IN THE DISTRICT COURT
AT TIMARU

CRI-2015-045-000058
[2015] NZDC 22721

WORK SAFE NEW ZEALAND
Prosecutor

v

HOUTIMATA FARMS LIMITED
Defendant

Hearing: 17 November 2015

Appearances: L J Moffitt for the Prosecutor
M A Beattie for the Defendant

Judgment: 17 November 2015

NOTES OF JUDGE J E MAZE ON SENTENCING

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[1] Houtimata Farms Limited must now be sentenced on a charge laid under s 51A Health and Safety in Employment Act 1992 that it failed to take all practicable steps to ensure the safety of Bene Poihakena Materoa-Mahu while he was at work in that it failed to take all practicable steps to ensure that he was not exposed to hazard arising out of pumping effluent from a pond.

[2] Mr Materoa-Mahu died on 15 August last year. He appears to have fallen from a position near an unfenced, unguarded effluent sump. It is known that he died by drowning. At the time it is thought he was engaged in the activity of pumping the contents from the pond. The autopsy and the medical assessment established the possibility that he had suffered a heart attack which possibly caused him to fall into the pond but it is clear that he died from drowning. He was a literate man and an experienced worker employed in similar work for very many years.

[3] In sentencings of this kind the Court must prioritise accountability, responsibility and deterrence as well as provide for the victims by way of reparation. I am obliged to follow a three-step process assessing the amount of reparation, fixing the fine and, if need be, adjusting for overall proportionality and appropriateness.

[4] The victim impact statement is obviously a significant document when attempting to assess the impact of the offending. It is a very detailed and very moderate document and I can accept entirely that not only the shock of the death but the manner of the death will have caused this family acute life-long distress and anxiety. It does appear that it is possible there was a medical condition but there is nothing to indicate that Mr Materoa-Mahu even knew of that himself.

[5] In attempting to identify an appropriate point for reparation in this case I have in the sentence indication referred to *Department of Labour v Polynesian Spa*, District Court, Rotorua, CRI-2003-063-10885, 4 February 2006, before His Honour Judge Cooper and *Department of Labour v James Arthur Boshier*, District Court, Thames, a decision of His Honour Judge Everitt, CRI-2007-075-564, 19 February 2008.

[6] In attempting to weigh up the emotional impact of the consequences, as I say, I must bear in mind the appalling circumstances in which Mr Materoa-Mahu died and the impact that has on his family. I indicated a range between $70,000 and $80,000 as appropriate, recognising as does every Judge in the position I am today, that to attempt to put a price on a human life is impossible and potentially distressing for the deceased's family. In an attempt to bear in mind the circumstances as a whole, I fix the figure at $75,000 and to give Houtimata Farms Limited its credit they are ready to pay that immediately upon completion of the sentencing exercise.

[7] The next question which must arise is to fix the starting point of the fine based on an assessment of culpability. The Department identified four practicable steps which could have been and were not taken. The first was an identified written policy and procedure for the extraction of effluent; stabilising the pontoon was the second, a secure covering and/or secure fencing of the container was the third and fourth.

[8] The defendant company had previously relied on practical oral communication which it saw as more effective in such circumstances. What is now noted is that the defendant company has a detailed written policy professionally drafted and put in place promptly after Mr Materoa-Mahu's death and it appears that it was able to be done without considerable difficulty or cost.

[9] The stabilisation of the pontoon the defence said was problematic. The prosecution advanced the argument that it was nevertheless possible and practicable. The defendant company has elected no longer to use the pontoon and pump in the way that it did and extraction of effluent is done in a completely different way. The kind of containment and removal of effluent is a common method used in farming up and down the country, is of limited assistance to the defendant company, but it does have an impact upon the assessment of culpability as a whole and so that will be taken into account.

[10] The last two possible steps to be taken were the covering or secure fencing of the container. While there was some criticism that the exact method of doing this was not clear, the truth is that Houtimata Farms Limited was able within a matter of a few weeks to provide a firm, adequate and secure cover in place over the pond.

[11] I am required to assess the nature and seriousness of the risk of harm and the risk was an absolutely obvious one. We require fencing for other forms of water containment and that must have an impact upon the assessment of the obviousness of the risk.

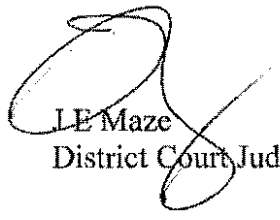
[12] The defence sought to argue that there were a number of controls already in place such as signs at the gate prohibiting unauthorised access and fencing around the property. The fencing was five wire and not very high. The signs at the gate would exclude people who had no authority to be there but this prosecution was about the failure to take all practicable steps to ensure the safety of someone who expected to be on the property and was there to carry out his employment duties. He had to be there to do what he was employed to do.

[13] The degree of departure from industry standards must recognise the fact that it seems that either no-one else or very few others have been prosecuted to date with or without an injury or fatality. The efficacy of industry standards must depend upon education, monitoring, enforcement and, if need be, prosecution.

[14] The prosecution put the culpability of Houtimata Farms at the highest end of the scale, the defence at the lowest. Both agreed, however, that in allowing for the possible medical event being the principal causative factor, it would allow removal from whatever the starting point was down to the next lower category. The Crown's submissions allowed me to conclude that they sought recognition of a reduction to the tune of about one-fifth and, in giving my indication, I applied that and so putting all of those factors together I said that a starting point of $100,000 for the fine was the least restrictive outcome to achieve the aims of sentencing, recognising the obvious risk from the accumulation of watery waste which is inherently dangerous to third parties who may happen upon it, to those who expect to be there but are careless, and to those who have an expectation of being there and are not careless but, through some intervening factor, are endangered by it. I adopted the one-fifth reduction which the prosecution sought to take into account the medical event as a possible factor and that took me to $80,000 as a fine.

[15] I accepted Mr Hall's submissions in relation to discounts for reparation, remediation, previous good record and co-operation at 35 percent and a one-quarter discount for plea. I indicated a fine of $40,000 coupled with the $75,000 reparation figure and that has been accepted by the defendant company by its plea.

[16] Accordingly now the defendant company is convicted. It is ordered to pay reparation of $75,000 in a lump sum within three days and the defendant company is fined $40,000. I will not impose Court costs.



LE Maze
District Court Judge