



£1 million fine for Major UK Retailer: The Importance of being Asbestos Aware

The recent prosecution of Marks & Spencer plc ("M&S") following its failure to properly manage works involving asbestos during refurbishment at two of its stores, serves as a timely reminder to all those who are involved in the management of premises. Amongst other duties, they must consider the dangers asbestos poses when disturbed and the control measures which are necessary to deal with it safely and in compliance with the law.

M&S was convicted of two charges under the Health & Safety at Work Act 1974 of failing to ensure the health and safety of its staff and others.

M&S and the three contractors which it used to undertake the refurbishment of its stores in Reading and Bournemouth were all fined for putting members of the public and the workers at risk of exposure to asbestos containing materials. M&S was fined £1million and ordered to pay £600k costs, Styles & Wood Limited was fined £100k and ordered to pay costs of £40k, Willmott Dixon Construction Limited was fined £50k and ordered to pay costs of £75k and PA Realisations Limited was fined £200 as it was in administration.

The Case

As part of the refurbishment works, construction workers had to remove asbestos containing materials that were present in the ceiling tiles. The contractors worked overnight in enclosures on the shop floor with the aim of completing small areas of asbestos removal before the stores opened to the public each day.

In convicting M&S the Court found that M&S had not properly planned the works and had not allocated sufficient time or space for the removal of asbestos containing materials during the works. This resulted in ceiling tiles containing asbestos falling to the floor and cleaned areas being re-contaminated due to air circulating in an unsealed roof void at the Reading store and pieces of asbestos being found outside of the plastic enclosures used for containment at the Bournemouth store.

M&S had engaged specialist contractors in each of the stores and introduced their own guidance for dealing with the asbestos, however, it failed to ensure that the contractors were working in accordance with this guidance or that the work complied with the appropriate minimum standards set out in the legislation.

In particular when engaging contractors to undertake work (including work involving asbestos), those instructing the contractors should ensure that all involved have the requisite specialist knowledge relevant to the task and that careful consideration has been given to the planning of the work and the level of management and supervision required.

The level of fine was a conscious, clear message that regardless of the actions of contractors, the premises occupier retained a primary duty to ensure that workers and the public were not exposed to risk.

Asbestos

Asbestos is the biggest single cause of work related deaths in the UK with an estimated 4000 people dying every year. Although use of asbestos in most construction was banned in 1985, there remain in the region of 850,000 commercial premises which still have asbestos containing materials.

In spring 2008, the HSE launched its 'hidden killer' campaign making it clear that criminal prosecutions would follow for those who failed to comply with their legal duties. Since that time there have been in excess of 30 prosecutions of companies and six prosecutions of individuals recorded by the HSE for asbestos related offences. Although the fines of companies have generally ranged from £10,000 to £25,000 as this and some other recent cases demonstrate, the fines and associated costs can be significantly higher. Fines in health and safety cases cannot, of course, be indemnified by insurance.

The Law

Although a significant number of prosecutions associated with asbestos have been brought under the general duties under the Health & Safety at Work etc. Act 1974 there is specific legislation in relation to dealing with asbestos.

The Control of Asbestos Regulations 2006 amalgamated three different sets of regulations introducing a new regime for the management of asbestos. This sets out a number of general requirements including the identification and registering of asbestos, conducting risk assessments, mandatory training and plans of work. In addition the legislation includes a licensing and notification of work regime.

The legislation is heavily prescriptive and may become yet more so. Despite the Coalition Government's apparent commitment to deregulation, companies' and contractors' responsibilities in this area are likely to become more onerous. In February 2011, the European Commission issued a reasoned opinion that the UK had not fully implemented the directive on protection of workers from risk to exposure from asbestos at work. This has been accepted by the Government and in September the HSE issued a consultation document ahead of proposals to introduce revised Control of Asbestos Regulations.

Conclusion

Those which have control of premises must not assume that delegating work to contractors means a delegation of their health and safety responsibilities. Even where guidance has been produced, if this is insufficient or not followed, liability still rests with the duty holder. This is the case when managing all health and safety risks, not just those relating to asbestos.

Height, demolition, electrical confined spaces risks, for example, all raise particular specialist approaches.

However, the specific controls necessary when dealing with asbestos requires particularly careful planning and close monitoring. The likely change in the law combined with the continuing number of asbestos related deaths as well as the high number of premises which still hold asbestos means that this issue will remain at the forefront of work related prosecutions. The recent wave of cases demonstrates that those with control of premises will not be able to stand aside where the contractors that they have engaged fail to deal with asbestos safely.

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