IN THE DISTRICT COURT
AT GISBORNE

CRI-2014-016-001807
[2016] NZDC 8350

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

JAMES WALTER BEAU THOMPSON
Defendant

Hearing:	10 May 2016
Appearances:	S Bishop for the Prosecutor P White for the Defendant
Judgment:	10 May 2016

NOTES OF JUDGE W P CATHCART ON SENTENCING

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[1] Mr Thompson, you appear for sentence in relation to a charge under the Health and Safety in Employment Act 1992. The charge, to which you have pleaded guilty, states – that being an agent of Hawke Equipment Limited, you participated in Hawke Equipment's failure to take any practicable steps to ensure that a contractor, Mr Dallas Wayne Hickey, was not harmed while doing work that Mr Hickey was engaged to do. The maximum penalty that you are liable for is a fine of $250,000.

[2] No doubt, all those present today will be aware that there has been a substantial change in liability for these offences in certain categories. The new law does not apply to this particular case. The maximum penalty of a fine only remains the liability here.

[3] It is now the law that offences of reckless conduct in respect of a health and safety duty bring with it a maximum penalty of five years' imprisonment and/or a

maximum fine of $300,000. Offences of failing to comply with a health and safety duty that exposes individuals to risk of death or serious injury or illness, or an individual, carry a maximum fine of $150,000. There are other categories. Needless to say, the legislator has seen fit to dramatically increase the liability for certain categories of offending.

Facts

[4] Mr Thompson you accept that the offending related to an accident on Ihungia Road on 13 February 2014. As you know, Mr Hickey suffered fatal injuries as a result of that accident. You accepted, as an agreed factual premise, that Mr Hickey was engaged as a driver by you. You have accepted as an agreed fact that Mr Hickey's role was to transport logs from Puketoro Station to Eastland Port.

[5] Mr Hickey was recruited by you on 11 February 2014 when another driver left unexpectedly. I recall the evidence in relation to that issue. The previous driver had been picked up by the Immigration Officials and was liable to being deported. That event, therefore, presented an unexpected situation and you, Mr Thompson, set about finding an alternative driver.

[6] Prior to meeting with Mr Hickey, you asked other drivers about their opinion of him. You also asked Mr Hickey to forward to you a copy of his health and safety manual and a copy of his drug test.

[7] You met with him on 12 February 2014. You went through a general safety manual and discussed maintenance. However, you accept that you did not follow your usual health and safety and induction procedures. It is also accepted that Mr Hickey brought to your attention an issue with the truck's indicators which was fixed that day. Also, it is accepted that Mr Hickey did not receive any actual training or induction prior to the commencement of his work with you and Hawke Equipment.

[8] Mr Hickey left for work at approximately 3.30 am on 13 February 2014. The summary of facts, to which you agreed, states that this was his first day driving for

you. He drove to the Puketoro Station where logs were loaded onto his truck and trailer unit.

[9] At approximately 7.53 am, Mr Hickey left the station for Eastland Port via Ihungia Road. At approximately 8.16 am, Mr Hickey had driven close to seven kilometres down that road when he abandoned the cab and became caught under the rear wheel of the truck. Tragically, Mr Hickey suffered multiple head, chest, abdominal, spinal and skeletal injuries as a result of the accident. The injuries were fatal. No medical conditions caused or contributed to the accident.

[10] You, Mr Thompson, failed to take all practicable steps to ensure the safety of Mr Hickey while at work, in that you failed to ensure that he did not come to harm.

[11] You now accept that the following practicable steps should have been taken to ensure Mr Hickey was not harmed. You accept:

(a) That you failed to take pre–employment confirmation of Mr Hickey's health and safety credentials and training.

(b) That you failed to take practicable steps to ensure that the pre-employment health and safety induction and training occurred.

[12] Mr Hickey's death was caused by means of those failures by you, Mr Thompson; in the sense that you did not take the practicable steps that I have outlined that may have averted Mr Hickey's death. The opportunities of possibly avoiding Mr Hickey's death were not utilised.

