IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-044-002596
[2021] NZDC 27274

WORKSAFE NEW ZEALAND
Prosecutor

v

HOBSON CONSTRUCTION LIMITED
Defendant

Hearing:	15 December 2020
Appearances:	E Smith for the Prosecutor S Bonnar QC for the Defendant
Judgment:	15 December 2020

NOTES OF JUDGE E P PAUL ON SENTENCING

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[1] Hobson Construction Limited appears for sentencing today, having pleaded guilty to one charge under s 36 (1)(a) and s 48 (1) of the Health and Safety at Work Act 2015. Herein after referred to as the Act.

[2] Hobson Construction Limited is represented by Mr Bonnar QC and Mr Bouchier. For Worksafe, who brings the prosecution, they are represented by the Crown, in particular, Ms Smith.

[3] I note one of the company directors is present in Court today. The charge is that Hobson Construction Limited, as a person conducting a business or undertaking a PCBU failed to ensure, so far as reasonably practicable, the health and safety of its

workers on a residential building site and that failure exposed workers working from the second level top plate of the building to a risk of death or serious injury, namely fall from height.

[4] I record at the outset I am delivering this decision orally after hearing submissions from counsel. I reserve the right to clarify or expand on the reason for my decision today.

[5] A summary of facts has been agreed between the parties. What it records is in 2018, Hobson Construction Limited was engaged to build a dwelling house at Millwater in Auckland. They employed a Mr Zhu as a site manager who is responsible for managing health and safety at the site. At the site a number of the workers carried out work under the direct control of the team leader, a Mr Deng.

[6] On 14 July 2018, Worksafe Inspector Kyle Bahn observed workers working on the first level top plate of the building at risk of falling from a height of approximately 2.5 metres due to inadequate external fall protection.

[7] As a result, the inspector issued two prohibition notices to Hobson Construction Limited, preventing further work on the first level plate until fall protection had been installed and prohibiting further work on the scaffold until internal fall hazards had been addressed.

[8] Between the 16 July and 19 July 2018, Hobson Construction Limited engaged third parties to carry out alterations to the scaffolding in order to comply, and other safety work. During this time, Mr Zhu sent Inspector Bahn pictures of progress. On 17 July 2018 prohibition notice ending 726, relating to the scaffolding, was lifted. Prohibition notice ending 725 was lifted on 19 July, although Inspector Bahn noticed a number of new wall frames had been erected on the first level, indicating work had been occurring while the prohibition notices were in force, in particular 725.

[9] On 23 July 2018 Worksafe received a complaint. Inspector Kevin Pope attended the site and observed three workers on the second level top plate which was an open frame. There was no second lift scaffold or safety nets installed. Accordingly,

at 1.30 prohibition notice ending 123 was issued prohibiting further work from the second level top plate until internal and external fall protection had been installed.

[10] At 2.50 pm on the same day, Inspector Pope observed workers standing on the second level top plate of the building unloading roof trusses from a crane truck in breach of the prohibition notice ending 123.

[11] Mr Pope spoke to Mr Zhu and 10 minutes after speaking to him the inspector noted the workers were no longer on that top plate.

[12] On 24 July 2018, Inspector Pope went to the area and observed more than a dozen roof trusses had been installed, and six workers standing on the top-level plate, with some working on the safety nets.

[13] On 25 July both Inspector Pope and Latimer arrived at 10.42 am and observed workers on the second level top plate amongst the roof trusses. They questioned Mr Deng on why the workers were up there, did assess the scaffolding, found it to be compliant and ultimately lifted prohibition notice ending 123.

[14] The Crown have addressed me on the purposes and principles of sentencing. Those purposes of the Act are significant and any sentence imposed, the Crown says in this case must reflect the Act's intention of securing the health and safety of workers and workplaces.

