Markos v Quin Investments Pty Ltd & Another **[2010] SAIRC 48**

MAGISTRATES COURT OF SOUTH AUSTRALIA
(INDUSTRIAL OFFENCES JURISDICTION)

MARKOS, Ian

v

QUIN INVESTMENTS PTY LTD
First Defendant

and

KUZUB, Nikolai
Second Defendant

JURISDICTION: Prosecution

FILE NO: 2475 of 2008

HEARING DATES: 26 July 2010

JUDGMENT OF: Industrial Magistrate M Ardlie

DELIVERED ON: 1 September 2010

CATCHWORDS:

Prosecution – Plea of not guilty – Trial proceeded and it was held that all charges against the first and second defendant were proved beyond reasonable doubt – Markos v Quin Investments Pty Ltd and Another [2010] SAIRC 30 – Submissions following the finding of guilt as to the appropriate penalties to be imposed – Claim made for compensation on both counts – Defendants consent to an order for compensation being made – ***Held****: As against the first defendant a conviction and fine of $95,000 plus levy and an order for costs to be agreed or taxed – As against the second defendant a conviction and fine of $95,000 - Ss 19(1), 61(3) Occupational Health, Safety and Welfare Act 1986, Ss 10, 53 Criminal Law (Sentencing) Act 1988.*

Markos v Quin Investments Pty Ltd and Another [2010] SAIRC 30

REPRESENTATION:

Counsel:	
Complainant:	Ms L Chapman with Ms E Hanson
Defendant:	Mr W Duddy with Mr G Germein
Solicitors:	
Complainant:	Crown Solicitor's Office
Defendant:	Duddy Shopov

Introduction

1 I will not repeat the findings made following the trial of this matter.[1]

2 The defendants have appealed that part of the decision relating to particulars 1.4(a) and 1.5(f).[2] Particular 1.4(a) states that:

> "…the first defendant failed to provide and maintain, so far as was reasonably practicable, plant in a safe condition in that it:
>
> (a) failed to undertake proper and sufficient maintenance and repair of the critical items of plant in the factory, including a powder blending machine known as the ribbon blender".

Particular 1.5(f) states that:

> "…the first defendant failed to provide and maintain, so far as was reasonably practicable, a safe working environment, in that it, whilst explosives were being manufactured in the factory:
>
> (f) permitted the use of a critical item of plant, namely the ribbon blender, to be operated whilst it was in a state of disrepair".

3 As counsel for the defendants indicated in his submissions the appeal is not against the findings at large. It was accepted by counsel for the defendants that I am to sentence according to the findings I have made following the trial of this matter.[3]

Summary of submissions made by counsel for the complainant

4 Victim impact statements, seventeen in all, were handed up. Permission was sought and granted for Ms Jane Keeley, the mother of the deceased Matthew Keeley and Ms Carly Stewart, partner of the deceased Matthew Keeley, to read their statements to the Court. Ms Keeley indicated that she had never heard from the defendants since the explosion. She further indicated that she took exception to comments made during the course of the trial about her presence being tantamount to emotional blackmail at the State's expense.[4] In a similar vain, Ms Carly Stewart stated that not once have the defendants acknowledged any accountability for their actions, nor apologised to her for what they have done.[5]

5 The comments in the various victim impact statements handed to the Court also refer to the lack of contact between the defendants and the

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[1] *Markos v Quin Investments Pty Ltd and Another* [2010] SAIRC 30
[2] Notice of appeal – dated 8 July 2010.
[3] Tr 16, 26 July 2010.
[4] Tr 7, 26 July 2010.
[5] Tr 9, 26 July 2010.

families. There was a visit to the Keeley home once, to the Harris household once and to the Millington's on a number of occasions. Derek John, the father of Damien John, who sustained injuries in the incident, stated in his victim impact statement, that no one from the defendants had ever visited him.

