SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPHS 90 AND 91.
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT ASHBURTON

I TE KŌTI-Ā-ROHE
KI HAKATERE

CRI-2019-003-000305
[2020] NZDC 12458

WORKSAFE NEW ZEALAND
Prosecutor

v

SIDOGG INVESTMENTS LIMITED
Defendant

Hearing:	29 June 2020
Appearances:	N M Self for the Prosecutor O J Lund for the Defendant
Judgment:	29 June 2020

NOTES OF JUDGE D DRAVITZKI ON SENTENCING

Introduction

[1] On 22 September 2018 Facundo Fermin Wingerter, a farm hand employed for a matter of only three and a half weeks by Sidogg Investments Limited, the defendant in this matter, was riding on the drawbar of a trailer being towed at a speed of approximately 20 kmph when he fell off.

[2] Mr Wingerter was subsequently run over by the trailer, leaving him paralysed from the waist down with fractured ribs, collar bone and pelvis. He has also lost bladder and bowel function as a result of his injuries.

[3] Worksafe undertook an investigation and identified failures on behalf of the defendant to comply with the Health and Safety at Work Act 2015.

[4] The defendant company appears for sentence today having pleaded guilty to one charge of contravening s 36(1)(a) and s 46 of the Act. Those provisions carry a maximum penalty of a fine not exceeding $1.5m.

[5] The charge specifically is that the company, having a duty to ensure as far as is reasonably practicable the safety of its workers, while collecting calves as part of a dairy farm operation, did fail to comply with that duty and that failure exposed the workers to a risk of death or serious injury arising from exposure to a crushing hazard.

[6] The charge is further particularised that it was reasonably practicable for the defendant to:

(a) Firstly, conduct an effective risk assessment of the calf collecting operation;

(b) Secondly, to develop, implement and monitor an effective safe system of work for that calf collection work.

(c) Thirdly, to ensure that the provision of effective information, training and instruction was disseminated; and

(d) Fourthly, to ensure that workers who were not competent to use towed trailers in the workplace were adequately supervised while that was occurring.

Facts

[7] A detailed summary of facts has been prepared by Worksafe and I do not propose to go through it in detail. The most important factual narrative was read in open Court today. There are, however, a number of specific features of the facts to which I will refer in this decision and which both counsel have referred me to in their submissions.

(a) Firstly, that the employee victim was a young man.

(b) He was only newly employed by the defendant having been there for approximately three and a half weeks.

(c) English was his second language.

(d) What occurred was that he was standing on the drawbar of the trailer, holding onto the trailer as it drove across a paddock. It was a patently dangerous activity. There was clearly risk of serious injury and that is exactly what eventuated.

(e) This is also not a case where there were no health and safety procedures in place by the defendant but, nonetheless, it is clearly accepted by the guilty plea made that those procedures were inadequate and specifically that their enforcement and implementation was inadequate.

Victim Impact Statement

[8] A very detailed victim impact statement has been provided from Mr Wingerter. It is quite clear from that that he is a remarkable young man. He was 19 when this life-changing incident occurred to him. The victim impact statement speaks of his determination to live as normal a life as possible and his continuing attempts to have active engagement in sporting activities to the best of his abilities. He also refers to the fact that he is grateful his injuries were not more serious or fatal. It is reasonably clear from the victim impact statement that he does not bear a sense of grievance against his employers. He says:

> About my employer and manager I think they are good people. The situation, it is unwanted by either party. My wish is that they can also overcome this in the best way. I think there are many ways to improve the way of working so that no employee should experience what happened to me. Simon and Rudolph has been in contact and visited me a few times in the hospital, being very sorry. I don't have any kind of problem with him. I'm not angry. I just wish that what happened to me doesn't happen to anyone else.

[9] Notwithstanding this, quite remarkable as I say, level of forgiveness by Mr Wingerter, it is equally clear that the incident has had absolutely life-changing effects on him.

[10] Further aspects of his statement note he cannot walk or feel his legs from the hips down, "I was told by my doctor that I was classed as B category which means there is little chance of me ever walking again."

[11] He refers to losing the use of his bowels and urinary tract which is a particularly difficult matter for him to manage no doubt. He refers to having ongoing rehabilitation and therapy since he has returned to Argentina. He refers to the difficulties of trying to live life in a country where the adaptions for his particular disability are not readily available. He says, "Before the incident all my activities happened spontaneously without needing to think about all these things, nothing is the same anymore." He acknowledges he will be in a wheelchair for the rest of his life.