[13] Looking at those facts, as I have described them to this stage, in a sense, Mr Thompson, this is a species of corporate manslaughter in all except name and you were the agent in that process.

[14] You were interviewed. You stated in the interview that you followed the training processes which included health and safety inductions. Those processes include taking a new driver through the MBIE Forest Operations Approved Code of Practice (ACOPs as it came to be known in the trial) and the Safety Manual.

[15] In your evidence, you said that you referred Mr Hickey to an induction check–sheet form which noted that ACOPs were used and that there was a copy in the truck that Mr Hickey was driving. Mr Thompson, you also indicated in that a health and safety document had been read and was to be signed but this had not been returned.

[16] I recall the evidence about those manuals. They were both dated 12 April 2014. There was no indication that Mr Hickey had signed the documents. There was a concerning aspect about those documents. One of the documents had been completed in red ink and one in blue ink by you. You, however, for reasons that were not fully explained (given when the trial stopped) got access to that vehicle at the crash site. You say that you were given permission to do so and entered the vehicle. I did not hear any evidence to the contrary given the fact that the case stopped when it did. Needless to say, Mr Thompson, that evidence about how you say you got access to that vehicle, and supposedly uplifted documents that had different ink colouring on them, is a matter that is going to remain unresolved.

[17] In my view, Mr Thompson, the case stopped at a point when you were about to face some very serious allegations that, in the end, were subsequently not advanced by the prosecution given your desire to be brought before the Court and to plead guilty on this agreed summary of facts.

[18] It is accepted that you stated you believed Mr Hickey was more than capable of doing the job. It is also accepted that you do not have any previous health and safety convictions.

Conflicts between summary of facts and the Defendant's trial evidence[1]

[19] There is a factual conflict between the prosecution and you as to how the Court is to view the summary of facts in relation to your evidence on points which, prima facie, are inconsistent with that summary.

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[1] See Minute No. 14 dated 26 April 2016.

[20] As I have already highlighted, you have accepted as a fact that Mr Hickey was engaged as a driver for you, that his role was to transport logs from Puketoro Station to Eastland Port, and that he did not receive any actual training or induction prior to the commencement of his work with you and Hawke Equipment.

[21] For the prosecution, Ms Bishop says that these propositions are inconsistent with your evidence under oath. Ms Bishop says that there was evidence that Mr Hickey had the keys to that vehicle and that the keys were handed to Mr Hickey by Mr Carrington. That was not fully tested in the evidence given the fact that the trial stopped prior to the completion of the evidence.

[22] However, it is accepted that Mr Hickey had done a walk–around check of the vehicle in the early morning of the day that he died. He turned the indicators on and found that they were not working. It is accepted that must be the case because you were made aware of that fact by Mr Hickey. It therefore means that Mr Hickey must have had the keys at that point.

[23] The next issue relates to your suggestion under oath that Mr Hickey was not engaged to work for you at that material time. He was, to use your constant phrase in evidence, "in the process" of being engaged. That concept is at odds with the summary of facts which you have accepted.

[24] The prosecution points out that the evidence I heard showed the forest dispatchers were contacted the day before the particular logs were picked up. There is a text message from the dispatcher that Mr Hickey received on 12 February 2014 that was adduced in evidence. That text message exchange between the dispatcher and Mr Hickey demonstrates that the dispatcher was under the belief that the former driver was still involved in the delivery. Mr Hickey's response to the dispatcher was to identify himself in the text message as, in effect, the new driver.

[25] The theory that ran through your evidence was to suggest that Mr Hickey was neither told by you to go to the forest and neither told by you not to go to the forest. In other words, you maintained that there was some sort of passive role that you took in relation to that point.

