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IN THE DISTRICT COURT
AT GREYMOUTH

I TE KŌTI-Ā-ROHE
KI MĀWHERA

CRI-2022-018-000151
[2023] NZDC 24245

NEW ZEALAND POLICE
Prosecutor

v

SOUTH WESTLAND EARTHWORKS LIMITED
Defendant

Hearing: 31 October 2023

Appearances: T Braden for the Prosecutor
G Gallaway for the Defendant

Judgment: 31 October 2023

NOTES OF JUDGE Q C S HIX ON SENTENCING

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[1] [redacted] at the age of 52 was, by my hearing of things today, living a dream life. He got to a stage of life where his son was about to embark on a relationship in a couple of years' time and have his first grandchild. He had met his dream partner in [redacted] established a fantastic reputation as a hunting guide and he and [redacted] had set up their dream business together here on the West Coast.

[2] That is backgrounded by [redacted] having had what I could only term a great upbringing. He had a fantastic whānau. I have heard about his close relationship with his older brother in particular. I am aware of that, being an older brother myself and I

have also heard about the great times they had together hunting and so on. As I said, they were living the dream, he, [redacted] [redacted] and their two stepsons.

[3] Unfortunately COVID came along and an impact for [redacted] and his whānau was the hunting dried up, obviously as a result directly of COVID. In an effort to supplement the household income he was offered an opportunity by Glen Monk and Robert McKenzie. They operated and continue to operate an earthmoving business that was structured in a way where they operated independently but it seems at some point relatively recently, combined operations to form a company called South Westland Earthworks Limited. [redacted] in an effort to supplement the whānau income, agreed to join up with Glen and Robert and be part of the team and operate an excavator, what I quaintly refer to as a yellow digger.

[4] The unfortunate outcome, and perhaps that is a term that is far too light in the circumstances here as to why we are here today, is that [redacted] lost his life through what I will refer to as an accident but really part of the exercise today is going into what [redacted] has referred to as the "what" and the "how."

[5] I have heard that on the morning of 16 March 2021 [redacted] had travelled to his workplace. He had been messaging his brother on how it was such a nice day and so on. Tragically [redacted] was found by someone at 2 pm in the afternoon. He had passed away because a tree had fallen on the cab of the excavator and he has passed away as a result. The exercise today is to determine the legal consequences of that incident, it having given rise to two charges before the Court today.

[6] The formalities are that the first charge reads that:

> On or about 16 March 2021 at 477 Whataroa Highway, Harihari, South Westland, South Westland Earthworks Limited is charged that being a person conducting a business or undertaking (PCBU) who manages or controls a plant at a workplace and having a duty to ensure, so far as reasonably practicable, that the plant is without risks to the health and safety of any person, including [redacted], did fail to comply with that duty and that failure exposed workers to a risk of death or serious injury.

[7] The particulars of the charge are it was reasonably practicable for South Westland Earth Works Limited to have:

(a) ensured that plant, namely a ZX330 excavator, provided to workers at the Mount Hercules Farm (MHF) quarry site was safe for use, including that the plant had appropriate operator protective structures in the form of a rollover protective structure (ROPS) and an operator protective guard (OPG) to protect the operator of the plant in the event of a rollover or falling objects impacting the cab of the plant; and

(b) used plant that had had appropriate operator protective structures at the MHF quarry site.

[8] That particular charge carries a maximum sentence of a fine of $1,500,000.

[9] The second of the two charges are that:

> On or about 16 March 2021 at 477 Whataroa Highway, Harihari, South Westland, South Westland Earthworks Limited being a person conducting a business or undertaking (PCBU) having a duty to ensure so far as reasonably practicable that the health and safety of workers who worked for the PCBU including [redacted], while workers were at work in the business were undertaking, namely while extracting rocks, did fail to comply with that duty and that failure exposed individuals to a risk of death or serious injury.

[10] The particulars of that charge are was it reasonably practicable for South Westland Earthworks Limited to have:

(a) effectively identified the risks associated with uncontrolled falling trees; and

(b) had in place a safe system of work that effectively identified the risks of falling trees, including ensuring that identified at risk trees were eliminated.

[11] That charge also carries a maximum sentence of $1,500,000 in terms of a fine.