[12] He notes further that he is "living a completely different life". He does not know what his future will look like. He does not know if he will get married or be able to have children.

[13] While I have already spoken of the fact he does not bear ill will against his employer, he does say he is upset that this has happened to him and that the incident could have been avoided if he knew where he was standing was a dangerous place. He says:

> It was normal for farm workers to stand there and I just did the work that I was being asked and paid to do.

[14] He notes also the effect that it has had on his wider family and says:

> My parents are the ones who are most affected by all this. It was very hard to assimilate all of this for them more than for me. They suffered too much, especially my mother who did not have the possibility to see me in the early stages of the incident.

[15] I dwell on these matters because clearly it is important to recognise the truly serious and life-changing nature of the injuries suffered by Mr Wingerter in this matter.

The Law

[16] In sentencing the defendant I am required to have regard to s 151 of the Act. That provides that the Court must apply the Sentencing Act 2002 and its provisions. S151 requires me to have specific regard to ss 7 to 10 of the Sentencing Act.

[17] S 151 says I must also have regard to the purpose of the Act, the risk of and the potential for injury or death that could have occurred, whether death, serious injury in fact did occur. I am required to have regard to the safety record of the defendant as well as the degree of departure from prevailing standards in the industry as well as the defendant's financial capacity or ability to pay a fine, although under s 151 the reference is specifically to the potential to uplift a fine if the defendant is of particular financial ability.

[18] In terms of the principles of the Sentencing Act, s 7 sets out the purposes of the Act. The particularly relevant matters in this sentencing, in my view, are the requirements, and the considerations of:

(a) holding the offender accountable for the harm done,

(b) promoting a sense of responsibility in the offender

(c) and providing for the interests of the victim including by way of reparation,

(d) denunciation and deterrence, both in relation to the offender and generally.

[19] Guidance has been given on the application of the sentencing exercise under the Act by the leading High Court decision of *WorkSafe v Stumpmaster*.[1] That case fixed four bands of culpability, or blameworthiness, in offending under s 48. Specifically, low culpability offending had a starting point of up to $250,000 by way of fine; medium culpability $250-600,000; high culpability $600,000-1,000,000 and very high culpability a starting point of over $1,000,000 up to the maximum fine.

[20] *Stumpmaster* also adopted a clear four step process to be undertaken when sentencing under the Act.

(a) Firstly, I am required to assess the amount of reparation that is to be paid to the victim.

(b) Next, I fix the amount of the fine by reference to the guideline bands that I have just referred to having regard to aggravating and mitigating factors.

(c) Thirdly, I am to determine whether any further orders are required under ss 152 to 158 of the Act which provides for various ancillary orders which can be made.

(d) Fourthly, I am to step back and make an overall assessment of the proportionality and appropriateness of imposing the sanctions and the reparation and whole package of sanctions that have been obtained under the first three steps.

Reparation

[21] The first part of that process, therefore, is to set the reparation amount that is payable. Reparation is payable specifically in this circumstance for both emotional harm and relevant consequential loss incurred.

[1] *Stumpmaster v WorkSafe New Zealand [2018] NZHC 2020*.

[22] It is important to say that reparation for emotional harm is never intended to adequately compensate a person such as Mr Wingerter for the extreme loss and harm that he has suffered. That clearly cannot be undertaken with some monetary amount. What it is intended to do is to give some recognition of the life-changing loss that has been suffered by him. Equally, I cannot be overwhelmed by Mr Wingerter's circumstances and there needs to be a degree of relativity in the reparation amount that I fix to other matters which are of a similar nature.

[23] I am mindful of the direction of the High Court in the *Big Tuff* case where it said:

> "reparation for emotional harm is an intuitive exercise.[2] Its quantification defines finite calculation. The judicial objective is to strike a figure which is just in all the circumstances and which, in this context, compensates for actual harm arising out of the offence in the form of anguish, distress and mental suffering."

[24] All cases will be different.

[25] Both counsel have referred me to various cases and both agree with a range of between $75,000 and $90,000 as being an appropriate amount of reparation in this matter.

[26] Specifically the cases referred to me included:

(a) *WorkSafe v Supermac*[3]. The injury there was tetraplegia and the reparation amount $100,00.