[26] I find the suggestion that Mr Hickey would travel all the way to Ihungia Road to pick up a fully–laden delivery of logs, for a truck and trailer, without a clear understanding that you had wanted him to and instructed him to do so that is extraordinary, to say the least.

[27] In my view, when you gave evidence suggesting that Mr Hickey was only "in the process of" being engaged by you and that you had given no permission for him to go to the particular site, that was untruthful evidence. In short, Mr Thompson I find that on that core issue your evidence was a false claim.

[28] In my view, you seized the opportunity to get a new driver as soon as possible because of the former driver's difficulties with immigration and deportation issues. That event led you to rushing the exercise with Mr Hickey. The evidence I heard draws me to the inevitable conclusion that you were taking an opportunity for substituting this driver to pick up those logs.

Victim Impact Statements

[29] I have been shown three victim impact statements. I have read that material. There is a victim impact statement from Ms Julie Grout, Sandra Hickey and Christopher Hickey. They are painful reading, Mr Thompson. The emotional impact of Mr Hickey's death upon them is obvious when one reads these statements. His death has devastated his former partner and his brother and his sister. Understandably, they express some real anger over the loss of Dallas' life as a result of what, in essence, they are saying is your little regard for health and safety laws.

Approach to Sentencing

[30] I must take into account a number of principles under the Sentencing Act 2002 in focusing on the outcome today. The approach to sentencing is set forth in the leading case of *Department of Labour v Hanham and Philp Contractors.*[2] That was a decision of the Full Court of the High Court.

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[2] (2008) 6 NZELR 79 (HC)

[31] It is accepted that the law requires a three–step process in terms of this sentencing. Under that case law, the first issue is to consider whether a reparation order is appropriate and, if so, the quantum of the reparation. Second, whether to impose a fine and, if so, the quantum of the fine. Third, having completed that exercise with the first two steps, the Court is then in a position to assess the appropriateness of the overall sentencing, taking into account the totality principle.

Quantum of reparation

[32] I now turn to the issue of reparation. Under the Sentencing Act 2002 a Court may impose a sentence of reparation if a defendant has "through or by means of his offending caused a person to suffer emotional harm or loss consequential on any physical harm."[3] That is clear from the agreed summary of facts.

[33] Here, the prosecution submits that an award of reparation for emotional harm is appropriate. The preconditions under s 32 Sentencing Act are satisfied. The real issue is to assess the quantum of reparation.

[34] In that regard, the prosecution points out that the Court must assess the actual loss and quantify the emotional harm to the victim. In those victim impact statements there is a reference to the actual and potential loss of income and expenses to the family as a result of Mr Hickey's death. In fixing the quantum of reparation, Ms Bishop submits that that this further component should be factored into the exercise.

[35] The victim impact statements really provide the basis for the need for a reparation order. The emotional harm element in this case is exhibited in those victim impact statements. Even in the absence of those statements, the emotional harm that this tragedy would have caused to the Hickey family is self–evident.

[36] Also, I remind myself of the principles about recognising an emotional harm component and that it is difficult to quantify such a matter. In that regard, I note the

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[3] Sentencing Act s 32

observations of Harrison J in *Big Tuff Pallets Ltd v Department of Labour.*[4] I have taken all of those principles into account. As Harrison J pointed out, the objective for the Court is:

> ... to strike a figure which is just in all the circumstances and which in this context compensates for actual harm arsing from the offence in the form of anguish, distress and mental suffering.

[37] The nature of the injury may also be relevant to the long–term effects of such suffering.

[38] I note, Mr Thompson, that you have earmarked the sum of $80,000 as being available for reparation. However, the prosecution were at pains to say to the Court, at the earlier hearing, that this figure should not represent a cap or limit on the award that the Court should make. That must be the case. It is a matter for the Court and not for the prosecution.

