IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-007339
[2022] NZDC 26076

WORKSAFE NEW ZEALAND
Prosecutor

v

360GROUP LIMITED
SHAKTHI CONSTRUCTION LIMITED
Defendants

Hearing:	21 December 2022
Appearances:	S Cossey for the Prosecutor M Russell for the Convicted Company 360 Group Limited S Curlett for the Convicted Company Shakthi Construction Limited
Judgment:	21 December 2022

NOTES OF JUDGE K MUIR ON SENTENCING

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[1] Before me today are two limited liability companies, 360Group Limited and Shakthi Construction Group Limited. They face a prosecution by WorkSafe, the charge being a breach of the Health and Safety at Work Act 2015, s 48(1) and (2)(c) and s 36(1)(a). The penalty for each company is a fine not exceeding $1.5 million.

[2] The specific charges relate to work that was carried out at Glenbrae Primary School in Glen Innes. Shakthi Construction Limited was the overall contractor and 360Group Limited was a subcontractor engaged to carry out painting at the property.

[3] The specific charge against 360Group is that being a person in control of a business or undertaking they had a duty to ensure, as far as is reasonably practicable, the safety of workers, including the victim Mr Nejadmousavi, while they were at work carrying out painting on the roof of the junior block and they failed to comply with that duty and exposed workers to a risk of death or serious injury from a fall from height.

[4] Specifically, they failed to carry out an adequate assessment of the roof to ensure appropriate controls were in place, for example, covering the Clearlite and edge protection across the roof prior to painting, and it was also reasonably practicable for them to have communicated information, instruction and supervision requirements to the workers regarding the painting work to be carried out on the site.

[5] An all but identical charge is faced by Shakthi Construction, except there is only one particular failure pleaded against them and that is failure to ensure that appropriate controls, for example, a covering over the Clearlite or edge protection, were in place.

[6] The facts are comparatively unremarkable. According to the summary of facts there was a handover of work the day before the incidents where effectively Shakthi handed over the site to 360Group so that some painting could be completed. This was the first day that Shakthi's workers were going to be working at height. Specifically, they were working on painting the building rather than the roof but at the level of the roof.

[7] There is a dispute over when the work was prepared to start and who was meant to be in charge. The victim was due to start work at 7 am that morning and due to finish at three. He said that those were his usual hours of work and I accept his account. I have no reliable contrary evidence to that effect. He started work by getting up on the roof using a scaffolding that was in place. He was on site with a co-worker.

[8] Evidently, there was supposed to be another supervisor, a Mr Faramand, on site and 360Group appear to have been under the impression that Mr Faramand should have arrived before they started work. 360Group also say that they were not aware

that Mr Soltani who was on site with Mr Nejadmousavi was given a key to enable them to start work. Mr Nejadmousavi on the other hand says that Mr Faramand had a reputation for arriving at sites late or not arriving at all and he had no idea that he was meant to wait for him.

[9] I find it irrelevant to the culpability of 360Group, or indeed Shakthi, whether or not Mr Faramand was meant to be there or what time the workers were supposed to have started work. The most that might have come of that was a safety briefing of some kind warning them to keep away from the area of the Clearlite on the roof. No such briefing was given. That briefing could have been given the day before or at any time, but it would have been insufficient. The real failure here was failure to protect the relevant area of the roof. The accident that happened was entirely foreseeable. It was regrettable. It has happened all too often in the New Zealand construction industry, sometimes with very serious consequences.

[10] At some time during the morning, Mr Nejadmousavi stepped on the edge of the Clearlite with the roof. He fell through the Clearlite. He landed on the ground in significant pain. He fractured a vertebra.

[11] He has given a victim impact statement which is dated 31 October 2021. He says at the age of 40 he is married to his wife, Sonia Mohamadi, who is studying for her PhD in biomedical science at Auckland University and has no income. They have had to rely on his income from ACC which is significantly reduced. He said when the accident occurred in October 2020, he was taken to the hospital, was in a lot of pain and found it hard to breathe. He underwent x-rays, scans and other chest tests, was found to have fluid in his chest and a fracture on his L1 lumbar spine. The fracture compressed his spine and he has been in ongoing pain since. However, surgery has not been recommended as it is high risk.

[12] He describes short and long term pain. The pain causes him problems with sleeping so much that he has to sleep on the floor. He says he cannot work for longer than 15 to 20 minutes or drive for longer than five minutes. It has put a lot of pressure on his wife. He cannot even sit for longer than 10 minutes without standing or walking or lying down. It has affected his personal, sexual and emotional relationship with his

wife. He is embarrassed and he feels like he embarrasses his wife. He has put on a lot of weight, up to 25 kilos. He used to go to the gym and play football. He cannot do either and he feels depressed having to watch his teammates. About two months ago an epidural was recommended but he suffered the side-effect of additional pain.

[13] Prior to the accident he was earning $24 per hour which averaged around $1,152 per week before tax. Since the accident they have had to live on ACC payments of $570 per week. They have had to borrow about $55,000 for basic things such as food shopping, warrants for cars and the like. He has had to borrow for a dentist treatment on a Q Card.