(b) In *WorkSafe New Zealand v Ask Metro* tetraplegia resulted and similarly the reparation amount was $100,000.[4]

(c) *Department of Labour v Sims Metal* – paraplegia resulted and the reparation amount was $75,000 although as WorkSafe counsel acknowledged that is a somewhat aged matter.[5]

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[2] *Big Tuff Pallets Limited v Department of Labour, HC Auckland, CRI-2008-404-322, 5 February 2009.*
[3] *WorkSafe New Zealand v Supermac Group Resources Limited [2019] NZDC 15023.*
[4] *WorkSafe New Zealand v Ask Metro Fire [2017] NZDC 13314.*
[5] *Department of Labour v Sims Pacific Metals Limited, Dunedin District Court, CRN 8012500050,*

(d) On behalf of the defendant Miss Lund responsibly referred me to the more recent decisions of *WorkSafe v McKee* where tetraplegia resulted and the reparation award was $110,000 and *WorkSafe v Wai Shing Ltd* where again tetraplegia resulted and the amount of reparation awarded was $110,000.[6]

[27] In her submissions on behalf of the defendant today Miss Lund acknowledged that reparation at the upper end of that range would be appropriate and I agree that that is the case. It needs to be borne in mind this is a very young, active man and the injury clearly has had a devastating effect on the life that was in front of him and the opportunities available to him.

[28] I consider the figure of reparation of $90,000 to be appropriate in all the circumstances.

[29] Within that $90,000 I do have regard to an additional claim over and above reparation for emotional harm. That is reparation for consequential loss. A very small amount really is sought in relation to that. That is a result of low level earnings by Mr Wingerter over the period prior to his employment with the defendant. There is something of an argument, particularly as a result of the *McKee* decision, as to whether in Mr Wingerter's circumstances as a casual employee without guarantee of hours he is entitled to any award for consequential loss. In the circumstances I fix the overall $90,000 reparation figure to include both emotional harm and any claim for consequential loss.

Fine

[30] The second aspect of the sentencing exercise is to assess the quantum of the fine to be levied. I have already referred to the four bands established by the *Stumpmaster* decision. The most relevant of those bands for this exercise are the medium band which runs from $250,000 to $600,000 and the high band which starts at $600,000 to potentially up to $1,000,000. *Stumpmaster,* when discussing the

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30 July 2008.

[6] *Stephen McKee v WorkSafe New Zealand [2020] NZHC 1002; WorkSafe v Wai Shing Ltd* [2017] NZDC 10333.

appropriate level of fines in setting the various bands, noted that the well established principles of the decision of *Department of Labour v Hanham & Philp Contractors Ltd* remained relevant and helpful in assessing culpability and, in fact, that all of the various factors which were identified in *Hanham & Philp* as relevant in assessing culpability are essentially reflected within s 151 of the Act.[7] That is, that the *Hanham & Philp* factors largely integrate with s 151.

[31] For that reason, I will work through the *Hanham & Philp* factors in assessing the level of culpability.

[32] The first factor is to identify the operative acts or omissions at issue and the "practicable steps" that it was reasonable for the offender to have taken in terms of the Act. This is essentially what the particulars of the charge have done. That is, there should have been an effective risk assessment undertaken. There should have been developed, implemented and monitored an effective system arising out of that risk assessment which would enable a safe system of work. There should have been effective dissemination of that system to the workers and that there should have been adequate supervision of those who required it.

[33] The second aspect is an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk. Quite clearly there was significant risk in this matter. That is accepted by all counsel, including responsibly by the defendant. This was a heavy trailer being towed over uneven ground and Mr Wingerter was in a position of unsure footing and in close proximity to the wheels of the trailer. There was clearly a major risk of serious injury or fatality. Furthermore, in this case, the realised risk was a serious and permanent injury. That is the injury which actually did occur and clearly that also must be factored into the sentencing exercise. It is acknowledged by all that in fact the injury could have been worse and specifically the possibility of a fatality was a real risk.

[34] The next matter for consideration is the degree of departure from standards that were prevailing in the industry. There is discussion of this in the summary of facts. The industry standards do not specifically state "*do not stand on the drawbar of a*

[7] *Department of Labour v Hanham & Philp Contractors Ltd (2009) 9 NZELC*

trailer" but that is probably because it is so clearly and obviously dangerous that it was not considered necessary. Clearly, standards are in place that identify working with farm vehicles and trailers as real risk areas that need particular care.

[35] As I said at the outset, this is not a case where there were no steps whatsoever taken by the defendant.