6 The maximum penalty for each of the two counts is $100,000 per count. The maximum penalty should be imposed in relation to both counts. The maximum should be imposed because of the multi-faceted failure on the part of the defendants. Further such a penalty is warranted because of the consequences of the failure to ensure the safety of the employees. The consequences were the deaths of three employees and injuries to two employees. The injuries and the effects of the injuries have been alluded to by the two surviving employees (Cameron Edson and Damien John) during the course of the trial. Damien John has provided a victim impact statement.

7 The breach by the defendants must be viewed in the context that the operation involved an explosives factory. On the day of the incident the operation involved not only the production of pre-mix explosive but also melting cast TNT at the same time. The unsafe working environment due to the storage of items in proximity to the factory was undisputed evidence and highlighted the dangerous working environment. The environment provided by the employer positively put the employees at risk of injury and death.

8 The evidence was that the second defendant being the responsible officer was present at the factory on the morning prior to the incident. He did nothing about the working environment and by his instructions positively reinforced the continuation of the TNT production occurring at the same time the premix explosive was being prepared.

9 Aside from the working environment there was the failure to provide and maintain plant in a safe condition. There were no design details, drawings or manufacturer's instructions for critical items of plant and no proper maintenance records. Preventative maintenance was not carried out.

10 Whilst there was a safety management system document this document was never followed and implemented at a practical level. This in itself is an aggravating factor.

11 To maintain, as the first defendant did in the interview process, that maintenance records were contained in timesheets demonstrates the lack of seriousness with which the first defendant treated the maintenance of its plant.

12 The annual shutdown really was nothing more than a cleaning up process and very little was carried out as regards maintenance. Whilst the employees may have believed in the annual shutdown process this shows that they were labouring under what can only be described as a false sense of safety. The first defendant, as was apparent from the attitude during the course of the trial, missed the point in relation to the fact that it had a duty to maintain its equipment and to provide a safe working environment. It is clearly the employer's responsibility and such a responsibility is non-delegable.

13 The lack of maintenance records establishes that the first defendant did not have and could not have had knowledge of what maintenance work had been done at any relevant time. In those circumstances the first defendant could not ensure the safety of its employees given that it did not know how its plant was being maintained.

14 The lack of maintenance in relation to the ribbon blender highlights the problem. There had been no scheduled maintenance on this plant at all. The premix had been permitted to leak from this plant without any proper inspection. Gland packing had been used despite industry guidelines to the contrary. Over twenty years or more of operation the shaft of the ribbon blender had never been inspected.

15 The incident that occurred on 9 May 2006 was preventable and the first defendant should have had preventative maintenance in place.

16 There has been no indication of remorse or contrition on the part of the first defendant or the second defendant, its responsible officer.

17 There is no evidence to suggest that the first defendant, as employer, was making proper attempts to do the right thing by its employees in terms of safety. There was a total failure on the part of the first defendant to provide a safe working environment and to properly maintain and provide safe plant and equipment.

18 An order for compensation pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988* is sought. The victim impact statements provided, detail seventeen persons with Damien John being disentitled due to the provisions of s 53(5) of the *Criminal Law (Sentencing) Act 1988.*

19 In addition to those persons who submitted victim impact statements, compensation is sought for Ethan John Keeley (DOB 19 January 2006), the son of Carly Stewart and Matthew John Keeley (deceased). The total amount of compensation able to be awarded, namely $40,000, is to be divided amongst the seventeen claimants. In relation to Ethan Keeley and Bailey Millington (daughter Darren Millington (deceased)) both persons are under eighteen years of age and the compensation awarded should be

paid to their respective mothers, namely Carly Stewart and Judith Millington, to be held in trust.

20 An order is sought regarding costs to be either agreed or taxed.

Summary of submissions by counsel for the defendants

21 Counsel indicated that he was instructed to express on behalf of both defendants deep regret and remorse for the loss and grief suffered by the families and by the injured parties.

22 In accordance with the findings made following the trial of this action there is no doubt that there was a failure in the systems prevailing at the workplace as regards the work environment and in housekeeping. Such systems were inadequate and unsafe particularly in the context of explosives manufacture. It is accepted that that failure represented a significant and serious risk of injury to health and safety of the sort that actually manifested on 9 May 2006.

