IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2019-092-009753
[2020] NZDC 26656

WORKSAFE NEW ZEALAND
Prosecutor

v

W. GARTSHORE LIMITED
Defendant

Hearing:	11 December 2020
Appearances:	I Brookie for the Prosecutor J Shaw for the Convicted Company
Judgment:	11 December 2020

NOTES OF JUDGE DAVID J HARVEY ON SENTENCING

---

[1] I have before me a charge against W. Gartshore Limited by WorkSafe in respect of an allegation that being a PCBU and having a duty to ensure, as far as reasonably practicable, the health and safety of workers who work for the PCBU. Whilst workers were at work, the business failed to comply with that duty and exposed individuals, including one, Dennis Lovell, to risk of death or serious injury arising from a fall from height, namely a mobile scaffold.

[2] The offending took place between 13 September 2018 and 18 September 2018. The defendant company has pleaded guilty to the charge. The circumstances of the offending were these. The defendant company was engaged in a premises fitout for a store that was situated in the Westfield shopping mall at Manukau. In the course of that fitout, it was necessary for some work to be done at height and the mobile scaffold

was provided for that particular purpose; the scaffolding having been rented from Kennards. What transpired was that some of the safety notifications on the scaffolding had been damaged as a result of use and some of the connecting material that was provided for the erection of the scaffolding was (to put it mildly) less than satisfactory. The scaffold had been assembled and there had been some instructions undertaken. As far as that was concerned, it had been disassembled with the purposes of installing some tiling and then was reassembled by Mr Dennis Lovell, the victim in this particular case. When it was reassembled, it appears that it was reassembled incorrectly, and it had not been a subject of an independent check by a third party.

[3] Mr Lovell was a 67 year old carpenter and the reassembling was not in accordance with good practice. The mid-rail had been disconnected; there was no room for the top handrail. During the course of his work on the scaffold, Mr Lovell fell from it and suffered serious permanent injuries. The defendant did not, it seems, complete proper task analysis or risk assessment for Mr Lovell's task, and his erection of the scaffold should in fact have been checked prior to use. Certainly, Mr Lovell's injuries were serious and are of a permanent nature and have significantly and adversely affected his quality of life.

[4] It now falls to me to fix the proper sentence for that offending. The process of sentencing involves the assessment of reparation and the assessment also of any consequential loss that is payable. It is then necessary to fix the amount of the fine, taking into account aggravating and mitigating factors, and also to fix any amount that should be payable for the legal costs of WorkSafe. Finally, there must be a consideration of any adjustment that should be made, having regard to the company's ability to pay the fine.

[5] The process is not in dispute. Indeed, many of the items, the subject of the sentencing process, are not in dispute either. For example, reparation has already been made in the sum of $60,000. That to me seems to be a reasonable figure, based upon the authorities, and I have had the advantage of substantial written submissions both on behalf of the defendant company and on behalf of WorkSafe. It is suggested in the course of the defendant's submissions that a figure of $50,000 would be justifiable, but the fact of the matter is, the company has paid $60,000, and I think in some respects

they could be said to be estopped from saying that a lesser figure should be paid. I note that that $60,000 reparation figure has been paid and it is not necessary for me to incorporate that into a sentencing outcome.

[6] There is also the issue of consequential loss because the victim of the offending has been in receipt of ACC and there is something of a shortfall. The figure that has been proposed by WorkSafe is $15,160.58 and that figure for consequential loss is also accepted by the defendant.

[7] As far as the fine is concerned, WorkSafe suggests that a starting point figure of $600,000 should be adopted. The company, on the other hand, suggests that a starting point figure of $450,000 should be adopted. The approach that is required is to consider a number of factors that impact upon the level of the fine and to undertake effectively what is an analysis that has been provided primarily in the case of *Stumpmaster*, which sets out certain bands for the level of fines that should be imposed.[1] This particular case, it is suggested, falls within the medium or high bands of *Stump Master* (and I will clarify that in a moment). The medium band looks at fines of between $250,000 and $600,000 as a starting point. The high band looks at starting point figures of between $600,000 and $1 million dollars.

[8] What is argued is that this particular case either falls within the higher range of the medium band or the lower range of the high band. From WorkSafe's point of view, that higher medium range figure of $600,000 or the low range of the higher band of $600,000 is the figure that should be adopted as the starting point and they have cited some authorities for that that I will get onto in a moment. The defence approach is that this case falls within the moderate to high medium band of *Stumpmaster*; that is that it should fall within the range of the $250,000 to $600,000 starting point.