(a) There were a series of safety cards provided by a company, HazardCo. These identified risks specifically around the use of vehicles. It appears that those cards, while present, were not in active use, at least in relation to this aspect of farm operations.

(b) In addition, the defendant did have shed meetings at which specific risk issues were discussed. I am also advised that when new matters of risk arose those would also be discussed at the regular shed meetings. It is accepted that at one of those shed meetings the employers' manager did say that persons should not stand on the trailer drawbar although Mr Wingerter was not present at that meeting. As I understand it that pre-dated his employment.

(c) Mr Wingerter himself was told not to sit on the drawbar of the trailer, together with some of his colleagues.

[36] Mr Wingerter was not given any significant or meaningful induction into the risks specifically around this aspect of farm work. He was a very young man. He was operating heavy machinery. English was not his first language. He had no farm experience although the defendant notes that he understood that he did have some prior experience working on a farm in his home country. Of course, that really serves to illustrate the fault of no meaningful induction meeting with him at which it would no doubt have become immediately clear that Mr Wingerter did not have any prior relevant experience.

[37] Possibly most importantly Mr Wingerter refers in his victim impact statement, as I have said, (and also as referred to in the agreed summary of facts as the basis on

which I am sentencing), that it appeared that the practice of standing on the drawbar had become normalised and common. That is to say, even though it was apparently pointed out that it should not occur, this is not a prohibition that was given effect to in day-to-day life on the farm. It is in that aspect of implementation and effectiveness of work practice where there has been a clear shortcoming.

[38] It is also noted that this is an area where there has been previous highly publicised serious injury cases and deaths resulting from use of farm machinery.

[39] Clearly it was a risk that was clear and obvious. That is the next specific matter which I am required to have regard to. That is, the obviousness of the hazard and I do not need to say more about that. It was a clear and obvious hazard to life and limb and sadly those risks came to fruition in this case.

[40] The next matter to give consideration to is the availability, cost and effectiveness of the means necessary to avoid the hazard. Really what was required in terms of avoiding the hazard are those particulars which I have already set out. That is, to undertake a risk assessment to devise an effective and safe process of working and to ensure it was implemented and given effect to. It was not a huge cost or onerous obligation. That is identified by the fact that when WorkSafe undertook its first visit in its investigation on 29 October there was no need for them to issue any notices to abate any particular practices because the company had already by then undertaken all of those steps. That is, designed and implemented an effective risk management system.

[41] The final consideration under the *Hanham & Philp* criteria is the current state of knowledge of the risks, nature and severity of the harm which could result and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence. Again, this was a reasonably straightforward and obvious risk. The means by which it could be mitigated were also relatively straightforward.

[42] Against that background, I am required to set a starting point for the fine which is to be imposed. WorkSafe urge on me a starting point of a $600,000 fine. That is to say, right at the top of the band of medium culpability. The defence argue that a

starting point of $480,000, that is within the middle of the medium culpability band, is appropriate. Both have referred me to relevant cases and I will traverse those briefly.

[43] The prosecution particularly relied on *The Sunday Hive Company* case.[8] That was a case of a rollover death involving rural machinery. There were absolutely no meaningful systems in place in terms of health and safety in that case and a starting point of $700,000 was considered appropriate by the sentencing Judge.

[44] The case of *Stevens v Stevens* was also a fatality and that involved a quad bike rollover.[9] Industry standards in that case were considered to be generally lacking. A starting point of $600,000 was considered appropriate.

[45] The *McRae* case also resulted in a fatality that involved a tractor rollover.[10] The machinery was defective. The employee was relatively new although very experienced. The sentencing in that case occurred under the old regime. A fine of $115,000 was considered appropriate. That was approximately 40 percent of a potential fine of $300,000. If that is essentially scaled up to the new maximum fine regime, and I accept that that is not always appropriate, but by way of indication, that would give a starting point fine of approximately $575,000.

[46] It is noted that all of those cases are fatalities.

[47] Miss Self in her oral submissions today emphasised the similarity of these matters on the basis that they are rural in nature, the danger was relatively obvious and readily rectifiable and that little or no training had been given. Miss Self particularly emphasised the vulnerable nature of Mr Wingerter as a young migrant man with English as a second language.

