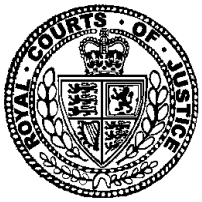

Neutral Citation Number: [2019] EWCA Crim 227

Case No: 201703698 C2; 201703699 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HHJ BEDDOE
T20160038

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before:

LORD JUSTICE LEGGATT
MRS JUSTICE CUTTS DBE
and
HIS HONOUR JUDGE WALL QC (SITTING AS A JUDGE OF THE CACD)

- -

Between:

The Queen	**Respondent**
- and -	
Squibb Group Ltd	**Appellant**

- -
- -

Sailesh Mehta (instructed by the **Health and Safety Executive**) for the **Respondent**
Stephen Hockman QC and **Mr Watson QC** (instructed by **Womble Bond Dickinson**) for the **Appellant**

Hearing date: 15 February 2019

- -

Approved Judgment

Lord Justice Leggatt:

1. The appellant, Squibb Group Ltd ("Squibb"), was tried at Southwark Crown Court in July 2017 on an indictment alleging breaches of duty under two provisions of the Health and Safety at Work Act 1974. On count 1, Squibb was charged with an offence of failing to comply with its duty under s.2(1) of the Act "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all [its] employees." Count 2 charged Squibb with an offence under s.3(1) of failing to conduct its undertaking "in such a way as to ensure, so far as is reasonably practicable, that persons not in [its] employment who may be affected thereby are not thereby exposed to risks to their health or safety."

2. Squibb was convicted by the jury of the offence under count 1 alleging breach of its duty towards its own employees, but was acquitted of the offence under count 2 alleging breach of its duty to others. The sentence imposed for the offence of which Squibb was convicted was a fine of £400,000.

3. Squibb has appealed, with leave, both against its conviction and, if that appeal does not succeed, against its sentence.

Factual background

4. The prosecution arose from Squibb's involvement as a contractor in a project to refurbish a school called Warwick School South in the London Borough of Waltham Forest. The project was managed on behalf of the local authority by a company called NPS London Ltd.

5. The school was built at a time when asbestos was routinely used in construction. Under the Control of Asbestos Regulations 2006 there is a legal duty on everyone who has an obligation of any extent in relation to the maintenance or repair of non-domestic premises, to manage the risk from asbestos. This includes a duty to ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises. To that end, NPS commissioned a survey from a company called Redhill Analysts, which prepared a report. The final version of the Redhill report was issued on 1 July 2011. The report identified the presence of asbestos in various places in the school building and steps were taken to remove this asbestos safely. The first phase of the refurbishment project was then carried out.

6. The main contractor appointed to carry out the second phase of the project was a large construction company then known as Mansell Construction Services Ltd and since renamed as Balfour Beatty Regional Construction Services Ltd. We will refer to it as "Balfour Beatty". As part of this phase of the project, Squibb was engaged as a sub-contractor to carry out demolition work. Part of the demolition work was carried out between 4 and 14 April 2012 during the school's Easter holidays. The work resumed on 23 July 2012. On 24 July an employee of Squibb, when inspecting an area above a suspended ceiling, discovered a large clump of asbestos. All work then immediately ceased while a new asbestos survey was carried out by a different surveyor. This confirmed the widespread presence of asbestos sprayed on ceilings throughout the school and demonstrated that parts of the building which had been demolished had contained asbestos.

7. NPS London Ltd, Balfour Beatty and Squibb were all charged with offences under the Health and Safety at Work Act 1974. NPS London Ltd and Balfour Beatty pleaded guilty to the offences charged but Squibb did not, and Squibb was tried before HHJ Beddoe and a jury between 4 and 19 July 2017.

8. At the trial, Squibb did not dispute that there was asbestos in the building which was disturbed during the demolition work, with the result that both Squibb's own employees and others (including staff and children at the school) were exposed to a risk of inhaling asbestos fibres. It was also not in dispute that such inhalation carries a long-term risk to health of contracting a potentially fatal asbestos-related disease.