23 Counsel highlighted the extensive involvement of the second defendant and his wife in the Gladstone community. Such involvement related to voluntary organisations, involvement in local football and netball and other sporting clubs. There is no doubt that both persons have had an extensive involvement in their local community at all levels. Further that involvement also related to financial support for equipment and player development. I accept that both persons have been actively engaged and have served their community over a number of years.

24 Immediately following the incident the second defendant attended at the site and assisted in what way he could.

25 The defendants arranged for counselling following the incident as an extension of counselling offered through WorkCover Corporation. Contact was made with the various families affected by the incident and all personnel employed by the first defendant attended all funerals. Both the second defendant and his wife and other staff members visited the injured men in hospital in Adelaide.

26 Both the first defendant and the second defendant supported financially all fund raising activities which were held to support the families of the deceased.

27 The second defendant and his wife remain shocked and overwhelmed by the scale of the tragedy. The second defendant's focus has been on the question of cause of the incident and that, in many ways, the human element and human consequences of the tragedy have been subsumed by that preoccupation.

28 The second defendant surrendered its licence to manufacture explosives to SafeWork SA in September 2006. The second defendant understood that there was to be an independent inquiry. He remains extremely concerned by the circumstances involving the three and a half week delay in locating one of the deceased. He was and remains extremely concerned by the absence of any initial explosives expertise being utilised despite immediate offers to that effect.

29 The defendants supplied significant resources and assistance during the course of the investigation. The second defendant submitted to a record of interview over a three-day period to assist with the investigation.

30 There was a system in place. There were some records of maintenance. Maintenance was undertaken essentially on an as needs basis. It is accepted that the records were inadequate, that the maintenance regime and system were inadequate, and that the storage of certain items around the factory was unacceptable. During the trial there was no contest in relation to the storage issues.

31 It is accepted that in the circumstances of this case there are grounds for the penalty to be fixed at or near the maximum on both counts. The findings that have been made in the context of an explosives manufacturing environment would warrant a penalty very much at the high end of the range.

32 Compensation pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988*, which allows an award of compensation of up to $20,000 for each offence, is consented to. It is agreed that the compensation should be apportioned in the manner claimed. There is adequate evidence for such an award in what is contained in the victim impact statements.

33 As to costs the appropriate order should be for costs to be agreed or taxed with liberty to apply.

Consideration

Compensation

34 The defendants consent to an order for compensation being made pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988*. The maximum amount of compensation is limited to $20,000 per count, there being two counts, resulting in a total of $40,000 for compensation.

35 The compensation is to be divided equally between the seventeen claimants. The claimants are:

Family of Darren Millington:

- Judith Millington – wife;
- Bailey Millington – daughter;
- Rhys Millington – son;
- Koby Millington – son;
- Deborah Schwark – sister;
- Kevin Millington – father.

Family of Damien Harris:

- Gary Harris – father;
- Beverley Harris – mother;
- Leonie Harris – sister;
- Leanne Opperman – partner.

Family of Matthew Keeley:

- Carly Stewart – partner;
- Ethan John Keeley – son;
- Trevor Keeley – father;
- Elizabeth Jane Keeley – mother;
- Sara Keeley – sister;
- Daniel Keeley – brother.

Family of Damien John:

- Derek John – father.

36 An equal division results in $2,352.94 in relation to sixteen claimants and one payment of $2,352.96 for one claimant.

37 The consent of the defendant to make a payment of compensation is a matter to be taken into consideration when considering what penalties to impose.

Penalties

38 The first defendant as an employer had a duty in respect of each employee to ensure so far as was reasonably practicable that the employee was whilst at work safe from injury and risks to health.

39 The second defendant as responsible officer was charged with the responsibility to take reasonable steps to ensure compliance by the first

defendant with its obligations under the legislation. Both defendants for the reasons that I have expressed in my decision totally failed in their obligations.