[48] Miss Lund for the defendant particularly referred me to a decision of *WorkSafe v Supermac*. In that case paraplegia resulted but together with very significant other injuries including a significant head injury and badly impaired sight. There was a lack of training in that case and a breach of industry standards. The

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[8] *WorkSafe New Zealand v The Sunday Hive Company Limited [2018] NZDC 20796, 3 October 2018*.
[9] *WorkSafe New Zealand v Stevens and Stevens Limited [2018] NZDC 19098.*
[10] *WorkSafe v Stephen Alexander McRae [2018] NZDC 2209.*

sentencing Judge in that matter considered that a starting point of $450,000 was appropriate.

[49] Miss Lund also referred me to *WorkSafe v Kiloran Land Company Ltd.*[11] This also was a fatality matter. It involved a quad bike. No helmet was being worn by the victim in that case and the spray apparatus on the vehicle was incorrectly mounted. That matter was also dealt with under the old regime. A fine of $80,000 being 80 percent of the then middle band was considered appropriate. Again, on a "scale up' basis and again accepting that is not always appropriate, a fine of $480,000 would be a starting point under the new regime.

[50] I have given consideration to these cases. All will be slightly different. I refer to the matters which I have already mentioned in terms of the specific factors that apply in Mr Wingerter's case. Clearly there has been a departure from industry standards. Clearly there was obvious and real risk. Clearly there have been extremely serious consequences to Mr Wingerter. I do note and do take on board and accept the particular factor that he was a young, inexperienced person with English as his second language. I take into account that there were some health and safety systems in force but they were not adequate and they were not being enforced.

[51] I agree with Miss Lund, however, that there must be some differentiation between the various fatality cases which are referred to. While Mr Wingerter's injuries are extremely serious, thankfully he was not killed although, as I think it is accepted by all, that was a genuine possibility.

[52] Bearing all of those factors in mind and taking them all into account, I consider that a starting point fine of $500,000 is appropriate. The most similar case in my view is the *WorkSafe v Supermac* situation although I accept the situation is somewhat more culpable given particularly Mr Wingerter's vulnerability for the reasons that I have already discussed.

[53] I am then required to take into account any mitigating or aggravating features of the defendant. It is agreed there are no aggravating features.

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[11] *WorkSafe v Kiloran Land Company Ltd* [2016] NZDC 25082.

[54] There is a substantial dispute between the parties as to what extent I should bring into account mitigating features. I am mindful that *Stumpmaster* warns against what might be referred to as discount creep for a number of disparate mitigating factors which in combination result in an overall discount which is out of proportion to the culpability. That said, *Stumpmaster* itself recognises that when appropriate reasoned argument is put forward as to the applicability of mitigating factors, they should be brought into account. What is needed is a careful consideration of the mitigating features advanced.

[55] The defence says that discounts and mitigating features should be brought into account as follows:

- Five percent for the previous good safety record of the defendant;
- A further five percent for good character;
- 10 percent to recognise the reparation which is payable and specifically the step of obtaining insurance to ensure that it could be paid;
- Five percent is argued as a discount for genuine remorse;
- Five percent for remedial work which has been undertaken to rectify the health and safety defects which are described as going above and beyond what was required and,
- Five percent for co-operation of the defendant with the investigation.

[56] If all are allowed, that would result in a total reduction of the sentence of 35 percent.

[57] WorkSafe submit that the only discounts which should be granted for mitigating factors are

(a) five percent for the defendant's previous good safety record;

(b) five percent for reparation. (They argue against the 10 percent which is sought for by the defendant)

(c) and a further five percent for the defendant's co-operation with the investigation which is acknowledged.

[58] The total discounts which the prosecutor would allow for by way of mitigating features would total 15 percent.

[59] I have given careful consideration to this matter and am prepared to allow discounts (although "discount" is an unfortunate use of language) to take into account the appropriate mitigating factors of this prosecution.

[60] Firstly, I accept that a discount or a mitigating feature of this prosecution is the defendant's prior good safety record. It is a notably dangerous industry. The defendant has been engaged in it for almost 15 years. It has not come before the Court for matters of this nature at all in that time. Combined with that mitigating feature the defence has argued that the company's good corporate character should also be brought into account. WorkSafe said it is unusual for that to be given a second credit and even if it is appropriate in certain circumstances the threshold that would be required has not been made out in the case of this defendant. Overall, I am minded largely to agree with WorkSafe in relation to that but equally the defendant could be given a small recognition of its good previous corporate character. It does have a good safety record. The total mitigating effect of those matters combined in my view is seven percent.