[14] He says he wonders why he is living. He often says to his wife: "I can't work. I can't play soccer or work out anymore and what's the point of living." His life had changed. They had only been married a year before the accident. They have not had children yet. It has clearly had a significant and lasting effect on him.

[15] Immediately after the accident the directors of 360Group went to the hospital having arrived at site. They went to the hospital to support Mr Nejadmousavi. I find that the directors of both companies have been very concerned once the accident has occurred. A fix was put in place relatively quickly in the form of some scaffolding that forms a barrier between the area of the roof that is safe to stand on and the Clearlite. 360Group say that they believe there had previously been plywood in place covering the Clearlite, but they do not say when the plywood was there or when it was removed or when they inspected to see whether or not the plywood was still there.

[16] Regardless, there was a very straightforward engineering solution that could and should have been put in place in the form of a scaffold barrier or perhaps covering the Clearlite. It would have been obvious that the Clearlite was not there. You only had to look up from inside the building or ascend a short ladder and look at the building. The steps that could and should have been taken to prevent the accident being taken were obvious and it was an obvious risk with an obvious inexpensive and straightforward cure. All of these are relevant to the level of fine that should be imposed.

[17] Very careful written submissions have been filed by WorkSafe as well as by 360Group and by Shakthi. WorkSafe in summary say that $40,000 should be paid by way of emotional harm reparation. It seems to be common ground that there should be consequential loss reparation of $17,625. There is a calculation from a forensic accountant that confirms that. WorkSafe say that this was an obvious risk that was not managed at all and that the start point for the fine should be $450,000, and that would be applying a band of penalty that comes from the case of *Stumpmaster*[1] where this falls within the medium culpability band where fines might range between $250,000 and $600,000.[2]

[18] There seems to be common ground as to the costs that should be awarded against 360Group and Shakthi.

[19] The prosecution tell me that there should be a 25 per cent discount for the guilty plea and 20 per cent in total additional discounts, representing five per cent for the good record of both companies, five per cent for their co-operation with WorkSafe which was impressive by both of them, five per cent for reparation that will be paid and five per cent for remorse and their participation in restorative justice.

[20] An issue that has arisen is the ability of 360Group to pay a fine. There is sufficient evidence to establish to the satisfaction of WorkSafe that 360Group can pay a fine of $50,000 over three years. Mr Cossey for WorkSafe submitted that they therefore ought to be able to pay the sum of about $83,000 over five years and it would be appropriate that that be the order that I make. I will come back to that.

[21] Both WorkSafe and Shakthi submit that culpability, and therefore liability, for payment of the fine and any reparation should be apportioned equally. 360Group takes a different approach. They say there should be a 40/60 split, with the 40 per cent being in their favour. They say that principally because they say Shakthi was the organisation that was overall in control of the site. They say that 360Group had not worked at height before that date. They say that 360Group is effectively charged with only one principal omission, the failure to guard the edge. They say that Shakthi

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

Construction had assessed the risk and appreciated that the Clearlite formed the risk and yet done nothing about it. They therefore say that 360Group is less culpable because 360Group had not assessed the Clearlite as a particular risk.

[22] I have considered the apportionment argument with considerable care. I accept that Shakthi was in control of the site up until the day before the accident. They therefore were in a good position to assess this risk. They had assessed the risk. They ought to have put the simple engineering solution in place. Their lawyer accepts that that ought to have happened.

[23] On the other hand, 360Group knew that they were taking over the site the following day. They knew that their workers would be working at height on the roof. They had every opportunity to inspect the site before the accident occurred. The fact that they were relying on a supervisor to arrive some time before Mr Nejadmousavi started work at 7 am does not to my mind reduce their culpability. Ultimately, I find that it is reasonable that the parties should be equally culpable to contribute to loss, which leaves just one question that I will discuss later. That is, how much should 360Group actually pay given what they say about their impecuniosity?

[24] WorkSafe say that the fine that should be imposed should start from a starting point of $450,000. They rely on a variety of cases in that analysis, but ultimately analysing similar facts in similar cases is only of limited assistance to the judge who has to stand back and consider overall what penalty is appropriate while of course bearing in mind the clear bands that have been set in the case law, including of course *Stumpmaster*.

[25] I accept that liability in this case falls within the medium band of *Stumpmaster*. We are dealing with an obvious hazard, a hazard that is simple to fix. We are dealing with a hazard that has the potential to cause very serious harm. We are dealing with an accident that caused moderate harm, albeit it had a life changing effect on the victim. I think that this case is sufficiently analogous with the case in *WorkSafe New Zealand v Forest View High School Board of Trustees* decision as far as both fines and reparation are concerned.[3] In that case a start point of $500,000 was adopted,

[3] *WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558.

although I accept that the injuries that were suffered by the two victims there were significantly worse.

[26] There is also an analogy with *WorkSafe New Zealand v Agility Building Solutions Ltd* where a fall from scaffolding with insufficient elements led to multiple skull, facial and rib fractures, including hearing loss, facial paralysis and visual impairment.[4] A starting point of $450,000 was adopted in that case. I accept the injuries in this case were less immediately significant although they still had a lasting effect on the victim, and it does appear that the scaffolding in that case was in an appalling state, but on the other hand the presence of the Clearlite was, as I have said, an obvious risk.