[15] In terms of the approach to sentencing for Worksafe prosecutions, they are well known. Firstly, an assessment of the amount of reparation, then fixing the fine amount by referring to the guideline bands, and then having regard to aggravating and mitigating factors. Then, determining whether any further orders are required under the act, and finally making an overall assessment of the proportionality and appropriateness of imposing the sanctions under those first three steps.

[16] It is agreed between the parties that no reparation is sought in this case. Why? Because no injury occurred. There was no accident as such. There was, however, observable non-compliant behaviour.

[17] The Crown also reminds me of the requirements to apply, the two-step methodology for sentencing under *Moses v R*, and that is well known.[1] They have also referred me to the guideline bands from the well-known decision in *Stumpmaster v Worksafe New Zealand* where there is a low band, medium band, which has a range of fines of between $250,000 to $600,000, then a high culpability band starting at $600,000, then finally, the very high culpability, in excess of $1,000,000.[2] In terms of the factors relevant to culpability, the Crown say there is the identification of the operative acts or omissions at issue, and practical steps that were reasonable to have been taken.

[18] They say the reasonably practical steps would be ensuring that appropriate fall protection controls were in place before commencing work from the second level top plate, ensuring that workers had safe access to the second level top plate, ensuring that workers had adequate working platforms and did not use safety nets as a working platform, having in place effective systems for internal recording and reporting of incidents and interactions with Worksafe, and finally, complying with prohibition notices issued by Worksafe.

[19] Crown have then directed me to the obviousness of the hazard. They say falls from height are well known and commonly recognise it as a significant hazard in the building and construction industry. I would have to say I agree. In my experience with prosecutions relating to the building industry, invariably they relate to fall risks from height.

[20] Crown says Hobson Construction Limited well knew of the specific risks of working from height, and I have got to say, this must be so. Your core businesses is building and construction and clearly fall from height is a well-known risk for anyone in that industry, and accordingly, Hobson Construction Limited cannot hide behind that.

[21] The Crown point out, in the handover certificate for the safety nets installed at the site, they clearly state: "Netting system is not a working platform. Never

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[1] *Moses v R* [2020] NZCA 296.
[2] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2190.

walk/work on the installed nets … such actions damage the nets and make the netting system not safe to the user." Despite that, the workers continued to work on the safety nets as part of the agreed summary of facts.

[22] In terms of the risk and potential for injury or death, and whether it could have reasonably be expected to occur, clearly the Crown say that was a continuing risk and observed on several occasions by the Worksafe inspectors.

[23] The Crown are critical of Hobson Construction Limited, submit they have demonstrated an overall disregard for and careless attitude towards the prohibition notices they say as displayed by Mr Zhu and Mr Deng.

[24] In terms of degree of departure from standards prevailing in the relevant industry, the Crown acknowledge there are no codes or standards but there are a number of publicly available guidelines on working at height and on safety measures and certainly, in my experience for these prosecutions, those guidelines are generally available to anyone in the industry.

[25] The Crown say Hobson Construction Limited departed from these guidelines significantly by failing to install second lift scaffolding and platforms around the building so that workers could safely access and work on the second level top plate. The Crown say this is serious, particularly given the number of workers involved.

[26] In terms of the safety record of the company, the Crown point to previous prohibition notices. In terms of mitigating features, the Crown are somewhat critical of the post-event actions taken by the company. The Crown say the starting point for this offending should be at the top of the medium culpability band or at the bottom of the high culpability band, with a starting point of $600,000. They are then referred to a number of authorities which do attract starting points in the range indicated by the Crown.

[27] Equally, however, when one examines those cases, they are not on all fours in terms of the facts of the offending and I remind myself, in some respects, offending of this nature is very much fact based and focused.

[28] The Crown acknowledge there may be some discount for steps taken by the company to remediate matters. I acknowledge today there may be some small discount for co-operation, I accept the full discount for guilty plea of 25 per cent, have invited me to uplift by five per cent any fine for these past prohibition notices. I have already indicated I am not prepared to do this. I would have been far more amenable to that if the company had been previously convicted but that is not the case.

