

Complainant: **The Work Health and Safety Prosecutor**

and

Defendant: **Constantinos Kouzoukas**

REASONS for DECISION

Introduction

Mr Kouzoukas and his spouse purchased a building in Annerley in 1994¹ and subsequently leased it under a commercial tenancy agreement.

Notwithstanding that lease agreement and by virtue of a tendered statement of agreed facts² pursuant to section 148A of the *Justices Act*, Mr Kouzoukas admits he had a duty to ensure electrical equipment at the building was electrically safe³.

The Complainant alleges that on or about 6th February 2017, Mr Kouzoukas breached that duty in that he failed to ensure electrical equipment in the basement of the building was electrically safe in circumstances where it was reasonably practical⁴ for him to have done so. It is alleged that the blue compressor in the basement was not electrically safe⁵.

Mr Kouzoukas is charged with failing to comply with his electrical safety duty under section 38 of the *Electrical Safety Act 2002* in breach of section 40(D) of that Act, which is in the following terms-

40(D) Failure to comply with electrical safety duty – category 3

A person commits a *category 3 offence* if-

- (a) the person has an electrical safety duty; and
- (b) the person fails to comply with that duty.

Maximum penalty-

- (a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking – 500 penalty units; or
- (b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking – 1,000 penalty units; or
- (c) for an offence committed by a body corporate – 5,000 penalty units.

¹ Transcript page 2-6 at line 41 - 44

² Exhibit 1: Statement of Agreed Facts

³ *Electrical Safety Act 2002* section 38

⁴ *ibid.* section 28

⁵ Transcript page 1-4 at lines 33 to 35 and page 1-7 at lines 24 to 42

Mr Kouzoukas denies the allegation.

Prosecutor's Opening Address

In her opening remarks the Prosecutor explained to the Court that on 6th February 2017, a tragedy occurred in the building basement resulting in the death of Mr Viner. While the death resulted in an investigation that subsequently lead to the charge against the Defendant, the Prosecutor stated the following:

*'Importantly, it needs to be mentioned so that there is no confusion, the investigation was instigated due to a fatality in the basement of the property of a Mr Stephen Viner. Now, that will be referenced at some points throughout the interview in small parts as the reason that the investigation began. However, the nature of the charge before the court does not allege causation between the offence charged and the death of Mr Viner.'*⁶

Background

The basement of the building which is located at 36-38 Palmerston Street Annerley was prone to flooding as a result of water ingress through a pit built into the concrete floor. The pit had a float type mechanism fitted⁷ and when the water level reached a certain height, an electrically powered pump would activate and pump the flood water through a pipe which emptied out across a carpark at the building's ground floor level.

Mr Kouzoukas had a family relationship⁸ to Mr Viner and had engaged him to provide general maintenance and handyman type services at the building. To that end, Mr Viner had installed new pumps in the basement in about June 2016⁹.

Following a flooding episode immediately prior to 6th February 2017, Mr Kouzoukas asked Mr Alan Parker to attend the property. Mr Parker apparently pumped out flood water by throwing a hose through the locked steel gate¹⁰ at the top of the stairs leading down into the basement, with the other end of the hose discharging the water out into the carpark area.

Mr Kouzoukas subsequently asked Mr Viner to attend the property and inspect the pumps that he had previously installed in the basement as Mr Kouzoukas was concerned that those pumps may not have been functioning¹¹.

It was when Mr Viner attended the property on 6th February 2017 that the tragedy occurred.

No evidence was lead with respect to how Mr Viner died and as referenced above in the Prosecutor's opening remarks, the matter before the Court does not allege any causation between the offence Mr Kouzoukas is charged with and Mr Viner's death.

As a result of the incident on 6th February 2017, inspectors from Work Health and Safety and the Electrical Safety Office commenced investigations.