[9] There can be little dispute about a number of the elements that must be taken into account in fixing the amount of the fine. All of that can be resolved into a single word and that is a level of culpability on the part of the company. There were a number of acts or omissions that were operative insofar as this offending is concerned. There was a failure to ensure that the scaffolding was fit for purpose, because it was not of a

---

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

sufficient height, and there was a failure to have in place a proper maintenance system. So in effect, the correct equipment had not been provided and there had not been any proper monitoring of the use of that equipment, of the way that it was put together, of proper instructions in its use and importantly, a proper checking system once the scaffolding had been reassembled. When one takes into account all of those factors, it was quite foreseeable that there should be a serious risk of injury. So the various failures, insofar as operative acts or omissions are concerned, that is the failure for fitness of purpose, failure to put in proper monitoring and failure to provide proper equipment, amount to what Mr Brookie has suggested are systemic problems as far as the company is concerned.

[10] In addition, there were some standards in the industry that did not receive proper compliance. Failure to comply, for example, with scaffolding good practice guidelines, a breach of the Health and Safety in Employment Regulations 1995, and importantly, as far as this particular case is concerned, Mr Lovell was on his own, and in that respect, lacked proper supervision, training and instruction in the erection of the scaffolding. Once those items are taken into account, the obviousness of the hazard becomes clear and the way in which it could be avoided, and of course, with the advantage of twenty-twenty hindsight, that better equipment could have been provided and better maintenance could have been provided as well. There can be no doubt that the equipment that was obtained from Kennards should have been checked and particularly the manner of assembly, which involved some items that were subject to wear and tear and were not quite as good as they could have been, significantly contributed to the accident. The equipment had been used and used on a number of occasions and becomes abundantly clear when one looks at the photographs which show that much of the warning material has been obliterated through use. Effectively, what seems to have been used, the stick-on labels, the various instructions, which have been worn away as a result of the use of the scaffolding on other occasions.

[11] I have already made reference to the bands that are provided in the case of *Stumpmaster*; the medium band of $250,000 to $600,000, or the high band of $600,000 to $1 million dollars. The fact that reference to both bands have been made would seem to suggest that this case falls on the cusp between the two bands. A number of cases have been advanced, which give an indication of the type of fines that should be

imposed. It is perhaps interesting to note that although extremely high starting points are mentioned, the final outcome is significantly lower. For example, in the case of *Dong Xing Group*, a starting point fine of $580,000 was proposed.[2] In the case of *Forest View High School*, a starting point of $500,000 was imposed.[3] In *Forest View High School*, WorkSafe in fact argued that a higher starting point should be imposed; $600,000, like this case. The judge in that particular case noted however that the defendant was a school and was not in the business of construction. Had the school been involved in the business of construction, which of course it was not, he would have fixed the starting point at $600,000.

[12] On the other hand, the defence argues for a lower starting point; a starting point of $450,000, and in that particular case, they cite the case of *WorkSafe v Agility*, where a starting point of $450,000 was fixed.[4] However, they have suggested, to support that particular argument, that the particular mobile scaffolding was seen as the best solution for the problem that was faced in trying to complete this fitout for this store. For example, a scissor scaffold was not seen as a viable option given the location of the work and the circumstances pertaining in a busy shopping mall. In addition, the company argues that there was a contribution element over which they had little control, which was that of the faulty clips. That meant that the scaffolding could not be assembled in a properly secure manner. Of course ultimately the responsibility must fall upon the company to ensure that the equipment is fit for purpose, and that goes back to the culpability factors, which I have already mentioned, and with the greatest of respect, I do not think that it is available for the company to claim that contribution when it is something that they should have checked and either returned the scaffolding to Kennards and got a replacement set or, alternatively, have done something to ensure that the clips were not faulty at all.

[13] I consider that this particular case falls within the medium band of *Stumpmaster*, but I consider that it probably is not at the top of the medium band, that is the $600,000 figure, nor do I consider that it falls within the low range of the high band set out in *Stumpmaster*. I look at the cases of *Dong Xing Group* and *Forest View*

---

[2] *WorkSafe New Zealand v Dong Xing Group Ltd* [2018] NZDC 222114.
[3] *WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558.
[4] *WorkSafe New Zealand v Agility Building Solutions Ltd* [2018] NZDC 24165.

High School, and although in *Forest View High School*, a $600,000 figure was argued by WorkSafe, nevertheless, a $500,000 figure was fixed. *Dong Xing Group* involved $580,000, not $600,000, which would seem to suggest, in my view, that we are looking at a high medium band rather than a low high band (if I can put it that way).

[14] I think that there was a moderate to high level of culpability, based upon the facts to which I have referred, and I consider that a starting point sentence of $500,000 should be imposed. I base that because of the decisions in *Agility* and *Forest View High School.* I note what was said in *Forest View High School* about the business of construction, but when I consider the case of *Dong Xing Group*, I am still of the view that a $500,000 starting point adequately meets the level of culpability of the company in this particular case.