[27] In terms of reparation, I have looked at the reparation amounts that were payable in the *Forest View High School Board of Trustees* case where amounts of $45,000 and $50,000 were respectively awarded to the teacher and student who were involved in the fall.

[28] In terms of setting the starting point, I take account of the four steps that are set out in *Stumpmaster*. I first need to assess the appropriate amount of reparation, then fix the fine with reference to the guidelines and bands and then take account of the aggravating and mitigating factors. I need to determine whether any further orders are required, none are sought here, and then I need to make an overall assessment of proportionality and the appropriateness of the combined penalty, and that includes the ability to pay.

[29] I have already indicated that there is a level of agreement in terms of the consequential loss reparation, which is $17,625. In terms of the emotional harm, given the lasting impact on the victim that is disclosed in the victim impact statement I find it is appropriate that a sum of $40,000 be paid by way of reparations. That is a sum for which the parties are equally culpable and equally liable.

[30] That then brings me to the task of fixing the amount of fine. I find that the sum of $450,000 advocated by WorkSafe is too high. On the other hand, I was urged by

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[4] *WorkSafe New Zealand v Agility Building Solutions Ltd* [2018] NZDC 24165.

the defendants to go perhaps as low as $250,000. For all of the reasons that I have outlined, I think that is too low. I will move through what are called the *Hanham* factors starting with (a), which is the operative acts or omissions in question.[5] Despite the fact that there was a belief that plywood was in place to protect, it would have been a simple matter to check. The fix was simple, cheap and effective. Edge protection was subsequently provided. It should have been done in the first place. There was a failure to brief, a failure to warn, a failure to guard or protect. The victim had only worked at ground level until that day. The inductions and advice given were inadequate, so there was an obvious risk of failure.

[31] The second *Hanham* factor, or factor (b), is the assessment of the nature of the risk. This was an obvious risk which carried the real prospect of serious harm. Considerable actual harm was suffered.

[32] The third factor, or factor (c), is the degree of departure from best practice. I note there was no compliance at all with the good practice guidelines for working on roofs. In MBIE recommendations dated July 2012 there is an established practice and there have been well-publicised prior incidents in the industry. There was no compliance with the MBIE best practice guidelines for working at height in NZ 2009 and no compliance with a readily available WorkSafe fact sheet labelled "Be Safe Working on Roofs".

[33] The fourth factor, or factor (d), is the obviousness of the hazard. This was a very obvious hazard.

[34] The fifth factor, or factor (e), is the availability, cost and effectiveness of means to avoid the hazard. This was cheap and readily available protection.

[35] The sixth factor, or factor (f), is the current state of knowledge. The risk was well-known. Whether or not these defendants were alive to it really does not matter. They ought to have been.

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[5] *Dept of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.

[36] Ultimately, it is my assessment that a fine of $400,000 is appropriate here taking account of all of those factors. So that is the starting point that I adopt before any deductions for guilty plea or other factors.

[37] I turn now to 360Group and I take the starting point for fine of $400,000. I allow a 25 per cent discount for the plea of guilty, a five per cent discount for the remorse that they have shown, including a job offer that was made to Mr Nejadmousavi in March 2022. I allow a further five per cent discount for the co-operation with WorkSafe, five per cent for their good record and five per cent for the reparation that they will be paying. That is a total of an additional 20 per cent or 45 per cent in all which leaves a fine of $220,000, for which they would be equally culpable and equally liable with the co-defendant, but it is reduced for their impecuniosity to $60,000. That is a figure that is higher than the $50,000 that they can pay over three years, without doubt. It might be a stretch. It might take longer to pay, but it is a reasonable contribution given their level of culpability.

[38] Their emotional harm reparation payable to Mr Nejadmousavi is $40,000 in total which they are equally liable to pay with their co-defendant. Consequential loss reparation payable to the victim is $17,625 and costs of $1,117.57 are awarded. I also make an order that the summary of facts may be released by WorkSafe if requested. That is what I have recorded in the Court sheet for 360Group.

[39] Turning to Shakthi Construction, the fine of $220,000 for which they are equally capable and equally liable to pay with their co-defendant, that is arrived at adopting the same approach. A starting point of $400,000, 25 per cent for their guilty plea, five per cent for remorse, five per cent for co-operation, five per cent for their good record and five per cent for the reparations they will be providing.

[40] In addition, they are to pay the consequential loss reparation of $17,625 equally with the co-defendant. Costs in their case are $1,249.08 and there is an order that the summary of facts may be released by WorkSafe if requested. That is also what I have recorded in the Court record for Shakthi.

[41] I should record that before arriving at that decision I stood back and considered the overall financial impact of those payments in total in relation to the breaches that occurred here. I accept that we have two companies that generally value their employees and that are now certainly taking their health and safety responsibilities seriously, but this was a significant and obvious risk and a bad breach and the level of fine that has been set is important because the industry needs to understand the level of care that is required.

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Judge Kevin Muir
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/03/2023