⁶ Transcript page 1-7 at lines 4 to 9

⁷ Exhibit 6: Record of interview dated 2nd March 2017, page 13 at lines 8 to 11

⁸ Exhibit 6: *op.cit.* Mr Kouzoukas said his cousin was married to Mr Viner

⁹ Transcript page.... at lines....

¹⁰ Transcript page 2-28 at lines 25 to 31 and page 2-29 at lines 40 to 43 and Exhibit 6, *op. cit.* page 18 lines 16-23

¹¹ Transcript page..... at lines...

The Evidence

The Prosecution lead evidence from 4 witnesses and the Defendant himself gave evidence.

As already referred to above, an agreed Statement of Facts was tendered at the commencement of the hearing and further documents, photographs and other materials were tendered and marked as exhibits as the hearing progressed.

Witness Sparks

The first witness was Mr Kevin Sparks who identified his occupation as being Principal Electrical Safety Inspector. Mr Sparks background and qualifications are that he completed his electrical apprenticeship with SEQEB and gained his electrical worker licence in 1990 before being appointed as an electrical safety inspector in 1994 under the Electrical Safety Act. In 1999 he gained a fulltime position as an electrical inspector with Energex before moving three years later to the Electrical Safety Office with the Queensland Government where he continues in that position¹².

Mr Sparks said that he attended the property on 6th February 2017 and conducted an inspection of the basement area. He explained he observed a switchboard at the back of the room and he also saw an extension lead running down the stairs on his left side. In the middle of the room he observed a blue-coloured refrigeration compressor unit¹³.

In respect to the extension lead this witness observed running down the stairs (and which is visible in the photographs tendered), no other evidence was adduced about it.

Mr Sparks went on to explain he observed some wiring coming out of the of the switchboard, running across the ceiling, down a wall to an isolator switch and then a timer before entering a conduit that ran down to the electrical equipment of the blue refrigeration unit¹⁴.

A series of tests were conducted between the switchboard and the blue refrigeration unit which were described by the witness as continuity testing. His evidence was that there was a three phase feed to the unit and he explained that in the following way:

*'...So there's – so three actives, which is typical for motors, larger type motors. So it's a three phase switch, so the three actives get switched by the isolator. And so they run through that and then down to the three phase contactor below, which is another type of switch, it's just switched electrically with a coil...'*¹⁵

The witness explained how he undertook testing of the electrical circuits and opined that the blue compressor unit was not electrically safe at the time he inspected it and that there were serious defects with the earthing in the basement-

'Q. And just for clarity, what did those results indicate to you?

¹² Transcript page 1-8 at lines 40 to 45

¹³ Transcript page 1-9 at lines 18 to 21

¹⁴ Transcript page 1-10 at lines 24 to 29

¹⁵ Transcript page 1-15 at lines 28 to 31

A. Serious defects with the earthing in the basement.¹⁶

A little later Mr Sparks continued-

'Q. And can you tell the court, in your opinion, whether the blue compressor, including that white plastic area, the terminal enclosure, was electrically safe?

A. No, I don't believe it was.

Q. Okay. Was it free from electrical risk?

A. No

Q. Okay. And are you in a position to be able to comment as to how that electrical risk could either be removed or minimised?

A. So, yeah, okay. Well, there's two ways. So there's isolation, but if you – there's – in the code of practice for managing electrical risks and – and also in the general electrical industry, which is – they're covered in, like – there's AS/NZS 4836. There's certainly climates for isolation. So the switch has to be turned off, locked out, tagged out and – and then isolation has to be proven by a competent person. So that's – generally an electrician, usually, would test, de-energise to confirm the switch contacts have opened. Yeah, and so there's – that's isolation, but a high control measure. There's elimination, which is disconnection, and – yeah. So, for example, some of the other old refrigeration units had been disconnected. The wiring had been stripped out. So that's a higher control measure than – than isolation.¹⁷

Under cross-examination, Mr Sparks conceded that all his testing was done while the power was switched off.