[29] In terms of the companies financial capacity after fixing on a fine, the Crown are critical of the amount They remind me any fine must bite, it cannot simply be a licensing fee for the company to go on and carry on in the fashion that has been identified.

[30] Crown have submitted and acknowledge the company is not perhaps in the strongest position now, particularly with the events of 2020 and the impact of COVID-19 on the construction industry but do note the company is confident they can trade their way up, despite those impacts.

[31] Also, the Crown was critical on the absence of any information in terms of the company's ongoing contracts and anticipated income beyond 2020, in terms of the financials supplied during these proceedings.

[32] Finally, the Crown noted legal costs of $6,226.19 have been incurred and invite a reasonable contribution towards that. I suggest perhaps acknowledging that not the total amount.

[33] Mr Bonnar for the defendant company has, in his written submissions, referred to a number of background facts for the Court's assistance. Reminded me there was no accident or injury here, that the company did not, itself, install the plant which gave rise to the risks. There was a language barrier between the inspectors and the workers. No suggestion that the workers in question were unhappy or felt pressured to work as they did.

[34] Hobson Construction Limited had made attempts to comply with the prohibition notices and previous regulatory intervention I infer prohibition notices

related to different sites, different personnel. He pointed out that the company is a small construction company, currently employing approximately 20 workers. I acknowledge its business is the construction of residential dwellings, reminded me the company has not been previously convicted, and that the scaffolding on site was erected by a third party unrelated to the company.

[35] In terms of the breaches of the prohibition notices, Mr Bonnar took me through that. He suggested perhaps, at least for Mr Zhu, he had not understood fully the inspector's instructions. With respect to the prohibition, the first two prohibition notices, in terms of the third, acknowledged workers had re-entered the site before the inspector had an opportunity to attend and confirm the notices could be lifted. He reminded me of the company's co-operation with Worksafe's investigation and I am entitled to take that into account. He reminded me of the early plea. He pointed out the loss the company is likely to make for the 2021 financial year which goes to their ability to pay.

[36] In terms of the culpability assessment factors, he acknowledges there were practical steps that could be taken and the company does not step away from that. He does make the point that Hobson Construction Limited's failures were, in essence, a failure to procure installation that met industry guidelines, and a failure to prevent workers accessing the building while adequate fall protection was in place.

[37] Clearly, from the facts, workers were accessing the building, even when prohibition notices were in place. The obvious inference is that must have been at the direction of those who were in charge of their work, so again, that leads to the responsibility lying where it should, and that is with Hobson Construction Limited.

[38] The company acknowledges the nature and seriousness of the risk of harm, again, reminds me no harm in fact occurred, except there was a departure from industry standards but do not accept that that was a significant aggravating feature in this case.

[39] Objectively, the company accepts the obviousness of any risk where workers are working at height, offer an alternative, a suggestion as to why the workers persisted

at working at height, in particular, that they were used to these, if I can put it, conditions, and their lack of the English language meant there was a flaw in communication around the prohibitions that were imposed.

[40] The company accept they had the means to mitigate the risks that were identified and ultimately, they did implement them.

[41] The company refers to the actions of the employees, in that the actions of Zhu and Deng were not in accordance with what was expected of them and go to the culpability of the company.

[42] Again, Mr Bonnar addressed that with me today, and there is certainly authority that the behaviour of employees can have an impact on the question of the culpability of the prosecuted company.

[43] I note at paragraph [77] of counsel's submissions that the company did have health and safety processes in place prior to the accident, while acknowledging they were inadequate.

[44] Mr Bonnar has carefully taken me through an analysis of the decisions relied on by the Crown and has also referred me to a number of cases which perhaps assist the company's position, and he has invited me, ultimately having regard to the particular circumstances of this case, desirability of consistency with like cases. That an appropriate starting point would be in the middle band at $400,000.

[45] He has then gone on to address me as to mitigating factors, that is, remedial steps taken by the company. Perhaps a two-edged sword. Obliged to follow those guidelines but equally, one of the purposes of the Act must be an educative one in that overall public interest, so there must be some discount available for that. The company did co-operate, and again, I suggest that any prosecution where the defendant cooperates, that is in the interests of all concerned.

