

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2022-004-006707
[2023] NZDC 13506**

WORKSAFE NEW ZEALAND
Prosecutor

v

BETTERMENT PROPERTY LIMITED
Defendant

Hearing: 27 March 2023

Appearances: T McIlroy for the Prosecutor
S Houlston for the Defendant

Judgment: 27 March 2023

NOTES OF JUDGE E M THOMAS ON SENTENCING

Betterment Property Ltd is fined \$7,000 and ordered to pay prosecution costs of \$2,000.

REASONS

The offending

[1] Betterment Property Limited is a property developer. It is charged that on 1 October 2021 it failed to take reasonable steps to preserve an accident site. That is a charge brought against ss 55(1) and 55(4)(b) of the Health and Safety at Work Act 2015 and attracts a maximum penalty of a fine not exceeding \$50,000.

[2] On 1 October 2021 there was an accident at one of the defendant's developments. It was then in the process of constructing a two-storey dwelling. The defendant managed and controlled the work. It engaged a subcontractor to install safety netting. That safety netting had been installed by that subcontractor the day before the accident. A worker, Mr Yuchen Dai, fell from height. He suffered serious head injuries. An ambulance was immediately called. He was taken to hospital where he remained for two months. He has been able to return to work albeit in a different capacity.

[3] The defendant is required under the legislation to notify WorkSafe of the incident. It did so on 4 October. No other workers were at risk following the incident. The site was secured by temporary fencing which had been put up prior to the incident.

[4] WorkSafe investigators arrived at the scene on 5 October. The scene had been cleaned up. The safety netting had been reinstated and other parts of the site had had safety netting installed. As a result, safety investigators were unable to gather the necessary evidence to prosecute anyone.

Disputed facts

[5] The defendant has always claimed that it arranged for the site to be cleared and safety netting reinstated to ensure that the scene was safe. It now understands that its obligation was to keep it as it was. It says, however, this was no deliberate act to thwart any investigation. It was motivated purely by reasons of safety. WorkSafe is suspicious about that explanation and does not accept it. However, it also concedes that it has no evidence to the contrary. It accepts that if it were to rely in terms of

culpability on any sinister intent on the part of the defendant company it would have to prove that. It accepts that it cannot and that does, therefore, reduce the defendant's culpability for the purposes of sentencing.

Starting point

[6] WorkSafe relies on two cases:

- (a) *WorkSafe and KNCC*.¹ A starting point of \$20,000 was adopted in that case. However, that also involved a failure to notify, and
- (b) *WorkSafe v KB Project Management Limited*.² That also include a failure to notify as well as a substantial starting point on a s 36(1)(a) charge.

[7] Those two cases, in the absence of evidence here to the contrary, involve a materially different flavour. As I have already said the absence of any provable sinister intent here renders the defendant's culpability far less than the defendants in those two cases. A starting point significantly below that then is required to maintain consistency with other sentencing decisions. I am also required under the Sentencing Act 2002 to adopt the lowest possible starting point I can. That starting point is \$10,000.

Reducing the fine

[8] The defendant has pleaded guilty at the earliest opportunity. It is entitled to the maximum credit of 25 per cent.

[9] It argues that it has no previous convictions, is traditionally diligent about its health and safety obligations and has always been co-operative with WorkSafe. It is true that it has no previous convictions, but WorkSafe otherwise disputes that it is entitled to the credit that it seeks for these factors. It points out that in the past multiple notices have had to been issued to the defendant. While that has not resulted in any

¹ *WorkSafe v KNCC* [2020] NZDC 9928.

² *WorkSafe v Kiwibank Project Management Limited* [2022] NZDC 12618.

convictions, I accept the argument that any reduction for those factors must be tempered by a more chequered history than the defendant had initially signalled.

[10] Total reductions then come to 30 per cent.

Result

[11] I fine the company \$7,000.

[12] It accepts that an award in respect of the prosecution costs is also appropriate. WorkSafe seeks a little over \$2,000. The defendant does not argue with that. I make an award of \$2,000 towards the prosecution costs.

[13] I compliment both sides again for the quality of their submissions both written and oral, thank you both.

Judge EM Thomas

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 05/07/2023