On this point, Mr Sparks explained that it was his opinion that it would have been unsafe to conduct tests while the circuits were energised¹⁸ and in any event, the continuity tests were on the active conductors and there did not need to be a complete circuit¹⁹-

'Q. Now, Mr Sparks, I understand that all of the testing that you conducted in the basement or, in fact, at the premises in February 2017, that was all de-energised testing, wasn't it?

A. Yes.

Q. Yes. And so that means that all the testing was conducted with the power off; is that right?

A. Yes.

...

Q. So there's not electricity flowing through any of the circuits?

A. That's correct, yes.

¹⁶ Transcript page 1-21 at lines 6 to 7

¹⁷ Transcript page 1-25 at lines 22 to 39

¹⁸ Transcript page 1-35 at lines 37 to 38

¹⁹ Transcript page 1-36 at lines 5 to 7

Q. Correct. So none of the equipment, none of the installations were live when you did the testing?

A. No.

Q. No?

*A. That's correct.*²⁰

The witness was further questioned on this point:

'Q. ...You can't be certain that there might be a preclusion from electricity flowing from the basement switchboard across to the isolator switch and then down into the blue refrigeration unit?

*A. No, I was totally satisfied there was continuity and the test we did measured continuity. We have a wire. I could get a piece of wire here and if I can prove continuity there's – you power in one end, you know, power out the other. So – and the reading we got were very low. I mean it's .1 of an ohm so it's negligible resistance...'*²¹

In short, Mr Sparks evidence was that, in his opinion, the tests he conducted on the de-energised circuits related to the blue compressor unit demonstrated that the unit was electrically unsafe.

When questioned about the utility of de-energised testing as compared to energised testing, Mr Sparks was adamant the testing he undertook was sufficient for him to be satisfied the basement and blue compressor unit was not electrically safe.

This aspect of the evidence is drawn into sharp focus later in these reasons when I examine the evidence of another prosecution witness, Professor Andrews.

Witness Hewitt

Prosecution witness Mr Ronald Hewitt²²(who described his position as an inspector under the Electrical safety Act for some eight years), told the Court he also attended the property at 36 Palmerston on the 6th February 2017.

Mr Hewitt conducted continuity testing between the submains and the submains fuses. He explained that his testing found-

'...In other words, it has a continual copper conductor. [Indistinct] between the main fuses at that main switchboard, which is located outside the building, down to the distribution board that was located in the basement where Mr Viner was found. ...

...I conducted those- that testing. [Indistinct] which I conducted at the main switchboard. And I found that those were continuous. ...

²⁰ Transcript page 1-34 at lines 15 to 29

²¹ Transcript page 1-37 at lines 10 to 16

²² Mr Hewitt was granted leave to give his evidence via telephone: Transcript page 1-45 at lines 42 -43

In my opinion, [indistinct] electricity [indistinct] connect to that premises, there would be a live terminal in the distribution board in the basement.²³

When cross-examined, Mr Hewitt agreed that all the testing he undertook at the premises was also done while the circuits were de-energised.²⁴

Witness Underwood

The third witness called by the Prosecution was Mr Stephen Underwood who was a Workplace Health and Safety Inspector appointed under the Act.²⁵

As a part of his investigation into the incident that occurred on 6th February 2017, he subsequently conducted a recorded interview with Mr Kouzoukas. That interview was undertaken on Thursday 2nd March 2017 at the Workplace Health and Safety offices, Mount Gravatt.

The recorded interview was played to the Court²⁶ and a transcript provided.

Before I discuss the content of that interview, I want to turn to the report that was prepared by Mr Underwood at the conclusion of his investigation. It was tendered by the Defence but only after an objection by the Prosecution, which I overruled.

The Office of Industrial Relations Investigation Report²⁷ had been disclosed by the Prosecution in the brief of evidence and contained Mr Underwood's findings which were as a result of the investigation he undertook following the incident on 6th February 2017.