9. The argument at the trial was about whether Squibb had done all that it was reasonably practicable for it to do to protect its employees and others against the risks to their health created by exposure to asbestos. That is a matter on which under s.33(1)(a) of the Act, the employer (i.e. Squibb in this case) bears the burden of proof, with the standard of proof being the balance of probability.

10. The prosecution case was, in short, that, to comply with its duties under sections 2(1) and 3(1) of the 1974 Act, Squibb needed to satisfy itself that there was no risk of finding and disturbing asbestos during the demolition works. That required Squibb to obtain and study carefully the Redhill report. Had Squibb done this, it would or should have realised from the caveats in the report that the survey undertaken by Redhill was inadequate and that a further and more thorough survey was required before the demolition works could safely be commenced.

11. Squibb's first line of defence was that it had reasonably relied on assurances given to it by Balfour Beatty that all asbestos in the areas where it was engaged to carry out work had been identified and removed. The evidence of Squibb's employees was equivocal at best as to whether they had examined the Redhill report. But Squibb also argued, relying on the evidence of an expert witness, that the report would reasonably have been understood as confirming that all relevant areas had been surveyed. A particular point of controversy concerned the proper interpretation of a table on page 17 of the report setting out a list of areas of the building to which it was said that access was required. The prosecution maintained that the report made it clear that the areas listed in the table were areas which Redhill had not accessed and which should be presumed to contain asbestos. Squibb contended that, to the contrary, the report was reasonably read as indicating that these were areas which Redhill had surveyed.

12. The judge directed the jury to give separate consideration to each count. He handed out written directions which included the following passage:

> "**Separate consideration**
>
> The essential difference between the two counts are the persons said to be put at risk and it may be that the counts stand or fall together, i.e. that your verdicts on each count will be the same. However, it does not necessarily follow that they will be and although you are entitled to look at the whole of the evidence when considering each of the two counts, you must give each count and your verdict on each count careful and separate consideration."

Similar directions were given orally in summing up the case to the jury.

13. In relation to each count, the judge directed the jury to consider three questions, which were also set out in a document showing "routes to verdict". For each count, the first question was whether the jury was sure that during the period identified Squibb was an employer. The judge indicated to the jury that this question was unlikely to cause them any difficulty, as Squibb accepted that it was an employer and they had heard from witnesses who were employees of Squibb at the material time.

14. Under count 1 the second question which the jury was asked to consider was whether they were sure that during the period identified one or more Squibb employees was exposed to the risks of asbestos and thereby exposed to risks to their health and safety. The corresponding question posed in relation to count 2 was whether the jury was sure that, through the way that Squibb carried out its undertaking during the period in question, persons not employed by Squibb were exposed to risks to their health and safety by exposure to the risks of asbestos.

15. In connection with these questions, the judge reminded the jury of undisputed evidence that asbestos was found in various parts of the ground, first and second floor of the building and represented a risk of exposure to asbestos to Squibb employees and others. He also reminded them that they had heard unchallenged evidence about the potentially serious harm caused by breathing in asbestos and therefore that, if one is exposed to asbestos, it is easy to see how there is a risk to the person's health and safety.

16. On count 1, the third question for the jury, if they were sure of both the first two matters, was whether Squibb had proved to them, on a balance of probabilities, that during the period identified it did all that was reasonably practicable to reduce the risk of exposure to asbestos for its employees. On count 2, the same question was posed in relation to persons not employed by Squibb.

The grounds of appeal

17. There are three grounds of appeal. These are, in summary:

    i) that the verdicts which the jury returned on the two counts were inconsistent with each other, such as to make the conviction on count 1 unsafe;

    ii) that the jury should have been directed that it was not open to them to return different verdicts on the two counts; and

    iii) that the judge should have directed the jury to consider the work done by Squibb in April and in July separately.

18. Although Mr Hockman QC in presenting the appeal on behalf of Squibb put the third ground of appeal at the forefront of his submissions, we will consider them in numerical order.

