

Cover page	
Meeting	Trust Board
Paper Title	HSE asbestos prosecution – Telford Magistrates Court 8 May 2019
Date of meeting	30 May 2019
Date paper was written	17 May 2019
Responsible Director	Julia Clarke, Director of Corporate Governance
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Executive Summary	
<p>In June 2012 Estates works in Flat 4, Block 3 of the RSH Accommodation Blocks disturbed a panel of asbestos insulating board in a shower room. The incident became the subject of a whistleblowing case and an HSE investigation began in early 2014, resulting in the 2018 decision to prosecute the Trust for breaches of the Control of Asbestos Regulations 2012.</p> <p>On 8 May 2019 the Trust attended a hearing at Telford Magistrates Court. The judge awarded a fine of £16000 plus £18009.80 costs and a Victim Surcharge of £120.</p> <p>This paper outlines the background to the matter and the issues discussed at the hearing.</p>	
Previously considered by	Not applicable

The Board is asked to:			
<input type="checkbox"/> Approve	<input type="checkbox"/> Receive	<input checked="" type="checkbox"/> Note	<input type="checkbox"/> Take Assurance
To formally receive and discuss a report and approve its recommendations or a particular course of action	To discuss, in depth, noting the implications for the Board or Trust without formally approving it	For the intelligence of the Board without in-depth discussion required	To assure the Board that effective systems of control are in place

Link to CQC domain:				
<input checked="" type="checkbox"/> Safe	<input type="checkbox"/> Effective	<input type="checkbox"/> Caring	<input type="checkbox"/> Responsive	<input type="checkbox"/> Well-led

Link to strategic objective(s)	<p><i>Select the strategic objective which this paper supports</i></p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> PATIENT AND FAMILY Listening to and working with our patients and families to improve healthcare <input type="checkbox"/> SAFEST AND KINDEST Our patients and staff will tell us they feel safe and received kind care <input type="checkbox"/> HEALTHIEST HALF MILLION Working with our partners to promote 'Healthy Choices' for all our communities <input type="checkbox"/> LEADERSHIP Innovative and Inspiration Leadership to deliver our ambitions <input checked="" type="checkbox"/> OUR PEOPLE Creating a great place to work
	<p>Link to Board Assurance Framework risk(s)</p> <p>Not applicable</p>

Equality Impact Assessment	<ul style="list-style-type: none"> <input checked="" type="radio"/> Stage 1 only (no negative impact identified) <input type="radio"/> Stage 2 recommended (negative impact identified and equality impact assessment attached for Board approval)
Freedom of Information Act (2000) status	<ul style="list-style-type: none"> <input checked="" type="radio"/> This document is for full publication <input type="radio"/> This document includes FOIA exempt information <input type="radio"/> This whole document is exempt under the FOIA
Financial assessment	<p>Not applicable</p>

Main Paper

Situation

In June 2012 Estates works in Flat 4, Block 3 of the RSH Accommodation Blocks disturbed a panel of asbestos insulating board in a shower room. The incident became the subject of a whistleblowing case and an HSE investigation began in early 2014, resulting in the 2018 decision to prosecute the Trust for breaches of the Control of Asbestos Regulations 2012.

The Board have received regular updates on both the Employment Tribunal matter and the investigation, disciplinary hearings and changes introduced to the management of asbestos following this incident.

On 8 May 2019 the Trust attended a hearing at Telford Magistrates Court. The judge awarded a fine of £16000 plus £18009.80 costs and a Victim Surcharge of £120.

HSE's press release of 9 May 2019 is published at <https://press.hse.gov.uk/2019/05/09/nhs-trust-sentenced-after-employees-and-contractors-exposed-to-asbestos-during-refurbishment-work/>. A BBC News article is published at <https://www.bbc.co.uk/news/uk-england-shropshire-48214085>.

Background

In June 2012 two members of Estates Operational Team staff were instructed to carry out enabling works in Flat 4, in preparation for Estates Capital Team refurbishment works. They were required to isolate and remove redundant sanitary ware and services. During the course of these works it was necessary to remove a small (<1m²) panel to the base of the riser concealing the soil stack in the shower room, and this panel was broken as it was removed. Estates staff suspected the panel to contain asbestos, and stopped work. They reported it to Estates management but appropriate remedial action was not taken immediately, and subsequently Capital contractors were permitted to enter the flat to assess further works. Environmental monitoring undertaken by a specialist asbestos company in 2013 indicated that asbestos exposure was unlikely to have breached the control limit, however the disturbance of the material should have triggered a report to HSE under RIDDOR. The incident was not reported through the Trust's usual incident reporting channels and as a consequence was not reported externally. Subsequent investigations revealed that the works had been undertaken without the benefit of an appropriate asbestos survey.

These events led to an Employment Tribunal case and a linked whistleblowing disclosure to the Director of Corporate Governance in early 2014, internal disciplinary investigations in 2014/15, and an HSE investigation from 2014 to 2018.

The following remedial action has been taken to prevent a recurrence.