In particular, the report *inter alia*, contains the following –

Mitigating/Aggravating Features

In considering the circumstances of the incident under investigation it is considered that there are mitigating features that should be considered.

In this regard: Post Incident Control Measures

- *The duty holders assisted inspectors throughout the investigation*
- *The duty holder participated in a record of interview*
- *Immediately following the incident the duty holder implemented control measures to prevent reoccurrence – (the basement electrical system was isolated completely)*
- *The duty holder had in place a risk management system prior to this incident. (Regular testing and tagging of equipment. Regular maintenance.) ...*

Conclusions/Findings

...

There appears to be insufficient evidence to implement a prosecution against any duty holder.²⁸

²³ Transcript page 1-47 at lines 18 to 30

²⁴ Transcript page 1-47 at lines 41 to 44

²⁵ Transcript page 1-48 at lines 33 to 34

²⁶ Transcript page 1-49 at line 16

²⁷ Marked as Exhibit 7 in these proceedings

²⁸ Exhibit 7 at page 12

When cross-examined about his report, Mr Underwood said the following-

*'...At the time I did this report, that was my findings with the caveat being that there could have been other information coming to light at a later stage.'*²⁹

I accept the submission made by the Prosecutor with respect to any weight the Court should place upon the report's conclusions/findings. It is of course, a matter for the Court to determine the sufficiency of evidence before it, and for that reason I place no weight on the conclusions/findings expressed in Mr Underwood's report.

However, the material regarding the co-operation of Mr Kouzoukas in the period immediately after the incident on 6th February 2017, as expressed in the report³⁰, is relevant and I will return to that matter later in these reasons.

The Recorded Interview with the Defendant

I will now return to the interview Mr Underwood recorded with the defendant.

Mr Kouzoukas voluntarily participated in the interview and was at the time of the interview, accompanied by his lawyer, Mr Jonathon Hadley, a partner at Gadens.

During the interview (which was conducted over approximately a 40-minute period), Mr Kouzoukas was asked about the state of the equipment in the basement when he had initially purchased the property. Mr Kouzoukas responded that all the equipment had been decommissioned prior to him buying the property:

*'...Um, when I bought the place they were decommissioned and um, you know, they were partly pulled apart and um, all the electricity had been disconnected to it apparently and um, yeah, they were just always there.'*³¹

When he was further questioned by Mr Underwood about the state of the equipment in the basement, his response is set out in the following exchange:

Q. Do you recall who actually disconnected that um, equipment in the basement?

A. Which equipment?

Q. The – all those compressors and thing down there?

A. It was like that when I bought it, I bought it as is like that. It was done before I bought it.

Q. Oh, it was de-commissioned before you bought it?

A. Yeah, definitely.

Q. Okay, sorry. I thought it was de-commissioned when you bought it?

A. No, no...

...

Q. So all of that was de-commissioned... prior to you owning it?

²⁹ Transcript page 1-55 at lines 45 to 47

³⁰ Exhibit 7 at page 12 under the heading *Mitigating/Aggravating Features*

³¹ Transcript of Interview 2 March 2017 page 14 at line 34-37.

A. Yes.³²

Earlier in the interview, Mr Kouzoukas was questioned about any history of electrical problems or issues with the basement and he answered that there had not been any in the 20 years he had owned the property³³.

Witness Kouzoukas

It is convenient at this point to review the evidence of the Defendant, Mr Kouzoukas, as it relates to matters disclosed during the recorded interview discussed above.

