

**IN THE DISTRICT COURT
AT OAMARU**

CRI-2013-076-000529

PLUMBERS GASFITTERS & DRAINLAYERS BOARD

v

KURT JOPSON

Hearing: 6 November 2013
5 December 2013

Appearances: R M Flinn for the Informant
K Campbell for the Defendant

Judgment: 20 January 2014

RESERVED DECISION OF JUDGE J E MAZE

[1] Kurtis Jopson is charged with doing or assisting in doing drain-laying work while not authorised under s10.

[2] It is not denied that Kurtis Jopson lacked registration as a drain-layer at the relevant time. Therefore the only factual question to be determined is whether what he was doing on 24 May 2012 near Waimate amounted to “doing or assisting in doing drain-laying work”.

[3] Angela June Leckie was then senior building inspector for Waimate District Council. In carrying out her duties she went to Lynburn Farm on the date specified. She encountered the defendant near a van marked with the trade name Think Water. Attached to the van was a trailer containing pipes. At the back of the van she could see elbows and bends for pipes. She asked the defendant, who was standing about four metres from the van, who was the drain-layer and he said he was. She asked if

he had a level and he said he was using the level of the digger driver. She asked for his licence and the defendant said he did not have one. She then directed him to cease work. She photographed the site showing a trench from the new dairy shed, with pipes lying in the bottom. She understood the purpose of the trench was to contain a drain to remove effluent from the dairy shed. She spoke to the defendant's employer who denied the defendant was laying drains. She refused to accept that response and said she had issued a stop work notice. She reported her findings to the Board of the prosecuting agency. She accepted there was no base material in the trench under the pipes and that some pipes were unconnected; she considered however that some pipes may have been connected. She accepted she had not considered the digger driver (working on the trench into which the pipes had been deposited) to be laying a drain, and had not stopped him from working.

[4] The owner of Lynburn Farm confirmed that for the purposes of the conversion to dairy farming the company had engaged Think Water to do the drainage and plumbing work and to organise effluent disposal. He understood the trench in the photographs was part of the planned disposal of effluent from the dairy shed. He produced as exhibit 3 two invoices from Think Water to Lynburn Dairies; the first is for parts and labour in May 2012, and the second is for installation of pumps and plumbing for new dairy shed as per quote. He understood Think Water had engaged Hi Flo Plumbing (which employed registered drain-layers) to do the work required to be done by a registered drain-layer.

[5] Ross Cockburn is employed by the informant Board as a technical assistant. He confirmed that Mr. Jopson is not licensed as a drain-layer. He has had 34 years experience as a drain-layer. He explained the risks of drain-laying not done competently. He said the industry does not accept that it is permissible for drain-laying to be done by an unauthorised person who then obtains approval on inspection by an authorised drain-layer. He produced the Gazette Notice (exhibit 5) to explain what the Board considers is required for qualification as an authorised drain-layer. He conceded in cross-examination there was a lot more to drain-laying than just putting pipes in a trench. He accepted it would be common for a digger operator without drain-laying qualifications to be engaged to dig trenches, because that digger operator is not laying the pipes. It is laying the pipes which is at the heart of the

Board's concerns ("Ultimately drain-laying is laying the pipes" – NOE p.40). The drain-layer must ensure the trench is constructed safely and the fall is acceptable. The drain-layer would "install the drain pipes in the drain". He opined that when you lay pipes in a trench you are drain-laying. His opinion is not binding upon me nor is it determinative of the matter.

[6] Mr. Jopson said he attended the site to deliver the component parts for the drain while under the impression that there was pressure to have the drain laid before a concrete pad was poured later that same day. He rang the drain-layer charged with laying the particular drain and asked what the required levels should be. He borrowed a laser level from the digger driver and then put component parts of the pipes in the trench. He did, and intended to do, nothing else. He considered he was probably saving time for the drain-layer and avoiding double handling of the pipes. He also did not want any of the pipes damaged by any of the machinery operating around the site at the time. He understood the drain-layer would check the levels and do whatever was required after that. He did not, at any time, intend to connect any drain pipes. He did not do so.

