

Reliance on statutory mine surveyor role and sufficient weight not given to other evidence

512 It was submitted for Mr Robinson that the trial judge relied on Mr Robinson's role as Mine Surveyor, a statutory appointment required by the CMR Act, to find the charges proven. It was submitted the mere appointment under the CMR Act as Mine Surveyor was insufficient to found a charge under s 50 of the OHS Act.

513 Counsel submitted there was no evidence that Mr Robinson participated in any Board meetings or was otherwise responsible for any decision making processes or decisions for either NWCC or OPL. Other relevant evidence that it was submitted was not given sufficient weight by her Honour included:

- On her Honour's own finding the role of Mr Robinson was limited to controlling the surveying and drafting staff at the Gretley Mine subject to the instructions of the mine manager and the production manager. It is notable that the staff under the control of Mr Robinson consisted of Mr Foley, a full time employee and a casual employee.
- According to the evidence of Mr Foley would assist him in carrying out surveys underground. None of these facts support the ultimate findings of *Staunton J.*
- Mr Robinson was a casual employee at the time he was appointed mine surveyor and only became a permanent employee on 1 October 1996. This adds weight to the submission that on any view Mr Robinson could not be regarded as a person concerned in the management of either OPL or NWCC.
- Mr Robinson received \$67,614 in wages in the 1997 financial year. This was indicative of the level of responsibility held by Mr Robinson in the corporation OPL. When compared to other statutory appointees such as the Under-managers (who all earned in excess of \$100,000 for the same period) it supports the contention that Mr Robinson held a relatively low ranking in the management structure of the mine. It certainly does not support the contention that Mr Robinson was in a position of authority such that he had influence and control for the decisions of the whole of OPL.
- Her Honour describes the management structure of Gretley as a "moveable feast". Annexure F to the Trial Judgment contains three undated organisational charts as support of the management structure. The position of surveyor appears in only one of the charts. In that chart, Mr Robinson is denoted as reporting to the Production Manager. The evidence disclosed that the Production Manager was Mr Alston.
- Surveying services are support services in an organisation and are not normally regarded as key management roles for the whole organisation. Mr Thomas did not regard survey services as "the statutory line of authority" for a mine but rather support services for one or more mines depending on the size of the corporation. Indeed it was not uncommon for a surveying section to be located "offsite".

514 The import of these submissions is that Mr Robinson was a surveyor, not a person concerned in the management of either OPL or NWCC. In considering these aspects of the appellant's submissions it is pertinent to refer again to *Powercoal (CA)* where it was held that the words "management of the corporation" in s 50(1) should not be read down so as to apply only to central management ([116]). The Chief Justice determined that:

The Court is concerned with a person who has a level of complicity in the commission of the offence by the corporation. Such complicity arises in a context where persons in a managerial role could have taken steps to ensure that the object [sic] of the Act are achieved.

515 The objects referred to by his Honour are:

- (a) to secure the health, safety and welfare of persons at work;
- (b) to protect persons at a place of work (other than persons at work) against risks to health or safety arising out of the activities of persons at work;
- (c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs.

516 The question then becomes whether Mr Robinson was in a "managerial role" in NWCC and OPL and whether, in that role, he could have taken steps to ensure the objects referred to above were achieved.

517 We do not consider that it was established beyond reasonable doubt that Mr Robinson was concerned in the management of OPL or NWCC. In our opinion, Mr Robinson's role was not managerial but rather was more akin to that of an advisor or consultant to mine management in relation to surveying. Mr Robinson was more in a support role than a role that involved managing or directing the business of the two corporations. We have come to this view based on the following considerations:

- (1) A mine surveyor is not charged with any managerial function or responsibility under the Coal Mines Regulation (Survey and Plan) Regulation. This is in sharp contrast to the duties of a Mine Manager under s 37 of the CMR Act.
- (2) Under cl 7 of the Survey and Plan Regulation the surveyor has control of the surveying and survey drafting staff for the mine but always subject to the instructions of the Mine Manager. Control and supervision of staff (in this case two staff) is not necessarily indicative of a managerial role.
- (3) That Mr Robinson "prepared mine and mine sections plans as requested and required for diverse activities within the mine and in the preparation for and planning of mining activities at

Gretley" and this was "absolutely critical" to the operation of the mine, it did not involve the exercise of a managerial function but rather the exercise of highly specialised skills.

(4) That the mine plans produced by a Mine Surveyor are "a decisive factor in decisions taken at corporate level as to the direction and extent of mining operations in a particular area and they are critical to the safe conduct of such operations" does not transform the work of the Surveyor into that of a person concerned with the management of the corporation for the purpose of s 50.

(5) That surveying advice "would have a significant impact on decision making at the corporate level in relation to planned mining activity affecting the corporation as a whole" does not transform the work of the Surveyor into that of a person concerned with the management of the corporation for the purpose of s 50.

(6) The survey work undertaken by Mr Robinson was not work that could be said to reflect an involvement of Mr Robinson in administering or directing the business or affairs of either OPL or NWCC.

(6) Mr Robinson did not participate in General Mine Manager's Meetings.

(7) Mr Robinson, as well as being subject to the direction and instruction of the Mine Manager, reported to the Production Manager, Mr Alston.

518 Clearly, Mr Robinson was in a position to take steps to ensure the objects of the OHS Act were met, using the test considered by *Spigelman CJ in Powercoal (CA)*, but that is not sufficient to bring Mr Robinson within the scope of s 50. The legislature has determined that for s 50 to apply the person must be concerned in the management of the relevant corporation, which whilst not limited to central management as the Chief Justice found, nevertheless requires the person to be in a managerial role. We are not satisfied that was the case with Mr Robinson. We consider that *Staunton J* erred in finding that Mr Robinson was concerned in the management of OPL and NWCC. The conviction of Mr Robinson should be quashed.

P. SUMMARY OF FINDINGS

629 Our key findings on appeal may be summarised as follows:.....

(40) It was not established beyond reasonable doubt that Mr Robinson was concerned in the management of OPL or NWCC. In our opinion, Mr Robinson's role was not managerial but rather was more akin to that of an advisor or consultant to mine management in relation to surveying. Mr Robinson was more in a support role than a role that involved managing or directing the business of the two corporations.

Q. ORDERS

630 We make the following orders:.....

**Matter No IRC 1595 of 2005 - Mark Robinson v Inspector Stephen Finlay
McMartin**

6) The appeal is upheld in relation to IRC Matter No's 3230, 3231, 3232 and 3233 of 2000.

(7) The judgments and orders of *Staunton J* are set aside in IRC Matter No's 3230, 3231, 3232 and 3233 of 2000.