[15] The response of the company to the tragic outcome that occurred in this particular matter has been commendable. There is no doubt that there were some restructuring elements that were going on within the company and that may have had some contributory effect to what took place, but the company was swift to make reparation. Their expressions of remorse are commendable. A restorative justice process has been undertaken. The company has acknowledged its responsibility by entering an early guilty plea and has co-operated with WorkSafe throughout its investigation.

[16] For an early guilty plea, they are certainly entitled to a 25 per cent discount from the starting point that I have articulated. They have made reparation and paid that without any direction from the Court, properly expressed remorse and undertaken restorative justice, and for that, they deserve credit. I am prepared to fix that discount at 10 percent for that. For co-operation with WorkSafe, they are entitled to a discount, in my view, of five per cent. It has been suggested that they should have a discount for previous good character. The difficulty there is that there was an earlier notice relating to WorkSafe requirements that did not result in a prosecution, but I also am cognisant of the fact that there were management restructures going on at this particular point in time, and in that respect, I am prepared to give a discount for previous good character, in the sense that there had been no earlier prosecutions or convictions, of five per cent. That means that I reach a total discount figure of

45 per cent. 45 per cent of $500,000 is $225,000, which, when deducted from $500,000, gives me a figure of $275,000 finishing point.

[17] Legal costs of $15,900 are not in dispute and an award will be made for them.

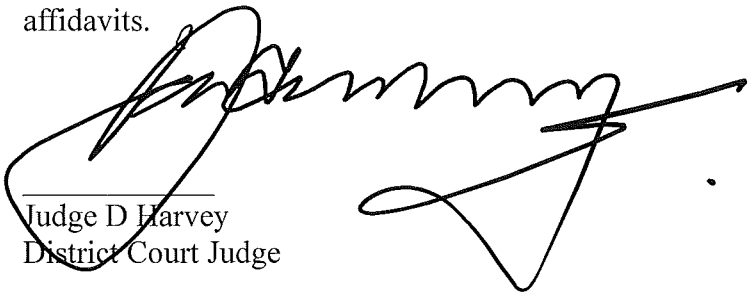
[18] The final matter that I have to consider is the ability to pay. A lengthy perusal of a file, by one who has been trained in the law rather than accountancy, has been necessitated. It seems that initially the assumption that was made by the WorkSafe specialist, Mr Shaw, was that there were some concerns on the part of the company as to whether or not they would be able to pay any sort of a fine at all. However, it becomes clear from the affidavit that has been provided by Mr Grace that indeed the company does have an ability to pay a fine, but it would have to be of a reduced amount. There are a number of factors that have been completely beyond the control of the company that are relevant in this regard. Perhaps the most significant impact is that with the onset of COVID-19 and the disruption that that has caused, the company has had to shift its focus of its operations to other enterprises, which perhaps do not have profit margins that shop and office fitouts might have otherwise provided.

[19] In addition, there has been, as I have suggested, restructuring issues, and the ability to pay is more based upon a reduced amount. The factors that I take into account in this regard are these. Firstly, the penalty should not cripple the continued operation of the company. Associated with that, the company should be allowed, and indeed encouraged, to keep trading and to provide employment, particularly at a time of recession, although given recent news reports relating to credit card expenditure and the like, one wonders whether or not that recession is in fact a reality, but certainly, the provision of employment at this particular time is significant. However, economic forecast would seem to suggest that we are in a recession and the ability to pay must be tempered by that factor. Certainly, the evidence that Mr Grace provides is that the company is capable of paying a reduced amount and he has suggested a figure of $100,000 over a period of two years. I think it would be incorrect to order a fine of $100,000 for offending of this nature given the level of culpability, to which I have referred. Furthermore, it would reduce the level of fine to something that is somewhat unrealistic. In light of those culpability factors, it would fail to provide the necessary

deterrence to this company and to others and to ensure that proper safe workplace practices are engaged in.

[20] Accordingly, I am of the view that the fine should be fixed at least to $75,000 less than the figure that I calculated. It should be fixed at $200,000 payable over a period of four years. Therefore, the outcome of this is that the company will be convicted. Firstly, there is no need for a reparation order because reparation of $60,000 has been paid. Consequential loss will be ordered and payable in the sum of $15,160.58. The company will be fined $200,000, payable over a period of four years. The legal costs of $15,900 will also be ordered to be payable. There will be court costs of $130.

[21] I make a non-publication order of the financial details contained in the affidavits.



Judge D Harvey
District Court Judge

Date of authentication: 06/01/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.