[39] There is an issue between the prosecution and your counsel as to guidance from the case law on reparation issues. The prosecution highlights various cases which suggest a range from $75,000 to $125,000 in cases involving fatalities and I set out for the benefit of counsel that schedule in Ms Bishop's submissions page 4:

Case	Summary	Emotional harm reparation
Department of Labour v Hanham & Philp – 18 December 2008	Miner was killed when there was a sudden in–rush of water into the area where he was working underground.	High Court (on a Crown appeal) increased emotional harm reparation to the widow from $50,000 to $75,000.
Department of Labour v Fletcher Concrete & Infrastructure Ltd – 20 August 2009	Employee cleaning the inside of an aggregate bin using sand as working platform. Engulfed when sand was drawn from bin and died at scene.	District Court awarded $125,000 which had been offered by the Defendant Company.
Department of Labour v Fonterra Co–operative Group Limited – 20 January 2010	A worker collapsed after a meal break on the conveyor rollers face–down which crushed his head, killing him.	District Court awarded $116,000 emotional harm reparation.

[4] HC Auckland CRI–2008–404–322, 5 February 2009 at [19]

Department of Labour v Pike River Coal – 5 July 2013	Well known case of explosion at Pike River mine.	District Court awarded $110,000 emotional harm reparation for each family.
WorkSafe New Zealand v Lyttleton Port Company Limited – 6 August 2015	Port employee was killed when he was attempting to jump-start a straddle crane.	District Court awarded $75,000 emotional harm reparation.
R v Burr and Paul Burr Contracting Ltd – 30 October 2015	Forestry fatality.	High Court (at first instance) awarded $75,000 emotional harm reparation for a single man with no dependants.
R v New Zealand School of Outdoor Studies Limited and Tony Te Ripo – 29 February 2016	A Malaysian student on a diving course drowned.	District Court awarded $125,000 in emotional harm reparation and a further $25,610.50 for financial costs following the death.

[40] In line with those authorities, the prosecution says that there should be a reparation order in excess of $100,000 to compensate for the emotional harm and economic loss suffered.

[41] Mr White, on your behalf, takes issue with the prosecution's reliance on that table of cases. In that table, there is a reference to the decision of *Department of Labour v Pike River Coal*.[5] As everyone knows, that is the well-known case of the explosion at the Pike River mine. In that case, the District Court awarded reparation for emotional harm in the sum of $110,000 for each family. Mr White makes the point that that case is really an unusual or an extreme example given the enormous emotional harm that those families suffered as a result of the bodies being unrecovered for an indefinite period.

[42] Looking at those cases cited in the table, Mr White contends that the submission by the prosecution that there should be a reparation order of $100,000 is excessive.

[5] DC Greymouth, CRI-2012-018-822, 5 July 2013

[43] Mr White confirmed that the $80,000 earmarked for reparation is made up of a payment available from your insurers of $50,000 and the balance of $30,000 has come from your pocket.

[44] Quantifying these matters is a difficult exercise. I have reached the view that the reparation order should be fixed at $100,000.

Ability to pay reparation and fine

[45] At this point, 1 deal with the issue surrounding your ability to pay for reparation and for the fine. I have to hand your declaration as to financial capacity, dated 29 April 2016. Also, I have a declaration as to income, dated 2 May 2016, from his partner.

[46] In that declaration by Mr Thompson, there is reference to the financial position of Beau Thompson Limited. When one looks at the assets and liabilities, it is clear from the accountant's analysis that the shareholder advance account is presently propping up the company. That is the money that you owe to the company. It is in the order of $1.2 million. On that evidence, it is clear that Beau Thompson Limited is only solvent as a result of that current account.

[47] However, Mr Thompson, in your assets there is a reference to livestock on hand worth $18,500, a Custom Cruiser worth $15,000, a Harley bike valued at $10,000, a boat worth $5000, sundry farming plant at $15,000, and sundry farming machinery at $10,500.