[61] It is agreed that the mitigating nature of the ability to pay reparation should be brought into account. I agree with that entirely. That does provide real and meaningful reparation to Mr Wingerter. I am mindful also of the direction in *Stumpmaster* to be careful to avoid over accepting payment of reparation as a mitigating feature. In the circumstances I consider the standard five percent allowance to be appropriate.

[62] I consider the five percent mitigating factor of the defendant's co-operation with the WorkSafe investigation also to be appropriate. That is its own submission and is accepted by WorkSafe. It is appropriate in my view.

[63] I do consider there has been a genuine display of remorse by the defendant in this matter. I note Mr Wingerter's comments in his victim impact statement of the visits to him in hospital by the defendant's principal and the farm manager. I note, in particular, the steps that were taken to support Mr Wingerter's father when he came from Argentina to support his son in hospital as he recovered. Those are the type of matters which, in my view, do indicate genuine remorse by the defendant and I consider that they should be appropriately given recognition and I do so by way of recognising a five percent allowance for those matters.

[64] The last matter for consideration is the nature of the remedial steps taken. Again, *Stumpmaster* cautions that this should not be an automatic allowance and in particular where the faults were obvious and readily rectified that may not give rise to any form of recognition. The defence puts forward in this case that over and above fixing the immediate faults the defendant has engaged in health and safety audits from two external accreditors.

[65] It was put forward that the second one of those, in particular, was engaged by the new company that Mr van der Hayden is involved in. But I do accept that this terrible accident has led to a robust assessment of health and safety obligations on his part and that the engagement of an external consultant to undertake a full audit of the defendant's processes does indicate that remedial steps which are slightly above and beyond what could absolutely be required is appropriate. In the circumstances a small additional allowance of three percent is allowed for that.

[66] In the event that it is not clear, the mitigating features which I have brought into account together with their specific percentages are as follows:

- The good safety record combined with a good corporate character – seven percent;

- Reparation arrangements made – five percent;

- Co-operation with the investigation – five percent;

- Genuine remorse shown – five percent;

- Remedial actions "above and beyond" are taken into account -three percent.

[67] The total discount which I am prepared to take into account by way of mitigation is therefore 25 percent. That is obviously somewhat less than the defendant contends for but are more than WorkSafe consider appropriate.

[68] I am somewhat fortified in my view by the comments in *Stumpmaster* appeal itself that a credit of 25 percent in that case was considered appropriate. The court referred to it being the case of a good but not exceptional response from a first-time offender. In my view that is a reasonably accurate description of the response that has been undertaken by the defendant in this case also.

[69] In terms of the fine, accordingly the fine levied is one of $500,000. That is reduced by the mitigating features by 25 percent, that is, $125,000, leaving a resultant fine of $375,000. To that needs to be applied the discount which is appropriate for an early guilty plea. It is agreed that a 25 percent discount for that should be given. That is a further discount of $93,750 so that the final resulting fine that is imposed is one of $281,250.

Ancillary orders

[70] The third step of the sentencing process is to take into account any other or ancillary orders that might be made under the Act. This can be dealt with quickly. The only matter which is sought is a costs award of $1,990 to contribute towards WorkSafe's costs and the prosecution. That is accepted by the defendant and that costs award is accordingly made.

Overall assessment

[71] The fourth and final step of the sentencing exercise is the proportionality assessment that I need to undertake. That is to undertake an overall assessment of the proportionality and appropriateness of the suite, or package, of sanctions under the first three headings which I have undertaken.

[72] I need to step back and look at matters overall and consider whether that is a reasonable overall sanction.

[73] Relevant to this consideration is the defendant's financial capacity to pay a fine and again the parties have significantly different views and have made significantly different submissions in relation to this aspect although neither of them say that I am absolutely prevented from levying a fine in these circumstances.

[74] The defendant's position is that the company is in liquidation, there are no assets in the company and there is, therefore, no utility in a fine. The company has no assets with which it could pay a fine.

[75] The prosecution submissions initially said I should request more information about the company's financial circumstances including potentially a forensic accounting exercise for reasons I will outline. However, today, Miss Self advocated that it was not necessary and that a fine could and should be levied against the defendant.

[76] This matter does require some examination.

[77] Evidence is filed about the company's financial position, both by Mr van der Hayden who has filed two affidavits and by the company's accountant.