[12] The exercise today is in some respects relatively academic because most of the otherwise contentious issues have been agreed. Really, there are only two areas where there is a disagreement between the prosecution and defence. It puts me in a bit of a difficult position I have to say, because I am conscious of the length of time that this case has taken for everyone and I am aware that if I differ from what the lawyers have agreed, then that does open the possibility of one side or the other appealing.

[13] I do not want to necessarily be over-influenced by that issue but at the same time I do want to bring some finality for everyone that is sitting in the back of the room today. Having said that, I have read the material that is available and the agreed positions that have been reached are within the parameters that are available. I am not necessarily sure I would have agreed but I have heard one of the lawyers say about nickel and diming and I am not going to get into that exercise, but there are two areas of contention.

[14] The first is the level of the fine and even that is not in contention in a practical sense because the actual fine to be imposed is substantially less than what would otherwise have been imposed if South Westland Earthworks had been in a position to pay the full fine. However, I will need to go through and resolve that particular issue. In essence the lawyers wish to know what the starting point would have been, at least from my perspective, in the circumstances of this particular case. The end result though for the company is substantially different.

[15] The other area of contention is essentially some expert costs that are claimed by WorkSafe and I will deal with that issue as well.

[16] In terms of dealing with the level of the fine, I will summarise by saying that the parties take respective positions as follows. First, WorkSafe say that on analysis of the competing factors in this case, the appropriate starting point for a fine is somewhere between $550,000 to $600,000. The defence initially took the approach that the starting point, taking into account a relatively contentious factor which would have been contested by WorkSafe, was around $400,000.

[17] In oral submissions today the defence have taken the position that that other contentious issue, which I am reluctant to go into detail about, is no longer being relied upon and it is left to me to determine what the appropriate starting point would be and I will do that.

[18] Rather than going through a detailed analysis of the various factors that are outlined in the legislation that apply in this case, I just highlight the key factors for me, in terms of determining the level of the fine, and the background to it is I really need to determine whether it is in the low-end category, which is a fine of up to $250,000, in the medium category a fine of $250,000 to $600,000, in the high category of $600,000 to $1 million or the very high, that is $1 million plus.

[19] The factors I take into account are first, the nature of the risk here. My reading of the summary of facts and reviewing the photographs that are available, noting I have no personal experience in this area at all, I come at it essentially as a layperson. However, looking at the photographs it does appear to be that the risk of either further rockfall from another slip or a falling of the one or both of the trees identified in this case seemed to be readily apparent, at least from the photographs and the fact that the slip occurred in the first place.

[20] The background is that in about 2019 due to an adverse weather event, a significant slip occurred in essentially what appears in the photographs to be a creek bed. As part of that slip it appears, at least from the photographs, that some soil and vegetation, including two trees made its way towards the bottom of the slip.

[21] South Westland Earthworks obtained consent to go and extract some of the materials at the base of the slip. Indeed, South Westland themselves acknowledged that they were aware of the dangers of either further slippage or rockfall while working at what is referred to as the toe of the slip.

[22] They also acknowledged the risk around the trees falling or the risk of that happening. In particular in this case, the tree involved that fell on [redacted] was measured at 13 to 14 metres in length. I take that as being height. Other analysis indicated it was 70 percent decayed or rotten and the risk of it simply snapping off and falling was

present. The nature of the risk does seem to me to be relatively clear and I have already stated that the defendant company, South Westland Earthworks, was aware of it. It is a question of what steps were taken to mitigate that risk.

[23] In this case South Westland Earthworks had used some photographs from when they had applied for consent to extract materials from the site. Someone had used a pen to draw some lines, essentially around the bottom of what is referred to as the toe of the slip and essentially told staff anything above the line towards the slip is a no-go area. Anything below the line, in other words on the flat, is a go area.

[24] The information I have taken from the summary of facts indicates that while the photographs were shown to people working at the site, they did not have them with them and for all intents and purposes it seems to me that at least in relation to the trees, it was a case of well just make sure you stay away from the trees and do not get hit by them if they fall over. It seems to be the approach that was taken. It is always perfect with 20/20 vision to say that well there were steps available, such as taking the trees out to eliminate the risk. It seems that the cost of doing that would have been relatively minimal and straightforward.

[25] The other concerning factor for me is the particular work area, in this case for [redacted] was in relatively close proximity to the trees. The photographs in particular I refer to are in figure 6 on page 10 of the summary of facts. Again, noting I am an amateur and I have never been involved in this, it shows at least from my reading of it, an area where someone has marked the letter L. It sits just above the excavator in the photograph which does appear to be in close proximity to the trees in question here.