During his evidence-in-chief, Mr Kouzoukas said that he had been advised by the selling agent, a Mr Michael Paternis, that the electricity had been disconnected from the building's basement and equipment prior to him having purchased the building.³⁴

He continued in his evidence and said that he had subsequently engaged an electrician to attend the property and undertake work there-

Q. And who was that?

A. His name was Renoff – sorry, not Renoff - Roloff Schumacher

Q. Yes?

A. He's known as Rudy.

Q. And who is Rudy?

A. He's the professional, authorised electrician.

Q. And when did you organise for him to look at the basement?

A. Straight after I bought the property. I'll go back a step. I had Energex come out to turn the electricity on at the back because it was switched off. Obviously the premises, you know, had been vacant for quite a few years and the electricity was switched off. Energex I believe, turned the power off to the building from the outside, on the street and I had to ring Energex up for them to come out to reinstate that connection and in order to do so, they said they have to send an electrician out to make sure it's safe, which they did. So in turn, they've turned the electricity on, we had electricity out the back. Within a month or two, we started renovations on the building at the front, on Ipswich Road. I engaged an electrician, Roloff Schumacher, to do some major works at the front including canopy lights, new battens, lighting inside the shop, and while he was there, I wanted him – I asked him to confirm whether the basement at the back – the one we just spoke about – was, in fact, safe and decommissioned. I asked him to do that inspection and he came back and said, 'Yes. Everything's decommissioned and safe'.

Q. And did you ask Mr Schumacher any questions about---

A. Did I – sorry?

Q. Did you ask Mr Schumacher any questions about what he told you?

³² Transcript of Interview 2 March 2017 at page 30-31

³³ Transcript of Interview 2 March 2017 page 25 at line 22- 31

³⁴ Transcript page 2-11 at line 22 - 43

*A. No. He just told me that everything was – he confirmed everything was safe.*³⁵

The defendant went on to explain that he was no longer in contact with that electrician as Mr Schumacher had passed away.³⁶

Mr Kouzoukas said other electricians had inspected the basement at his request when they had attended the property to undertake works. One of those was Mr Con Papademos who had been engaged by the Defendant to do some work on flood lights and general checks in the building; this included Mr Papademos going down into the basement. Mr Kouzoukas said Mr Papademos never reported anything wrong in the basement.³⁷

In addition to those two electricians entering the basement at the request of Mr Kouzoukas, he explained that in 1996-1997 period, officers from the Department of Primary Industries inspected the premises as part of an approvals process required for a food manufacturing business he was a partner in.

Mr Kouzoukas said those officers advised him of certain works that needed to be undertaken and as a result of this advice he engaged another electrician at that time-

'...We had to – we got one cold-room reinstated and we had to engage an electrician to do the electrical works and that electrician noted that there was some piping cut that led it down to the cold-room. And he actually visited the cold-room, the old cold-room, the engine room downstairs and he---

Q. Is this a separate – the old cold-room? You haven't mentioned this before?

A. No, the old basement, sorry. He inspected down there. He wanted to have a look at those pipes that led downstairs and he never reported that there was any problems down there.

Q. And how did you interpret that?

*A. That, yeah, no problems, no – everything's safe.*³⁸

Mr Kouzoukas said he did not undertake directly or ask any other person to undertake any works associated with the blue compressor. Similarly, he made no changes to the electrical circuits in the basement of the building. He said the only thing he had done was arrange for a second pump to be installed.³⁹

Earlier in his evidence and during his interview⁴⁰ Mr Kouzoukas explained he had personally entered the basement area on previous occasions when it was flooded. On one such occasion there was about a metre of water there⁴¹. He said he went in there to throw pumps in to expel the water.

When asked about whether he felt it was safe to enter the flooded basement on those occasions he said-

'...My thought process was, okay, well obviously it's safe to walk in here, because it's been verified that everything has been decommissioned and safe. Otherwise, there's no way in the

³⁵ Transcript page 2-12 at line 1 -27

³⁶ Exhibit 10 is a letter indicating Mr Schumacher passed away on 14th March 2007

³⁷ Transcript page 2-12 at lines 34 - 46

³⁸ Transcript page 2-13 at lines 14 - 24

³⁹ Transcript page 2-13 at lines 29 - 39

⁴⁰ Exhibit 6 *op.cit.* page16 at lines 21-22

⁴¹ Transcript page 2-10 at lines 5 - 9

world that I would have walked in if I knew any different. Yeah, I got on with it and expelled the water and replaced the pumps – the pump.⁴²

Mr Kouzoukas was vigorously cross-examined on his evidence.