Ground 1: inconsistent verdicts

19. In our system of criminal justice where the constitutional responsibility for judging the guilt or innocence of a defendant is entrusted to a jury, it is only in exceptional circumstances that a court is entitled to interfere with the verdict of the jury, reached

after being properly directed by the judge, that the defendant was guilty of an offence. One such circumstance is where a jury has returned inconsistent verdicts. But the test of inconsistency is a high one. The appellant must persuade the court that the jury has returned verdicts which cannot stand together, in the sense that no reasonable jury applying its mind to the evidence could have reached the differing verdicts which the jury has in fact reached and that the inconsistency is such as to demand interference by an appellate court because they think that it makes the defendant's conviction unsafe. The leading case which established this test is *R v Durante* (1972) 56 Cr App R 708. It has been followed on many occasions since. A recent example to which we were referred is *R v Electricity North West Ltd* [2018] EWCA Crim 1944; [2018] 4 WLR 148.

20. Squibb contends that, although the jury was directed to consider each count separately, there was on analysis no rational basis for differentiating between the two counts. The evidence clearly showed, and Squibb did not dispute, that the persons exposed to risk to their health as a result of the demolition works comprised both the employees of Squibb who carried out the works and also other people who were not employees of Squibb. The prosecution case as to what steps it was reasonably practicable to take to address the risk also drew no distinction between the two categories – the fundamental allegation being that Squibb should have obtained, read and acted upon the Redhill report. It was not alleged that there were particular steps which Squibb could and should have taken, but which it did not take, to protect its own employees but not others, or vice-versa. Likewise, Squibb's defence that it did all that was reasonably practicable in the circumstances and was entitled to proceed on the basis that all asbestos in the relevant areas had been removed did not differentiate between its own employees and others. Hence, Mr Hockman submitted, logic dictated that the jury's verdicts must be the same on each count.

21. Had the risks caused by the disturbance of asbestos to the health of employees of Squibb and to the health of others been identical, that logic might indeed have been inexorable. On the evidence, however, the jury was entitled to find that Squibb's employees were exposed to much higher levels of asbestos than anyone else. It is not in dispute that the level of exposure to asbestos would have been at its highest when parts of the building contaminated with asbestos (and especially walls which had asbestos trapped on top of them) were being knocked down. That demolition work was carried out by employees of Squibb who therefore bore the brunt of the exposure. A high level of exposure would also have occurred when the rubble was cleared up and removed from the building – a task also performed by Squibb's employees.

22. There was evidence that Squibb managed the works in a way that reduced the risks to others. Thus, the work was scheduled during the school holidays when no children and few members of staff were present. Access to staircases leading to the area of the works was shut off and plastic sheeting was put up to contain the dust. Rubble was bagged up and the sacks of rubble were removed by Squibb employees via the fire escape, so as to avoid carrying it through the school.

23. It is common ground that these precautions would not have prevented some people who were not Squibb employees from being exposed to dust, and that some of this dust would have contained asbestos. The other persons most exposed would have been a janitor who entered the area of the works on a daily basis and employees of other contractors who carried out work in the affected areas after the demolition had been

completed. It was also accepted by Squibb that, despite the steps taken to contain it, some dust would inevitably have found its way into the rest of the school and would have lingered after the demolition work had been done, thereby exposing children and teachers to some degree of risk. It is clear, however, that the jury would have been entitled to find that the risks caused to persons who were not Squibb employees were substantially lower than the risks to the employees of Squibb who carried out the works.

24. The judge directed the jury that doing what is reasonably practicable "involves balancing on the one hand the degree of risk – i.e. how likely it is that the harm will occur – with the steps necessary to avert the risk on the other hand." In considering whether Squibb had discharged its duty to ensure, so far as is reasonably practicable, the health and safety of its employees, the judge accordingly told the jury that:

> "… you will have to make an assessment in which you weigh up the benefit of taking each step to ensure employees' health and safety and compare it to the burden which would have been involved in taking each such step."

A similar balancing exercise was required in relation to non-employees.