[48] In addressing those matters, Mr White sensibly faced up to the contention that you would not need a number of those items in order to continue living. Mr White's point was those assets may need to be sold in order for funds to become available for living expenses. However, it is clear that, if you are in the process of winding up the company—as you say you are—then you will inevitably need to find an alternative source of income. I take into account your age. I take into account the fact that you have stated in an affidavit that Beau Thompson Ltd is in the process of being wound up. Nevertheless, in my view, these assets are available to be sold.

The availability of those assets thus affects your ability to pay the reparation and fine.

Quantum of fine

[49] I now move to the second step, which is assessing the quantum of the fine. In accordance with the decision in *Department of Labour v Hanham & Philp Contractors,* there are three bands:

(a) Low culpability, a fine of up to $50,000.

(b) Medium culpability, a fine of between $50,000 and $100,000.

(c) High culpability, a fine between $100,000 and $175,000.

[50] The prosecution contends that fine levels higher than $175,000 may be necessary in cases of extremely high culpability.

[51] Relying on the decision in *Hanham & Philp Contractors*, I am required to go through various factors in order to assess the quantum of the fine.

[52] The first factor is the identification of the operative act or omissions. That relates to the practicable steps. Here, the prosecution submits that the value in completing a health and safety induction process with logging driver contractors before the commencement of work is self-evident given the risks that such roles entail.

[53] The prosecution refers to the ACOP document. That document guides the forest operation's approved code of practice. It imposes a requirement that every person undertaking forestry work shall be either under documented training and close supervision, or deemed competent before commencing operations. It also states that no person shall work in the forest impaired by drugs.

[54] These are common-sense propositions, Mr Thompson. Even in the absence of such a code, it would be prudent upon an operator like you, engaging someone

like Mr Hickey in forestry work, to ensure pre–employment confirmation of his health and safety credentials and training. It was self–evident that you also needed to ensure that you undertook pre–employment health and safety induction and training. You did neither of those things.

[55] The prosecution submits that these components, which relate to your breaches of the legislation, were fleshed out in further evidence at the trial. In that evidence, there was reference to pre–employment reference checks, the TORO driver check system, pre–employment drug–test systems, face–to–face meetings to go through health and safety manuals, completion of an induction check–list, and an in–cab driver assessment.

[56] It is clear on the evidence I heard from you, Mr Thompson, that you were aware of these basic requirements. Your defence at trial was that Mr Hickey was in the process of being engaged by you and the exercise of completing these checks had not yet crystallised in the fuller sense.

[57] However I find on the evidence I heard from you that you turned a blind eye to Mr Hickey's position. In my view, you were more interested in ensuring that that load of logs got picked up without any undue interruption. The inference I draw from the evidence you gave, when matched up against the other evidence that I heard, is that you were motivated to earn the money from that particular load and you turned a blind eye to your obligations to Mr Hickey prior to him working for you and Hawke Equipment.

[58] In fixing the fine, I must also look at the nature and seriousness of the risk of harm occurring as well as the realised harm. The risk of harm to Mr Hickey was obvious and high. The sort of work he did had the potential to be fatal. Also, Mr Hickey was engaged in work in an area that he was not familiar with. A driver unchecked for health and safety compliance and unfamiliar with health and safety protocols in that scenario was always going to be at high risk. The risk that eventuated was as serious as it gets.

[59] I recall the evidence of Mr Kurei Grant who said that Mr Hickey at the skid site, where he picked up the logs, expressed concern about the vehicle and whether it could get down the hill. The witness, Sandy Walker, also spoke about Mr Grant's evidence.

[60] On that evidence, it is clear to me that Mr Hickey had expressed some real nervousness about the truck and the way it was handling. Mr Grant's evidence in that regard was telling. That evidence underscores the fact that your failure to ensure that Mr Hickey went through a pre–employment health and safety induction and training exercise before he started work that made him familiar with the truck in question and the territory was a serious breach by you.

