthews then referred to nine factors which he submitted are relevant in that context. Firstly, Mr van Duinen's action was deliberate and not careless. Secondly, Mr van Duinen's action was of no benefit to either United Fisheries or his employer, Seafarer Freightlines. Thirdly, it was physically impossible for Mr van Duinen to be exposed to the risk unless the system was overridden. Fourthly, the risk was obvious. Fifthly, his employer had told Mr van Duinen not to go into the storage bin while the auger was running. Sixthly, there was a danger warning on the doors to the storage bin. Seventhly, Mr van Duinen was a senior employee and had a duty to report any safety problems. Eighthly, Mr van Duinen acted in breach of both clause 25 of his employment contract and section 19 of the Act. Finally, no one had told United Fisheries' management of the practice involving the overriding of the foot pedal.

However, in my view these factors, while significant, are not determinative of the issue, nor is the question which Mr Matthews postulated the question which must be answered. As Mr Lynch submitted, the focus should not be solely on Mr van Duinen's accident but should be on the system which was in place and

on whether that system prevented the risk of injury to a user or operator of the ice plant.

It is clear from the evidence that Mr van Duinen was not the only person who disregarded the instruction not to be in the storage bin while the auger was running. While he may, or may not, have been the most blatant offender, Mr Jones, Mr Anthony Threadwell and Mr Dillon had all been inside the bin while the auger was running. Mr Dillon gave evidence which, although non-specific as to names, was not challenged and was to the effect that there were occasions when other users of the plant had overridden the foot switch by putting a weight on the pedal and had then climbed into the bin to shovel ice. Furthermore, the fact that it seems that Mr Anthony Threadwell must have knocked the bracket off the foot pedal when he went to help Mr van Duinen illustrates the possibility of the foot switch being activated inadvertently, either by an inexperienced employee or by a curious visitor to the wharf.

In this context it is also significant that the hazard which the exposed auger presented was clearly identified by United Fisheries when the ice plant was constructed. The warning panel on each door said as much, and it is significant that the second message on the panel was that the operator should remove the key from the meter before entering the bin. That instruction related to the original key-operated charging system, but it shows that at that time the risk that the foot switch might be activated, whether deliberately or inadvertently, while someone was in the bin was clearly recognised. That is because, if the instruction was observed, the power supply to the auger was disconnected, which meant that the operator could safely enter the bin, knowing that the foot pedal was simply not functional and the auger could not be activated.

The fact that the design of the doors and the placement of the foot pedal meant that an operator could not activate the foot pedal from inside the storage bin, and the fact that instructions, both verbal and by means of notices, were given to users of the ice plant, therefore both mean only that United Fisheries took some steps to address the hazard which the auger presented to the unwary or the foolish. As Mr Lynch submitted, and as I have already said, the duty on an occupier of a place of work is to take, not *some* practicable steps, but *all* practicable steps to ensure that people in or in the vicinity of the place of work are not harmed by any hazard in that place of work. Mr Lynch's submission that United Fisheries relied on a system which did not address the issue of the deliberate or inadvertent overriding of the foot pedal in many respects aptly summarises the position.

It follows that the fact that Mr van Duinen's action in going into the storage bin while the auger was running was a deliberate act, not an inadvertent act, and the fact that that action conferred no benefit on United Fisheries, are of little or no consequence in this context. During the hearing it was put to several of the witnesses by Mr Matthews that it was not necessary to go into the storage bin while the auger was running, a proposition with which the witnesses in question all agreed. However, the fact remains that, to a greater or lesser extent, the instruction not to go into or be in the bin while the auger was running was disregarded by both several United Fisheries employees and several other users of the ice plant, no doubt for reasons relating either to personal convenience (for example, to finish an unpleasant job quickly) or to financial considerations, in particular to maximise the throughput of ice while the auger was running. Furthermore, the fact that a particular action by an employee may confer no benefit on an employer is irrelevant, because employees frequently

act with their own interests in mind, without considering whether their employers will benefit from what they do.