In particular, it was put to him that it was a recent invention that he now remembered the names of two electricians, both of whom are now deceased, who he'd engaged to look at the electrical circuits in the basement-

'Q. Right. So it's accurate, then, to say that even though you were told by the real estate that it was decommissioned, you wanted to make sure for yourself? –

A. That's right.

Q. -that it had been decommissioned?

A. Exactly

Q And that's because, I suggest you had some concerns if it wasn't decommissioned about what that would mean for you?

A. I just wanted peace of mind

Q. Peace of mind?

A. For myself

Q. Certainly?

A. And when I purchased the building, there was no electricity there

Q. Yes. Well?

A. Switched off

Q. And you wanted to make sure of that and that's why you hired Rudy; is that correct?

A. That's right

Q. Yes. And it's the fact isn't it, that you wanted confirmation of that because you could see that the equipment was quite old; is that right?

A. It was old and I had a duty of care to actually know that this thing was actually decommissioned.⁴³

Mr Kouzoukas' evidence, under cross examination, continued on the subject of him having engaged the electrician-

'Q. Okay. When you asked Rudy to come out to inspect the basement, do you recall what it is you actually said to him?

A. Look, he was doing some work at the front shops. I didn't call him out specifically to go to the basement, but whilst he was there, I said to him, "While you're here, can you please go

⁴² Transcript page 2-10 at lines 25 - 29

⁴³ Transcript page 2-15 commencing at line 29 to page 2-16 line 3

and have a look downstairs in the basement and just clarify that the place has been decommissioned and is made safe from electricals to everything.” And he – and he inspected the place and he reported back to me and advised me that, yes, everything’s decommissioned; electricity, and it’s safe to be there.’⁴⁴

When he was asked why he hadn’t mentioned to Mr Underwood (during the recorded interview) the fact that he had asked electricians to inspect the basement for electrical safety issues, Mr Kouzoukas said he would have, if he had been asked that question.⁴⁵

When he was pushed further on that issue, Mr Kouzoukas said it had not entered his mind to subsequently raise this issue with Mr Underwood.⁴⁶

Witness Andrews

The final prosecution witness called was Professor Chris Andrews.

Professor Andrews is a Professor of Medicine and holds additional qualifications including a Bachelor of Engineering with first class honours, a Master of Engineering Science and a PhD and other qualifications in other areas.⁴⁷

The witness explained that in 2018 he had been approached by Work Health and Safety to provide a report in relation to the death of Mr Viner, including any potential cause of death.⁴⁸ He went on to say that his investigation included the blue compressor unit in the basement of the property, however he said he didn’t find it was germane to Mr Viner’s death.⁴⁹

Under cross-examination the Professor explained his qualifications enabled him to provide an opinion about electrical pathways and currents and the electrical science involved in those types of matters. He confirmed that he had undertaken an inspection of the basement at the subject property.⁵⁰

Without repeating the extensive explanations given by this witness with respect to the measurements of electrical currents through circuits, the area upon which the Defence challenged him, concerned the type of testing undertaken by two earlier Prosecution witnesses, Mr Sparks and Mr Hewitt.

Both of those witnesses’ evidence was that they conducted de-energised testing of the relevant circuits and equipment, including the blue compressor. Their evidence was that the de-energised testing of the basement cold room switchboard and related circuits, including the blue compressor unit, demonstrated the cold room was electrically unsafe.

Professor Andrews was asked-

‘Q. Do you consider de-energised testing of the electrical equipment in the basement adequate for the purposes of determining whether it poses an electrical risk?’