[61] The degree of departure from standards prevailing in the relevant industry is also a factor. I have alluded to an aspect of that a moment ago. In my view, when one looks at what occurred and your failure to check his reference, your failure to access the TORO driver–check system, your failure to have Mr Hickey's drug test made available to you before you got him to work, your failure to have in–cab supervision or training, your failure to take Mr Hickey through the health and safety manual and complete a skid site induction, or discuss hazards and other issues before he drove the truck, was to such a degree, that the departure from those standards was significant.

[62] The obviousness of the hazard in this particular case was really self–evident. As the person responsible as the agent, you would have the responsibility to ensure that the contractor had the ability to deal with unexpected or unusual behaviour on the truck's part. Therefore, the obviousness of the hazard here speaks for itself. I agree with the prosecution that the hazard of this kind was front and central to the trucking transport operation.

[63] I turn then to the issue relating to the availability of the cost and effectiveness of the means necessary to avoid the hazard. This can be dealt with quite quickly, Mr Thomson. Little was required by you to ensure that Mr Hickey was adequately inducted. Little was required by you to satisfy yourself that Mr Hickey was capable of driving the particular vehicle to and from the relevant forest and skid site. You

just rushed the exercise to ensure that that load was picked up. You were short-cutting the process with Mr Hickey. Any real induction would come either by Mr Hickey self-learning the truck and the terrain or from an employee of yours at a later point. In short, Mr Thompson, I consider that at the crucial time you turned a blind eye to your requirements under this legislation because you wanted the financial gain from that load of timber.

[64] Also, I need to consider the current state of knowledge of the risks and of the nature and severity of the harm which could result. Here, the prosecution submits the harm to which induction is targeted is partially at a general level. They point out that the manner in which a driver should act in the face of such risks is closely associated and linked to the induction process.

[65] However, the prosecution goes on to submit that in this particular industry it is also necessary to carry out training and induction for the specific vehicle the driver will be using, which did not occur here. Yes, it is true, as Mr White points out, that there may have been little difference with the vehicles that Mr Hickey had previously driven (a Western Star and Kenworth truck models) and the vehicle he died in on the day (a Freightliner Argosy). However, even taking that factor into consideration, it is apparent—especially from Mr Grant's evidence—that there was a need for you to ensure that Mr Hickey was familiar with this specific vehicle and the terrain.

[66] Finally, I need to assess the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence. The current state of knowledge about what was required here is really obvious. As I said, the breaches that you brought about were really common-sense propositions.

[67] Mr White takes issue with the prosecution's submission that the fine should be fixed in the high-culpability band. The prosecution submits that this particular offending falls within that third band. The prosecution relies on the breaches and point to the evidence. They rely on the case law mentioned in its memorandum, which includes the decisions in *WorkSafe New Zealand v Halls Direct* Limited,[6]

[6] [2015] NZDC 6434

Health and Safety Commission v J and R Harvesting Ltd,[7] *WorkSafe New Zealand v McCullough*,[8] *and Department of Labour v On Call Cranes Ltd*.[9]

[68] Mr White submits that when one looks at that case law it is not very helpful in terms of fixing a particular fine level here. With reference to the decision in *WorkSafe New Zealand v McCullough* Mr. White submits and says that the learned Judge at [79] of his decision seemed to correct an error as to the banding of that fine. In that case, Judge Crosbie surveyed a range of authorities and took a starting-point of $110,000. Judge Crosbie noted that over 19 fatality cases there was a mean starting-point of $112,000, which would place such cases in the high–culpability range. Mr White points out that there may have been a slight error in that analysis because subsequently at [79] the Judge inexplicably reduced the fine by 25 percent. The reduction appeared to be unrelated to any issues as to ability to pay.