40 Section 10 of the *Criminal Law (Sentencing) Act 1988* details matters to be considered by the sentencing court. The circumstances of the offence arose from the fact that there was a failure on the part of the defendants to conduct the operation in a proper manner. The evidence provided by Andrew Begg[6], highlighted the deficiencies that prevailed in the factory at Gladstone. Whilst there was a document relating to safety management systems[7] there was no evidence of any practical application of this document. The records of maintenance work that were kept on timesheets or in diaries were few and far between and were totally inadequate. I can only say that the operation of the factory was a disaster waiting to happen.

41 I have considered the personal circumstances of victims of the offence. I have read all victim impact statements provided to the Court. Coupled with the personal circumstances, the injury loss or damage resulting from the incident have also been considered.

42 Another matter to take into consideration is the degree to which the defendants have shown contrition for the offence. The only relevant aspect is the fact that the defendants were prepared to consent to the payment of compensation. Throughout the victim impact statements there is mention of lack of demonstration of contrition or remorse or contact being made by representatives of the defendants. I accept that in submissions counsel for the defendants did express regret and contrition but this seems to be the first time there has been such an expression. This in my view is a bare minimum and a case of too little too late.

43 I accept that the defendants cooperated in the investigation of the offence and provided considerable resources during the collection of the vast amount of evidence from the site.

44 I am mindful that the defendants have relinquished their licence to manufacture explosives; I have no doubt that the defendants have suffered financially as a result of the incident.

45 I need to consider the deterrent effect any sentence has and to ensure that the defendants are adequately punished for the offence.

46 There is little to persuade me that anything but the maximum fine should be imposed upon such recalcitrant defendants. Having said this I intend to make some small allowance for the consent to payment of

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[6] See paras 67 to 82 of *Markos v Quin Investments Pty Ltd & Another* [2010] SAIRC 30
[7] See Exhibit C40.

compensation and the cooperation and provision of resources provided during the course of the investigation.

47 The penalties in place at the time of the incident were a maximum of $100,000 for each count. Parliament has since increased this amount threefold for incidents occurring after 1 January 2008. This increase demonstrates the seriousness in which Parliament views breaches of workplace safety.

48 Having taken into consideration all matters referred to in s 10 of the *Criminal Law (Sentencing) Act 1988* and the submissions made by counsel I impose in relation to Count one a fine of $95,000 and similarly in relation to Count two a fine of $95,000.

Summary of penalties

49 I impose the following penalties:

In relation to **Count one**:

As against the first defendant I record a conviction.

A fine:	$95,000.00
Court costs:	$131.00
Victim of Crime Levy:	$80.00
Total:	**$95,211.00**

28 days to pay.

In relation to **Count two**:

As against the second defendant I record a conviction.

A fine:	$95,000.00
Court costs:	$30.25
Victims of Crime Levy:	$80.00
Total:	**$95,110.25**

28 days to pay.

COMBINED TOTAL:	**$190,321.25**

Costs

50 I order that the defendants pay to the complainant costs in relation to this matter, such costs to be agreed or in default of agreement to be taxed. Both parties have liberty to apply.

Compensation

51 Compensation as ordered below is to be paid within 28 days.

The sum of $2,352.96 is to be paid to Carly Stewart partner of Matthew John Keeley on behalf of the son of Carly Stewart and Matthew John Keeley, namely Ethan John Keeley, to be held by her in trust for the benefit of Ethan John Keeley.

The sum of $2,352.94 is to be paid to Judith Millington wife of Darren Millington on behalf of the daughter of Judith Millington and Darren Millington, namely Bailey Kaye Millington, to be held by her in trust for the benefit of Bailey Kaye Millington.

The sum of $2,352.94 is to be paid to each of the following persons:

Family of Darren Millington:

- Judith Millington – wife;
- Rhys Millington – son;
- Koby Millington – son;
- Deborah Schwark – sister;
- Kevin Millington – father.

Family of Damien Harris:

- Gary Harris – father;
- Beverley Harris – mother;
- Leonie Harris – sister;
- Leanne Opperman – partner.

Family of Matthew Keeley:

- Carly Stewart – partner;
- Trevor Keeley – father;
- Elizabeth Jane Keeley – mother;
- Sara Keeley – sister;
- Daniel Keeley – brother.

Family of Damien John:

- Derek John – father.