25. Applying these directions – of which no criticism has been or could be made – the jury was entitled to consider that, as the degree of risk of harm to Squibb's employees was substantially greater than the degree of risk of harm to others, the measures which Squibb was required to take to avert the risk to its employees were correspondingly more onerous. Approached in that way, there was a rational basis on which a jury, applying its mind properly to the evidence, could find that Squibb had done all that was reasonably practicable to protect the health of persons other than its employees but had failed to do all that was reasonably practicable to protect its own employees from the risks of asbestos.

26. Accordingly, while we understand why the acquittal of Squibb on count 2 in circumstances where Squibb was convicted on count 1 caused the judge and no doubt others involved in the trial some surprise, we are not persuaded that the two verdicts are inconsistent with one another, let alone that any inconsistency between them is such as to demand intervention by an appellate court.

Ground 2: no direction that the jury could not return different verdicts

27. If the position had been that no reasonable jury applying its mind properly to the evidence could have reached different verdicts on counts 1 and 2, as the jury did in this case, then this should have been reflected in the judge's directions. In such a situation it would have been necessary to direct the jury that it was not open to them to return different verdicts on the two counts. As it is, it follows from our conclusion that the verdicts were not inconsistent that the judge cannot be faulted for telling the jury to give separate consideration to each count and for directing them that it did not necessarily follow that their verdicts on each count would be the same. Hence, the second ground of appeal adds nothing to the first.

Ground three: no direction to consider April and July works separately

28. At the trial, counsel for Squibb requested the judge to direct the jury that they should consider separately the works undertaken by Squibb in April 2012 and the further works in July and should only find Squibb guilty on either count if they concluded unanimously that Squibb had failed to comply with its duty (to its employees or to others, as the case may be) in relation to the April works, or in relation to the July works, or in relation to both. The judge declined to give such a direction. Squibb's third ground of appeal is that he was wrong not to do so and that the absence of such a direction makes its conviction unsafe.

29. In developing this argument on behalf of Squibb, Mr Hockman relied on a line of authority exemplified by *R v Beckingham* [2006] EWCA Crim 773. In that case the appellant, a council employee, was convicted of an offence under section 7 of the 1974 Act of failing to take reasonable care for the health and safety of persons who might be affected by her acts or omissions at work, thereby exposing them to a risk of contracting Legionnaires' disease. The prosecution served particulars alleging 10 different acts or omissions said to constitute breaches of the appellant's duty. Her conviction was quashed because the judge did not direct the jury that they must unanimously be sure that one or more of the particulars relied on by the prosecution was made out.

30. Mr Hockman submitted that it was incumbent on the judge to give a similar direction in the present case. He argued that there were material differences between the works performed by Squibb in April and the works in July. For example, the April works involved the first floor of the building, whereas the July works involved the second and ground floors; separate risk assessments and method statements were prepared for each phase; different employees of Squibb were involved in April and July; and the April demolition works were carried out, whereas no actual demolition had commenced in July before Mr White discovered the presence of asbestos, whereupon all work immediately ceased.

31. Mr Hockman submitted that in these circumstances it was necessary for the jury to consider separately whether Squibb had done all that was reasonably practicable to ensure that its employees (or others) were not exposed to risk from asbestos, first of all in April, and then secondly and separately in July. The failure to direct the jury that they must be unanimous in their conclusion that Squibb was in breach of duty in relation to one of the two phases (or both) before they could find Squibb guilty means that there is a risk that Squibb was convicted without the jury being agreed upon a factual basis which amounted to the commission of an offence.

32. In our view, there is no substance in this argument. There were certainly factual differences of the kind identified by Mr Hockman between what Squibb did in April and in July. But in the way the prosecution put its case, those differences were not material. As already noted, the prosecution case was straightforward. It was that, before commencing any demolition work, Squibb should have obtained and read the Redhill report and realised that a full and proper assessment of the extent to which asbestos was present in the school building had not been made. On the prosecution case, as soon as demolition work began which created a risk of exposure to asbestos, Squibb was in breach of its duty. That breach continued for as long as the work continued and Squibb's employees (and others) were thereby exposed to further risk.

33. Having regard to the way in which the case was presented by the prosecution, it was unnecessary – and, in our view, would have been wrong – to direct the jury that they must treat the April and July phases of Squibb's work as if they were the subject of separate or discrete allegations.