[69] Mr White submits that more guidance is obtained from the case law relied upon in his submissions. Mr White refers to a number of decisions: *R v Burr*,[10] *New Zealand Police v River Run Products Ltd*,[11] *WorkSafe New Zealand v A J Russell Bricklayers Ltd*,[12]*Department of Labour v Alpha Refuse Ltd*,[13] *Kelly v Puketi Logging Ltd*,[14] *Maritime New Zealand v Darrach*,[15]and *Ministry of Business Innovation and Employment v Sundale Farm Ltd*.[16]

[70] Mr White contends that an analysis of those cases leads to the conclusion that the closest case is *Ministry of Business Innovation and Employment v Sundale Farm Ltd*. In that case, the starting-point for the fine was fixed between $45,000 and $50,000, with an ultimate fine imposed of $24,500. That case involved the death of a new worker who was run over by a tractor that had no fail-safe controls and upon which regular preventative maintenance was not carried out.

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[7] DC Taupō CRI–2007–069–88, 11 October 2007
[8] [2015] NZDC 2718
[9] DC Auckland, CRI–2007–450–3880, 22 May 2008
[10] [2015] NZHC 2675
[11] DC Morrinsville CRI–2012–039–748, 14 March 2014
[12] [2015] NZDC 22946
[13] DC Manukau CRI–2010–092–14054, 22 March 2011
[14] [2015] NZDC 19783
[15] DC Waitakere CRI2014–090–2472, 5 May 2015
[16] DC Pukekohe CRI–2014–057–1556, 1 April 2014

[71] Looking at submission, in my view the *Sundale Farm Ltd* case is at a level far too low to reflect all of the principles I am required to take into account in fixing a fine here.

[72] In my view, taking into account all of those factors, the appropriate fine here is in the sum of $100,000. In my view, that fine reflects the seriousness of the breaches involved in this case. It also reflects all of the factors I need to take into account. Also, it takes into account the fact that you gave false evidence under oath about Mr Hickey only being in the process of being engaged to work for your company.

[73] It is accepted that if reparation is to be paid then a discount of around 10 to 15 percent is available. Based on the principles outlined in the *Hanham & Philp Contractors* decision on that point, in my view a discount of 10 percent is appropriate. That therefore brings the fine down to a level of $90,000.

[74] I do not accept beyond the guilty plea that there is any room to view your conduct as exhibiting remorse for what you have done. In my view, you were plucked out of the heat of cross–examination before you faced even more serious allegations. I have already found that you have a financial capacity to pay the fine. Yes, your company is in a difficult financial state. There should be some allowance for that factor. However, looking at those assets that I have highlighted as being available to be sold, you do have the ability to pay. I therefore intend to reduce that fine only by a further figure of $10,000.

Assessing impact of reparation ($100,000) and fine of ($80,000) in combination

[75] The next step of course is to assess the impact of the reparation order and the fine in combination. The prosecution points out that care must be taken at this stage to avoid an advantageous double count being given to the defendant. That is obvious concern because in fixing the quantum of reparation and fine, a sentencing Judge such as myself has already taken into account the relevant purposes and principles of sentencing.

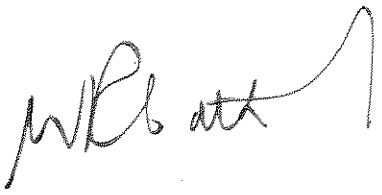
[76] I have addressed step 3. I do not intend to adjust the totality of the fine and the reparation order. I do not accept the defence submission that this third step requires a further adjustment for totality purposes.

[77] On the issue of costs for the prosecution, I will deliver a written decision on the papers.[17] At the end of the day, Mr Thompson, the Court fixes the fine as I have indicated and also reparation as ordered.

Concluding remarks

[78] In my view, with great respect to you, you are an unfit candidate to remain in this industry. Your position to the Court that you are going to wind up this company is a matter entirely for you. However, given the facts in the summary and the other relevant evidence in this sentencing exercise, I consider that a person like you should not be involved in such an industry.

[79] You are sentenced accordingly.



W P Cathcart
District Court Judge

[17] For avoidance of doubt no discount was given for the guilty plea. See reserved decision on costs issue.