[46] In terms of previous good record, I probably pitch it as a lack of prior convictions. Defence seek a further discount of, finally, the maximum for the guilty

plea, resulting in a 40 per cent discount, resulting in a reduction of the starting point to one of $240,000.

[47] Then there is this issue of adjustment for financial circumstances. Again, Mr Bonnar helpfully took me through the company's financial position.

[48] I am not convinced when the Crown say to me those effectively could be called up to meet any fine. It is a little uncertain what this company's future is but certainly, on the figures that the defence have supplied me and the explanations today, it appears they may well be, at least in the company's submission, impecunious in the sense that they may not be able to meet the anticipated fine.

[49] I do not know that the level of fine determines the financial adjustment, frankly, but what I do know is we have a company that has income, assets, outgoings, debts. It has not, for want of a better word, gone to the wall. It is trading, and its core business is really why it is here today. If it wishes to continue to trade it must meet its obligations under the Act. That is where this company has fallen short.

[50] In assessing culpability, I, to an extent, take account of the employees own culpability and an apparent failure on their part to communicate either with the workers or with their superiors the effect of the prohibition notices. I also record there were some safety measures in place, such as the fall netting, but equally, it has been conceded they were inadequate.

[51] Clearly, there were a number of failings which have already been acknowledged in the defendant's own submissions, as pointed out by the Crown, which are factors I take into account. At this point, one is already elevated beyond the low band, that simply could not be otherwise.

[52] I am mindful no injury occurred but again, the absence of an injury is not determinative in these types of prosecutions. It seems to me the company, to an extent, had a perhaps casual acquaintance with their health and safety obligations at times, but equally, when their shortcomings were pointed out to them they took the necessary steps to rectify them.

[53] I am not persuaded, even on looking at the authorities relied on by the Crown, that this level of offending, in total, could possibly reach the high band. It must fall within the middle or medium band in terms of *Stumpmaster* and I fix the fine at $450,000.

[54] In terms of mitigation, the company are entitled to a 25 per cent discount for guilty plea. Equally, five per cent for their co-operation, equally five per cent for the remedial steps taken, and perhaps generously, five per cent for a lack of previous convictions. That would equate to a reduction in the fine to one of $270,000.

[55] I then have to consider whether an adjustment is appropriate for the company's financial circumstances. I am satisfied that the company's financial circumstances are such that it could not meet a lump sum fine. Furthermore, I am satisfied, given the matters I have already referred to, that the company would not be in a position to pay the total fine by instalments, even over a five-year period, which is the orthodox period for time payments in any fine situation.

[56] Equally, however, I am mindful of the point made by the Crown that this behaviour, this casual approach to health and safety, cannot simply be seen as a licencing fee by the company. This company is still in business, still attracting significant income and I take it, still actively seeking and undertaking residential home contracts. For those reasons, there must be some element of deterrence and denunciation and any fine I impose today, mindful of the company's financial position:

(a) I am satisfied that this company, even on what I have read, should be in a position to meet a monthly repayment of $3,000. By my account, over five years, that would equate to an end fine of $180,000. That is the fine I intend imposing against the company today.

(b) Finally, there is this issue of legal costs incurred by the prosecution. I simply take the orthodox approach that $2,000 is appropriate and I award $2,000 costs in favour of the prosecution.

(c) Given the financial material that has been filed in these proceedings and the examination of that financial material by the Crown, I make an order that all financial matters in this case are to be suppressed until further order of the Court.

[57] For clarification, the $2,000 award of costs is to be paid to Worksafe. Mr Bonnar raised with me the fact that I referred to the company offering to pay towards any fine. I accept that is what I said, I was in error. It is clear from the submissions the company offered to pay towards any fine the Court imposed.

[58] End of decision, thank you.

E P Paul
District Court Judge