34. We would add that, so far as we can see, there was equally no material distinction drawn as part of the defence case between what it was reasonably practicable for Squibb to do in April and in July. The principal elements of Squibb's case – that it was entitled to rely on assurances from Balfour Beatty that all asbestos had been removed and that reading the Redhill report would merely have confirmed that understanding – applied just as much to both phases of the work. When the question was explored in argument, it seemed to us impossible to construct a realistic scenario in which some members of the jury might conceivably have thought that Squibb had done all that was reasonably practicable to ensure the health of its employees in July but not in April, but yet at the same time others might have concluded that Squibb had done all that was reasonably practicable to that end in April but not in July. In these circumstances, giving a direction of the kind which Squibb sought would simply have caused unnecessary complication by introducing a possible distinction which bore no relationship to the realities of the case.

Conclusion on the appeal against conviction

35. We conclude that none of Squibb's grounds of appeal against its conviction is well-founded and that there is no reason to think that its conviction is unsafe.

The sentencing decision

36. In sentencing Squibb, the court was required to follow the Definitive Guideline for Health and Safety Offences issued by the Sentencing Council. To determine the offence category within the guideline, the court must assess the offender's culpability in committing the offence and the risk of harm (along with any actual harm) which the offence caused. A fine is then fixed based on the size of the offender's turnover and other financial circumstances, adjusted where appropriate to take account of aggravating or mitigating factors.

37. The judge assessed Squibb's culpability as "high". He considered that the company had fallen far short of appropriate standards. It was incumbent on the company, working as it does in a field where they are very likely to have to address the risk of asbestos on a frequent basis, to have a system in place for doing so. This should include a system to ensure that, where an asbestos survey has been carried out, the survey report is obtained, read and acted upon. Instead, Squibb had sent its employees to carry out demolition works in a building where asbestos was likely to be found relying on what the judge described as "false and lazy assumptions … made on the basis of word of mouth."

38. The assessment of harm under the guideline requires a consideration of both the seriousness of the harm risked and the likelihood of that harm arising. It was agreed that the seriousness of the harm risked by Squibb was at level A because exposure to asbestos can potentially lead to a person who has inhaled asbestos fibres contracting a fatal disease. Although he did not say so in terms, it is apparent from the offence

category that he used that the judge assessed the likelihood of that harm arising as "medium" and the relevant harm category as harm category 2.

39. Squibb's turnover as shown in its most recent annual accounts was £43.4m, making it a medium-sized organisation for the purpose of the guideline. For such an organisation, for an offence involving high culpability in harm category 2, the starting point for a fine is £450,000 – which was the starting point taken by the judge.

40. The judge gave Squibb some credit for having no previous convictions and for having put in place improved procedures following the incident, though he considered that the case put forward at trial which sought to excuse Squibb's conduct and put all the blame on others reflected a poor attitude towards health and safety on the part of its senior management. Taking these factors into account, the judge decided that the appropriate sentence was a fine of £400,000.

Squibb's grounds of appeal

41. Mr Watson QC, who presented the appeal against sentence on behalf of Squibb, focused his submissions on the judge's assessments of culpability and harm. He argued that, in assessing each of those factors, the judge had placed the offence in the wrong category, resulting in a sentence which was manifestly excessive.

Culpability

42. On the question of culpability, Mr Watson submitted that the judge failed to take any proper account of the jury's finding by its verdict on count 2 that Squibb had done all that was reasonably practicable to ensure the health and safety of persons other than its own employees. Squibb's breach of duty towards its own employees had also to be seen against the background that its employees had been properly trained to manage asbestos risks; that other contractors had previously done work at the site over many months without any alarm bells being raised; that Squibb had received assurances from Balfour Beatty, a large and reputable contractor, that it was safe to commence works at the site; and that, save for its failure to review the Redhill report, Squibb had prepared suitable risk assessments and method statements. Mr Watson further submitted that the judge failed to distinguish Squibb in terms of culpability from the other defendants, and in particular NPS (London) Ltd, who were materially more culpable.