[78] This company was not a failing company. It was profitable. It is to be noted that Mr Wingerter's accident occurred on 22 September 2018. WorkSafe were appropriately notified of the accident almost immediately by 24 September. They undertook their first site visit and commenced an investigation in October 2018. Mr van der Hayden's evidence is that earlier in 2018, and possibly even earlier than that, the defendant company had identified different business opportunities including the possibility of obtaining an ownership interest in land which would involve the movement of the farming operation to a new area. For a number of business reasons, appropriate to that change in direction, a decision was made for the company to be wound up and a new company which would pursue the new business opportunity to be established. That winding up process though involved substantial distribution of

funds to shareholders, as I understand it, both by way of repayment of loans and as dividends.

[79] …

[80] ….

[81] The company was then placed in liquidation in May 2020.

[82] The company defendant then comes to Court at this point saying that it is simply not in a position to pay anything by way of fine on the basis of its liquidated state. I have to say that is an unappealing argument to me.

[83] I am very careful to say too that I am not suggesting in any way that the steps taken were deliberately to avoid payment of the outstanding fine. Mr van der Hayden has given sworn evidence as to the reasons for the company restructuring and I have no reason to dispute that. But the simple fact is that as a result of that restructuring, for whatever reason undertaken, there are no longer funds available in the company that in all likelihood would have been available to pay a fine at the levels that I have indicated are in my view appropriate and which have now been levied by the Court.

[84] Those actions did take place when the company must have known that at the very least a health and safety prosecution was a distinct possibility.

[85] It is beyond the scope of the Court to take that matter further and I do not think there is any need to do so. WorkSafe have attached to their submissions the first report of the liquidator of the defendant. The liquidator notes at paragraph [4] of the initial report that:

> "The assets [of the company] were sold with effect from June 2019 and the company was in the process of being wound down. Unfortunately, due to an accident by an employee a prosecution against the company commenced which caused the contingent liability leading to the company becoming insolvent. In that environment a decision was made to appoint liquidators."

[86] The potential fine liability is regarded as the only potential liability of the company and the liquidators have correctly and adequately set out how they intend to

proceed from this point. That is recorded in paragraph [7] of the liquidation report in which they say:

> "The liquidators will await the award from the Court which will confirm the extent of the debt due by the company. They will then review the company's books and records to establish if there are any potentially voidable transactions, any potential shareholder current account issues and ensure the director has complied with the duties and obligations imposed on him under the Companies Act 1993."

[87] That is obviously the appropriate course. I make no comment whatsoever as to the outcome of that and the matter will be appropriately considered and dealt with no doubt by the liquidator.

[88] If I have not already made it clear, I do not consider the current liquidated state of the company prevents me from finding that a fine should be and is currently payable. I think it would send the wrong message to do so and accordingly the fine that I have previously indicated as appropriate will be levied.

[89] I also deal briefly with the submission that because the company is a relatively small entity there should have been a reduction in the fine. I am not persuaded by that submission. The reality is that the company was profitable and it appears that it would have been in a position to pay a fine at the level which I have imposed but for the liquidation which has occurred. I accept that the fine is a significant imposition on the company, or any small to medium sized companies, but clearly it was intended that fines and prosecutions under the Act would be onerous and demanding on companies and that no doubt was the reason why the maximum penalties were increased so substantially.

Suppression of financial information

[90] The last matter that I need to deal with is the issue of the suppression of financial information provided by the defendant. I have received submissions that such information is regularly suppressed on the basis of financial confidentiality and sensitivity. I accept that the information is financially sensitive to the defendant and

its shareholders and that it would not ordinarily become available in the public domain. I note that WorkSafe take a neutral position on this particular aspect of matters.

[91] In the circumstances I consider it is appropriate that the financial information which has been provided by the defendant for these proceedings is suppressed and specifically suppressed are the passages of this decision which relate to that financial information and the distributions which it appears to me have been made from the company to its shareholding owners.

Summary

[92] The final position, therefore, in summary, is that reparation of $90,000 is imposed.

[93] The final fine imposed is $281,250. That fine is not waived or otherwise withheld on the basis of the company's liquidation.

[94] There is to be an order for costs of $1,990.59 to contribute to WorkSafe's costs in the matter.

[95] There is an order suppressing the financial information of the defendant for the reasons and on the basis that I have just given.

[96] A summary of facts is to be made available to the media as they require it.

[97] I wish to say I am very grateful to both counsel for their very helpful submissions in relation to the matter.

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Judge D P Dravitzki
District Court Judge

Date of authentication: 22/07/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.