When the issue is reduced to its essentials, the following points emerge. Firstly, the auger in the United Fisheries ice plant was exposed, as was stated in the signs on the doors. Secondly, the auger was a potentially lethal trap, as Mr van Duinen's tragic accident sadly illustrates. Augers of any size and capacity are known to be significant workplace hazards, and the United Fisheries ice plant auger was (and is) a large and powerful item of machinery. Thirdly, the current state of knowledge in 1995, and indeed since at least 1981, was to the effect that augers should therefore be guarded. Several years prior to 1995 there was another ice plant at Lyttelton, which was very similar to the United Fisheries/Independent Fisheries ice plant and in which the internal auger was guarded.

Furthermore, although Mr Kypros Kotzikas disputed Mr Ronald Threadwell's evidence on this point, I accept that the central plate was installed over the auger in 1985 principally to provide a user of the ice plant with a reasonably secure and safe area on which to stand while breaking up or knocking down ice which had solidified. However, that measure was inadequate as a safety measure, because both ends of the auger, which were directly inside the access doors, were still not covered or guarded in any way. Finally, the fact that both United Fisheries and Independent Fisheries were able to install guards over the augers within a short period after Mr van Duinen's accident, and at a comparatively insignificant cost and with minimal effect on the efficacy of the ice plant, means that that was a precaution which could have been taken before 1995, and that was acknowledged by United Fisheries during the hearing.

When all five considerations which are listed in the definition of "all practicable steps" in section 2(1) of the Act are taken into account, the only conclusion which can be reached is that in all the circumstances it was a reasonably practicable step to guard the augers in the storage bins of the United Fisheries/Independent Fisheries ice plant. Furthermore, in my view this is not a case involving "perfection in hindsight", to use the phrase which Hansen J used in the penultimate paragraph of his judgment in *Buchanan's Foundry Ltd v Department of Labour* (p 16). As I have mentioned, in 1984 United Fisheries recognised that the auger was a hazard. While the layout of the ice plant afforded some protection to users of the facility, United Fisheries otherwise relied totally on instructions to its employees and other users of the plant and on those users obeying those instructions as compliance with its obligation to provide a safe place of work. In my view that reliance was ill-founded.

It follows from what I have said that, subject to the section 19 issue, the informant has proved the charge.

The Section 19 Issue

Many of the factors which are relevant to this issue have already arisen in the context of the second issue. However, the question for present purposes is whether an unforeseen and deliberate action by an employee in breach of his or her employment contract is or can be sufficient to negate any breach of duty by the employer or, in the present case, a person in control of a place of work.

Issues relating to careless or deliberate actions by employees are hardly novel. It is a function of human behaviour that people sometimes act carelessly or deliberately against their own best interests or the interests of others. As the authorities emphasise, the breach by an employee of the section 19 duties

therefore generally does not afford an employer a defence to a charge of failing to ensure the safety of that employee. However, it is also recognised that an employee may act in such an unforeseeable manner that his or her breach of duty affords the employer a defence. In essence, Mr Matthews' submission was that the present case is such a case.

In *Department of Labour v De Spa & Co Ltd* (1994) 1 ERNZ 339, which was an appeal against sentence only, the High Court (Tipping and Fraser JJ) endorsed the principle that carelessness by an employee will not excuse an employer's breach of duty. The Court said (p 346):

> "While the accident may have been caused in part by some lack of care on the part of the deceased for his own safety, that is no real excuse for the employer. Hazards quite often arise in the workplace because employees for one reason or another overlook them. Under the legislation the primary onus to eliminate hazards is on the employer, albeit that s 19 requires every employee to take all practicable steps to ensure his or her own safety while at work."

In his submissions Mr Matthews focused on the phrase "in part by some lack of care", and he contrasted the present case, which he said involved a deliberate act by Mr van Duinen which was the sole cause of the accident which befell him. However, in my view in the passage in question the Court was not intending to imply that if the accident had resulted from a deliberate act by the employee, the employer would not have been liable.