[7] Peter Ryder is a certifying drain-layer and he owns Hi Flo Plumbing. At the relevant time his company was engaged to lay the drain in question. The employee who was to undertake that task at Lynburn Farms was to be supervised by Ian Ryder (a certifying drain-layer). Mr. Ryder's answers to questions from the bench indicated some degree of difference in understanding, and some confusion, between those in the field and the informant Board. In practical terms it is understood by those working as drain-layers that a registered drain-layer is not expected to complete literally everything required in creating a drain. Those who dig trenches in which a drain is to be constructed, for example, are not required to be registered drain-layers. The absence of a clear and unequivocal definition of 'drain-laying' has plainly caused a degree of confusion amongst those expected to comply with the law. It is undeniable that those, working on building sites where drains must be constructed, need to be able to identify those tasks which a registered drain-layer, and only a registered drain-layer, can do, both because the law must be complied with, and because it is important that the risks against which the law guards are avoided.

[8] The argument for the informant is :

- Drain-laying means laying a drain (s4 of the Act).
- The ordinary dictionary meaning of 'laying' is 'to put down and set in position for use'.
- Mr Jopson set the pipes in position for use because he said he worked under the direction of Hi Flo Plumbing, he used the digger driver's level to ensure the trench had the appropriate fall, he placed the pipes in the trench , and the pipes were ultimately to be used in the position and place where he put them. It is not necessary that Mr Jopson join the pipes to be drain-laying.
- The policy indication to be derived from the Act supports that approach.
- Supervision is not sufficient unless it is by a person himself authorised to lay drains and also authorised to supervise such work by others.
- As the offence section creates an excuse or qualification, it is for the defendant to establish that he was supervised by a person authorised to do drain-laying (a licensed drain-layer) and to supervise others doing drain-laying (a certifying drain-layer), and he has failed to do so.
- In any event even if there is sufficient evidence of a certifying drain-layer supervising the defendant, the evidence discloses it was not in accordance with the requirements of the Gazette Notice.

The defence argument is :

- Mr Jopson did not lay a drain;
- If Mr Jopson is deemed to be drain-laying he was being supervised (ss4 and 25). Supervision does not require compliance with the Gazette Notice as it is neither primary nor secondary legislation.

- The informant has failed to prove there was no legally satisfactory supervision; the evidence is that Hi Flo , as a registered drain-layer, was to do the work which can only be done by a registered drain-layer and that Mr Jopson acted under the direction of that drain-layer.

[9] The questions for me are:

1. Was Mr Jopson laying a drain as a matter of fact?
2. If he was, did he have a licence to do so? The evidence is clear he did not.
3. If he was drain-laying and lacked a licence, does he avoid liability by virtue of being supervised?

Was Mr Jopson laying a drain?

[10] It seems clear that the trench had been dug by another contractor. Think Water was engaged to install plumbing, and to engage Hi Flo, as its sub-contractor, to lay the drain for the effluent from the dairy shed. Digging the trench, and collecting component parts from the supplier and delivering them to the site does not amount to 'laying a drain'. Mr. Jopson checked levels within the trench and then placed pipes in the trench. There is no evidence Mr. Jopson did, or intended to do, anything else. So, was he laying a drain?

[11] Drain-laying is defined in s4 as (a) laying a drain, or (b) altering, reconstructing, extending, repairing, opening-up or renewing a drain ...or (c) fixing or unfixing a drain from a sewage tank, or (d) fixing or unfixing a gully-trap in connection with a drain or sewage tank. While 'laying' is not defined in the Act, a logical reading of all the acts which meet that definition of 'drain-laying' discloses that to lay a drain you must intend to create (or do any of the other things specified in relation to) a drain. You do not lay a drain by accident; you must intend to create a drain to be within the definition of drain-laying under s4. While criminal liability will attach to anyone who lays a drain without holding a licence, that does not mean that drain-laying itself does not require intent. Drain-laying is a deliberate act by which you intend to create (or by the extended definition modify) an artificial conduit for waste water. Until such time as the component parts are in place and

joined, there is no functioning drain. Therefore 'laying a drain' means deliberately creating, or attempting to create, an artificial conduit for waste water. If Mr Jopson was merely placing the pipes in a trench, without, at the time he put them there, intending to create a drain, he cannot be said to be laying a drain. The informant must prove Mr Jopson placed the pipes in the trench **intending at that time** to place them so that they created (or would create when he completed his planned action) an artificial conduit for waste water.