- Letters were written to staff and contractors involved in the 2012 incident, in 2015/16.
- The MICAD software suite was purchased in 2015, with the express intention of using the Asbestos Module to inform the future management of asbestos in Trust buildings.
- The Trust's asbestos management policy and asbestos management plan were re-written and reissued, in 2015 and 2016 respectively.
- A review of asbestos management training led to Senior Estates Managers attending the British Occupational Hygiene Society's P405 "Management of Asbestos in Buildings" qualification. Estates managers issuing work to Operational staff, and overseeing the works of both Operational and Capital contractors, undertook UKATA-approved Asbestos Duty to Manage training. All other Estates staff continue to undertake UKATA-approved Asbestos Awareness training, as before.
- Estates secured the services of an Asbestos Management Consultant working in-house from July 2016 on, currently provided by White Young Green (WYG). The services of an independent "Authorising Engineer" (AE) for asbestos have been secured, and annual external audits are undertaken.
- Estates management convened an Asbestos Task and Finish Group to oversee remedial works, and the ongoing development of the Trust's management of asbestos in Trust premises.

- Extensive asbestos removal works have been completed at RSH on a risk basis. Wherever possible asbestos removal is undertaken during Capital refurbishment works in order to reduce the total amount of asbestos-containing materials on Trust premises.

Assessment

At the hearing the Trust pleaded guilty to the following two offences.

1. Breach of Regulation 4(3) of the Control of Asbestos Regulations 2012: *“In order to manage the risks from asbestos in non-domestic premises, the duty holder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises.”*
2. Breach of Regulation 16 of the Control of Asbestos Regulations 2012: *“Every employer must prevent or, where this is not reasonably practicable, reduce to the lowest level reasonably practicable the spread of asbestos from any place work under the employer’s control is carried out.”*

The Trust’s basis of plea addressed the following issues.

- Both offences arose out of a single, isolated incident in 2012.
- No one was physically harmed and subsequent independent testing confirmed that the asbestos control limit would not have been breached and was well below (the control limit is 0.1 asbestos fibres per cubic centimetre of air (0.1f/cm³) averaged over a 4 hour period. In this case the 2013 environmental monitoring revealed that for the board around the soil stack the results were twenty times lower than the Control Limit (0.005 f/cm³) and for the cupboard it was 50 times lower (0.002f/cm³). The reality is that there are minute particles of the material continually present as a minor pollutant in the atmosphere and it is documented that we all receive an annual exposure of 0.001f/cm³, which can be several times more in urban city environments.
- Prior to the incident the Trust had commissioned external consultants to provide it with policies and procedures for dealing with asbestos, and expert advice, external audits and support regarding the management of asbestos.
- The Trust had invested, and continues to invest in asbestos remediation and removal works annually, running to several hundred thousand pounds per year.
- In 2011 (the year before the incident) the Trust had commissioned fresh asbestos management surveys, external audits and an asbestos management plan document, and was subject to an HSE management inspection which resulted in no enforcement action.
- At the time of the incident the Trust had in place policies, procedures and arrangements which, had they been followed, would have dealt with all the issues that lay at the centre of the breaches. These arrangements included UKATA-accredited Asbestos Awareness training for Estates staff.

However the Trust fully accepts that the matter should have been properly dealt with and accepts its duty to reduce worker asbestos exposure to as far below the control limit as possible, and there were disciplinary proceedings against a number of individuals.

With reference to the sentencing guidelines (see <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/individuals-breach-of-duty-of-employer-towards-employees-and-non-employees-breach-of-duty-of-self-employed-to-others-breach-of-duty-of-employees-at-work/>) the Judge stated that the case could be considered to involve **a low likelihood of harm**, and culpability lay somewhere between low and medium. He considered that there were no relevant previous health and safety convictions, and that the factors reducing the seriousness of the case were all present, notably:

- a much higher than usually expected level of cooperation with HSE;
- that procedures had been in place; and
- that the Trust had self-reported the details of its internal disciplinary investigations to HSE.

The Judge stated that the starting point for sentencing was £60,000 per offence and due to the factors outlined above reduced this to £48,000. The Trust being a public body reduced this by 50% to £24,000, and a one-third reduction for the earliest possible guilty plea reduced this to £16,000. In order to hold the Trust accountable for each offence, the Judge awarded a fine of £8,000 for each offence, totalling £16,000 plus costs of

£18,000.00, plus a Victim Surcharge of £120, to be paid within 6 months.

The Court also heard that the Trust had reported this case to HSE as part of the investigations undertaken by the Director of Corporate Governance and Health & Safety Team Manager (which resulted in disciplinary hearings). There had also been an unusually high level of cooperation by the Trust with the HSE investigation and the Trust had been open and transparent throughout the HSE investigation.

The Trust has taken very seriously what happened and put measures in place to prevent it from happening again. It has also shared all of its information with the HSE.

Recommendation

The Trust Board is asked to note the outcome of the HSE prosecution, which is now closed.