43. As well made as these arguments were by Mr Watson, they do not persuade us that we would be justified in disturbing the assessment of culpability made by the judge who heard all the evidence given at the trial. Within the guideline, the general description given of offences which fall into the category of "high" culpability is that the offender "fell far short of the appropriate standard" (examples of which are given) and that there has been "serious and/or systemic failure within the organisation to address risks to health and safety". The corresponding descriptions for the category of "medium" culpability are that the offender "fell short" of the appropriate standard and that "systems were in place but these were not sufficiently adhered to or implemented." In this case, no challenge is or could be made to the judge's finding that Squibb failed to have a proper system in place to obtain, review and act upon any relevant asbestos report before carrying out demolition works in a building which was known, or was likely, to contain asbestos. The judge was also entitled to find that Squibb's failings reflected a lax approach on the part of its senior managers towards their responsibilities

which subsisted over a significant period of time. Overall, dealing as he was with an organisation that specialised in this type of work and could routinely expect to encounter the risks created by the presence of asbestos, the judge was entitled to conclude that Squibb had fallen far short of the appropriate standard and that there had been a failure within the organisation which was both serious and systemic to address a material risk to the health of its employees. That squarely justified assessing Squibb's culpability as "high".

Harm

44. On the issue of harm, however, while it was common ground that the seriousness of the harm risked was at level A, there does not appear to us to have been any proper basis for the judge's conclusion that there was a medium likelihood of such harm arising. The likelihood or otherwise that exposure to asbestos at a particular level for a particular period of time will ultimately cause a fatal disease is not something which is rationally capable of being assessed simply on the basis of supposition, impression or imagination. It is a scientific question which should be answered, if possible, with the assistance of scientific evidence.

45. In this case the court was provided with a report from an independent expert instructed by Squibb which sought to estimate the risk to Squibb's employees (and others) of contracting an asbestos-related disease as a result of their likely level of exposure. The estimates were based on statistical data derived from published studies. The expert's best estimate was that, if 100,000 people were exposed to asbestos to a similar extent to Squibb's employees, about 90 deaths would result. To put this estimated risk in context, the risk of dying from smoking cigarettes is around 1 in 5 (i.e. 20,000 cases per 100,000) and the risk of dying from working in the construction industry for 40 years or from an accident on the roads is around 500-600 chances per 100,000. On this basis, the likelihood that one of Squibb's employees will die as a result of their employer's breach of duty in this case is on any view extremely small.

46. The prosecution did not adduce any expert evidence either to put forward any alternative estimate of risk or to criticise the methodology or assumptions used by Squibb's expert. Undoubtedly, as Squibb's expert acknowledged, any estimate of the kind which he made can only be very rough. Long-term risks of this nature are inherently difficult to assess and quantify, the relevant scientific knowledge is very far from perfect and any estimate must be subject to a wide margin of error. But that is not a reason to reject or disregard whatever scientific evidence is available. The rational approach for a court to adopt in these circumstances is to rely on the best evidence that it has.

47. The judge in this case did not give any reason for disregarding or disagreeing with the expert evidence of risk adduced by Squibb and, in our view, he was wrong to do so. We see no justification for assessing the likelihood of harm in this case as medium. The only reasonable conclusion on the available evidence was that the likelihood of harm arising from the offence was low.

48. On that basis, the offence fell in harm category 3, for which the starting point, for an offence involving high culpability committed by a medium-sized organisation, is £210,000. The judge made a modest downwards adjustment, of the order of 10%, from his starting point to take account of mitigating factors. Making a broadly similar

adjustment from the starting point which in our view he should have taken, we conclude that an appropriate sentence for Squibb's offence is a fine in a sum of £190,000.

49. Squibb has also sought to challenge the judge's order that it should pay £175,000 towards the costs of the prosecution. However, it is not suggested that the judge made any error of principle in his approach to costs and we do not consider that there is any basis on which this court could properly interfere with his assessment.

Conclusion on the appeal against sentence

50. In the result, we will vary the sentence by substituting for the fine imposed by the judge a fine of £190,000.