In this context, it must be remembered that *de Spa* was a sentence appeal only, and it is instructive to compare what Judge Holderness said on this point in

his judgment on liability in that case, which was as follows (the passage is quoted in *Mazengarb's Employment Law*, para 6019.4, page N/118):

> "I am not persuaded that a breach, or possible breach, by an employee of s 19 necessarily provides an employer with a defence to a charge alleging breach of s 6. Such a breach by an employee may well go to the question of mitigation. However, I am unable to accept that it will relieve an employer of the obligations imposed by s 6. It seems to me that there will be cases, and this is one, where an employee is induced, or at least encouraged, to act in breach of s 19(a) because the employer's failure to comply with the duties imposed by s 6 creates a situation which gives the employee an opportunity to unwittingly or unthinkingly place his or her safety in jeopardy. Where such opportunity could be minimised or eliminated entirely by the employer taking reasonably practicable steps it seems to me that a breach by the employee of s 19(a) will not avail the employer. The situation might be different in a case involving unanticipated skylarking by an employee. There is no suggestion of such behaviour in this case."

In my view that passage is pertinent in the present context. If United Fisheries had installed a guard over the auger in the ice plant, the opportunity for Mr van Duinen to act foolishly and with reckless disregard for his own safety would not have arisen. The fact that the auger was completely open or exposed meant that the risk that someone might act extremely foolishly, and with potentially tragic consequences, therefore existed. On that basis the first breach of duty was therefore United Fisheries' failure to guard the auger. The second breach of duty was Mr van Duinen's failure to observe elementary safety procedures, but that breach could not have been committed if United Fisheries had installed a guard over the auger.

In this context it must also be remembered that the employer or the occupier of the place of work in question is the person who dictates how particular plant or machinery is arranged and how a particular workplace operation is undertaken.

The fact that, as United Fisheries has done, an employer may seek input from its employees about safety issues does not negate that basic fact. As Williamson J said in *Canterbury Concrete Cutting (NZ) Ltd v Department of Labour* (High Court, Christchurch, AP 245/94, 13 February 1995, at pp 9 to 10):

> "In my view the obiter remarks of this court in the case of *Department of Labour v de Spa and Co Ltd* concerning s 19 accurately set out the position. In this case the employees were in breach of their obligations under s 19. Those breaches do not exonerate Canterbury Concrete but are relevant to its degree of culpability and to any penalty. Certainly under s 19 every employee has the responsibility to take all practicable steps to ensure his or her safety but the primary responsibility to provide a safe working environment and to ensure the safety of employees remains with the employer. The manner in which the sections are arranged in the Act supports that conclusion. It is also in accordance with the practical common sense of the situation where employers control the manner and costs involved in the carrying out of a particular operation."

Other cases were quoted by counsel in the course of their submissions. However, each case must depend on its own facts. In that context, *Department of Labour v Ashby Hale Log Movers Ltd* (District Court, Henderson, CRN 40900003405, Judge Shaw, 29 September 1994 and 24 March 1995), which is noted at [1995] ELB 71, merely provides a good example of an unforeseeable act by an employee in circumstances where the employer could have done nothing more to prevent the accident in question. In my view that is a far cry from the present case.

The fact that Mr van Duinen was a senior employee, the fact that he was under both a statutory duty and a contractual obligation to work safely and to comply with United Fisheries' safety rules, the fact that he should have reported any breaches of those rules to United Fisheries management, and the fact that the evidence points irresistibly to the conclusion that he acted in a grossly

foolhardy manner, all therefore do not afford United Fisheries a defence to the charge but are factors which are relevant only to culpability and therefore to penalty. The simple fact remains that, if United Fisheries had taken the elementary precaution of installing a guard over a machine which constituted a hazard, and a potentially lethal hazard at that, the accident which occurred on 31 July 1995 not only would not have occurred but could not have occurred.

Conclusion

For the reasons which I have expressed, I find that the charge against United Fisheries has been proved to the required standard. Although I have not specifically referred to the point earlier, I also find that there is no supervening absence of fault which would nevertheless afford United Fisheries a defence to the charge.

T M Abbott
District Court Judge

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