⁴⁴ Transcript page 2-17 at lines 11 - 19

⁴⁵ Transcript page 2-18 at lines 11 to 12

⁴⁶ Transcript page 2-20 at line 36

⁴⁷ Transcript page 1-58 at line 40 and page 1-59 at lines 26 - 34

⁴⁸ Transcript 1-58 at lines 45 to 46 and page 1-59 at lines 1 to 2

⁴⁹ Transcript page 1-59 at lines 8 to 17

⁵⁰ Transcript page 1-59 at lines 36 - 41

*A. There are two answers to that. One is that in Mr Spark's investigations and the environment he was in, it would have been unwise to have energised the circuit to do the testing. He would have exposed himself to potential risk. On the other hand, continuity alone and earth resistance alone will not give us an indication of the function of a particular circuit, and energisation may well be required to verify the integrity of particular connections. Are they, in fact, mandatory? Do connections or no connections pose a risk? And that really can only be established with energisation.*⁵¹

And further during cross-examination the witness was asked –

Q. Okay. And would you agree that conducting de-energised testing doesn't prove how various electrical circuits are going to behave when electricity's flowing through them?

A. I think that's true, particularly if there are faults within the system.

Q. Sure, and following on from that, de-energised testing won't establish whether or not electricity can flow through certain circuits; is that correct?

A. Broadly speaking, yes. Yes.

Q. And, for example, in our case, we're quite focused on the cold room circuit – which is identified on the basement switchboard – that the de-energised testing isn't going to establish whether or not electricity can flow through that cold room circuit, is it?

A. De-energised testing will not do that completely for us.

Q. Thankyou. Now Professor Andrews, do you consider insulation tests conducted while the installation is de-energised - do you consider them to be adequate for the purposes of determining whether or not the electrical equipment and electrical installation in the basement poses an electrical risk?

A. No, I don't think – and I don't think continuity testing of insulation resistance in its own right will point to the existence of a danger or anything of that sort. It may point to various necessities of the standards, but the assumption would be that if those were not present, then they constituted a danger. That is not a foregone conclusion.

Q. Now, would you agree, in the absence of any energised testing one can't rule out, in this particular circumstance, the possibility that electrical supply to that cold room circuit had been disconnected or decommissioned or whatever the term you want to use upstream, so behind the switchboard?

*A. Yes. I don't think we can do that wholly, no.*⁵²

In short, Professor Andrews evidence was that the de-energised testing undertaken by Mr Sparks and Mr Hewitt could not be conclusive as to whether the blue compressor unit and the basement area was electrically unsafe.

Conflicting evidence from Prosecution witnesses

Clearly this evidence is contrary to the earlier evidence of the two prosecution witnesses who maintain that de-energised testing demonstrated the area was electrically unsafe.

⁵¹ Transcript page 1-61 at lines 23 to 32

⁵² Transcript page 1-62 at lines 1 to 27

The conflict in the evidence between the prosecution's own witnesses was not settled when the Prosecution were able to re-examine Professor Andrews. After a brief adjournment the Professor was re-examined by the Prosecution. Of particular note, is an exchange with respect to the witnesses' experience in dealing with electrical installations-

Q. '... You gave some information about your background. What is your practical experience with electrical installations?

A. Well, I'll put it this way. My expertise is in the investigation and treatment of electrically-injured people, and of those, I have experience of something like 400, 450-such people. In order to ascribe the currents flowing – their pathway, their effect on individuals, one certainly has to have cognisance of the environment they were in, and so in each case, one would assess the environment.

Q. And does that include investigating actual electrical equipment?

*A. Only in a small proportion of cases. On the other hand, it does involve scrutiny in most cases of any further technical reports that are supplied, with regard to the state of the equipment in question.'*⁵³

Written Submissions

At the close of the evidence, directions were given with respect to the filing of any written closing submissions.

Both Parties subsequently filed written closing submissions.