[12] Without that requirement for intent to create a joined drain, the definition proposed by the informant will create problems. For example, would it be drain-laying to lay them alongside the proposed route? On the definition proposed by the informant, it could. The definition in the Act does not require a drain to be laid in a trench, and therefore the carrier who delivered the pipes by stretching them along the roughly proposed route, doing nothing more, would be drain-laying. Plainly that is not what the legislation is aimed at.

[13] Therefore, 'laying a drain' must mean deliberately putting pipes in a selected position with the intention at that time of joining them together in that position so as to create an artificial conduit for waste water.

What did Mr Jopson do and what did he intend to do?

[14] Mr Jopson says on oath that he delivered the pipes for the drain-layer and elected to place them in the trench to save time and double handling when the drain-layer arrived to do his work because there was pressure to have the drain completed before the arrival of the concrete trucks to pour the yard later that day. To what extent was that supported or compromised by other evidence? Mr. Gibson understood that the drain-laying was to be done by another contractor. Ms Leckie saw that at least some of the pipes were not connected one to another. She claimed that some pipes appeared to be connected, but she seemed to be trying to interpret the photos rather than remembering what she actually saw that day. The only reliable evidence is that no pipes were connected before the stop work notice was issued. That conclusion is supported by the defendant's evidence and the fact there was no additional base material put around the pipes.

[15] There are two aspects of Ms Leckie's evidence which appear at first blush to suggest Mr. Jopson intended to go further. Ms Leckie asked who the drain-layer was and the defendant said it was him, and he said he borrowed a level from the digger operator. The first question was plainly equivocal. In the circumstances in which it was asked, it would more readily be understood as asking who was responsible for placing the unconnected pipes in the trench. I am satisfied that the defendant was not actually saying "I am doing drain-laying", but was accepting that if Ms Leckie had any questions for the workman who put pipes in the trench, then he would answer them. Ms Leckie's further enquiry as to whose level he had used, also lacked the specificity for the purpose to which the informant wants now to put it. She needed to ask rather more questions than she actually did, before drawing the conclusions she did. What he said was not a 'confession' he was drain-laying.

[16] Therefore in the context of the credible and reliable evidence as a whole I am satisfied that the informant must prove that the defendant intended to embark upon drain-laying when he placed those pipes in the trench. Mr. Jopson has given evidence he had no such intention at any time. That evidence has not been displaced. Therefore I cannot be satisfied beyond reasonable doubt Mr. Jopson intended to begin drain-laying at the relevant time. That being the case he is not proven to be drain-laying at all, and therefore the charge must fail.

[17] If drain-laying (requiring registration as a drain-layer) means taking any action whatsoever in relation to the component parts of a drain in the vicinity of what is intended to be the site of a drain in the future, then I suggest the law needs to be clarified by amendment. It is inappropriate that criminal responsibility should attach to actions where there is widespread confusion about the requirements of the law amongst those engaged in the industry and expected to comply with the law. The aim of the legislation is plainly to ensure that those who install drains have sufficient knowledge and experience to do so adequately, safely and to the required standard. Mr. Jopson did not install a drain, and he did not intend to do so, when he put the pipes in the trench. Without more, his actions could never have created a drain in fact, and more importantly he did nothing which could have given rise to the concerns which the legislation was intended to address. Neither is it proven he was assisting anyone who was laying a drain, as it is not proven he intended to help

another person, then actually engaged in the process of laying a drain, to achieve their purpose. No-one had actually started 'laying a drain' at the point where Mr. Jopson stopped acting. All he did was deliver some component parts, nothing more. His position is the same as that of the trench digger; neither was assisting in the process of drain-laying.

[18] Accordingly I am not satisfied beyond reasonable doubt Mr. Jopson laid or assisted to lay a drain, and therefore this prosecution must fail. It is not necessary for me to address the issue of supervision, although I note there would appear to be difficulties for the informant in the use of the Gazette Notice. It is however not necessary for me to address that, as the prosecution fails at a much more fundamental level on the facts.

[19] The charge must be dismissed.



J E Maze
District Court Judge

Reserved decision delivered by me pursuant to section 68
of the Summary Proceedings Act 1957.



A M Stuart
Deputy Registrar
10.30am Monday 20th January 2014