With respect to the conflict issue, the Prosecutor urges the Court to reject Professor Andrew's evidence and to prefer the evidence of Mr Sparks and Mr Hewitt and accept that the de-energised testing of the basement circuits is conclusive proof that the Defendant failed in his duty to ensure the area was electrically safe.

But the difficulty with that submission is, it is not supported by clear, cogent or consistent evidence. The Court must be satisfied beyond a reasonable doubt that the Prosecution have proved each element of the offence before it can find the Defendant guilty.

Where such a significant inconsistency exists within the Prosecution's own case and that inconsistency remains at issue after all the evidence is adduced, then that conflict must be resolved in favour of the Defendant.

Of course, that does not in itself determine the matter. The Court must look at the totality of the evidence before it and only then decide whether the Prosecution has discharged their evidentiary onus beyond a reasonable doubt.

Decision

In arriving at my decision, I have taken all the evidence into account and made the following determinations.

Having listened to the recording of the interview and then carefully reading the transcript, I find that Mr Kouzoukas answered questions from Mr Underwood in a frank and forthright manner.

⁵³ Transcript page 1-76 at lines 11 to 22

During his oral testimony to the Court, I find the Defendant's evidence on these matters was consistent with the answers he provided during the recorded interview in 2017.

Any hesitancy or vagueness that might be read into his evidence before me, can in my view, be properly understood by the passage of time since the initial interview, which is now some four years ago.

I also find that the Defendant was co-operative in the period immediately following the tragedy and his degree of co-operation and assistance with the investigators is clearly set out in the tendered report completed by Mr Underwood, which includes the following observations-

- *The duty holders assisted inspectors throughout the investigation*
- *The duty holder participated in a record of interview*
- *Immediately following the incident the duty holder implemented control measures to prevent reoccurrence – (the basement electrical system was isolated completely)*
- *The duty holder had in place a risk management system prior to this incident. (Regular testing and tagging of equipment. Regular maintenance.)*

None of these observations were in contest before me and I accept them.

Nothing in that report or in the recorded interview suggests any consciousness of guilt on the part of the Defendant.

In fact his willingness to assist the investigators and the frank manner in which he answered their questions is, in my view, indicative of a person who was genuinely distressed with the death of Mr Viner and wanted to assist in any way he could.

I find on the evidence, Mr Kouzoukas believed all equipment in the basement, including the blue compressor, had been decommissioned at the time he purchased the property.

Notwithstanding this belief, I also accept his evidence that he subsequently engaged an electrician, Mr Roloff Schumacher who he specifically asked to inspect the electrical components in the basement to ensure they were electrically safe.

I find on the evidence, Mr Kouzoukas held an informed and reasonable belief that, following the inspection undertaken by Mr Schumacher, all equipment in the basement, including the blue compressor unit had been decommissioned and was electrically safe.

This belief was further evidenced at the time when the Defendant personally entered the flooded basement to attend to pumping it out.


It is, in my respectful view, inconceivable that the Defendant would have placed his personal safety in grave danger by entering the flooded basement area in circumstances where he had not taken all reasonable steps to ensure the area was free of any electrical hazards.

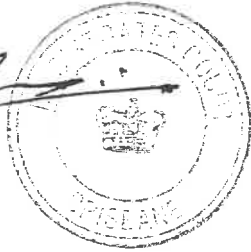
Further, the Prosecution did not bring any witness or other credible evidence to challenge the Defendant's testimony on these matters.

Similarly, and despite a rigorous cross-examination that directly challenged his evidence, the Prosecution did not gain any concession from the Defendant on these matters.

Having regard for these findings and coupled with the inconsistencies within the Prosecutions own witnesses' testimony and noting the degree of co-operation by the Defendant during the investigation that took place following the incident, I am not satisfied that the Complainant has proved, beyond a reasonable doubt, that the Defendant failed to comply with the electrical safety duty under section 40D of the *Electrical Safety Act 2002*.

I find the Defendant **NOT GUILTY**


MG Nolan
MAGISTRATE



11th June 2021