[26] My understanding is that [redacted] had been tasked to move materials from the creek bed as it appears in figure 6, up towards the area marked L and store it there. My looking at the photographs suggests that first, comparing figure 6 to figure 5, noting the differences there indicates that there has been a clearing of a path it seems closer towards the toe of the slip and the trees, that area being just behind the excavator in figure 6.

[27] The comparison with figures 4, 5 and 6 suggests, at least from my view of the photographs, that first the no-go/go line is relatively close to the trees concerned. In particular, it does suggest from figure 4 where the trees are visible, that part of the go zone does seem to be within the drop zone of the 13 to 14 metre high 3,980 kilogram tree. That really raises a concern with me that having been aware of the risk, [redacted] was really being asked to work close to that risk. That is as far as I can take that issue but it does seem to be, at least from the photographs I have seen, somewhat concerning that he was put in that position.

[28] There has been reference to various steps taken by the company in terms of having a health and safety plan and so on. As part of the charges here, it is also an issue in relation to the protection, or lack of protection provided by the cab in relation to the excavator being operated on that day by [redacted]

[29] In summary all of the other excavators operated by the company did have, from my reading of it, far more robust protective cabs. Unfortunately, the processes followed by South Westland in buying this particular digger, led to assumptions being made which were incorrect and that is that the protection provided by the cab was stronger than it actually was. There is an issue around that because the expert for the defence says well that would not have made any material difference because with a stronger protective cab, unfortunately [redacted] would have suffered the injuries he did anyway.

[30] There has been an alternative view given by a WorkSafe expert saying, well that is not necessarily a given. If he had more robust protection then there is a possibility he may well have survived. Whichever is correct, we will never know. The key issue though is [redacted] never had the opportunity to at least have that protection because the systems of South Westland in terms of the procurement of that digger, were insufficient to avoid the risk of buying equipment that was inadequate.

[31] I suppose I need to compare what has happened on this occasion to the broad spectrum and bring it back to that guideline range of potential categories that I have to determine. It sounds in my view a little callous but I do have to observe that there are cases that are far more serious than [redacted] case where the degree of negligence,

if I can put it that way, is significantly higher where the outcomes are significantly more concerning.

[32] Obviously there are cases in the lower band as well. I do accept that it does fall within the medium band and I suppose, taking a step back, I come to the view that assessing the overall culpability in terms of establishing a starting point, in my view it is towards the top end of the medium band. It is not at the top but towards the top. In my view $550,000 is just over a third of the maximum sentence available in this case and that seems in my view to be an appropriate starting point.

[33] In terms of if I was in the exercise of assessing a fine for someone that had the ability to pay, I then need to make adjustments for circumstances particular to South Westland Earthworks. They; only having been in operation for less than a year, do not have any previous record so that does not count against them. The issues I can take into account in their favour are first, the company's plea of guilty to the two charges. I have assessed that at the maximum available of 25 per cent.

[34] The other adjustments that have been suggested are issues such as remorse, assistance provided to WorkSafe in conducting the enquiries that have been required here, acknowledgement of the harm caused by an initial payment to [redacted] in this case and if I have not already mentioned it, the significant remorse, which no doubt will be felt by Glen and Robert themselves and their whānau, because this is not something that they ever wanted to be part of I am sure.

[35] Just the technicalities, there is a suggestion of a minor discount for a good previous health and safety record. I just cannot quite bring myself to do that because they have only been in operation for less than a year, so I cannot quite see how that can be added in.

[36] Rather than go through and do an exercise of five per cent here for remorse and 10 per cent there for something else, I have come to a global additional discount of 15 per cent, so that is 25 plus 15 makes 40, so if it was going to be a fine that was able to be paid it would have been $330,000 as a fine. That is dealing with the first contentious issue.

[37] The second contentious issue is the level of expert costs involved. The two issues in contention are first, a geotechnical report that essentially concludes that the slip itself was, I think the word I noted was "spring-loaded". In other words it would be relatively easy to set off another slip. The costs involved with that particular report is a Davis Ogilvie geotechnical assessment report of $8,054.42.

[38] I suppose in dealing with that, again I am an amateur in this area, but as South Westland Earthworks itself had already acknowledged, it seems clear from the photographs that the danger was there. I suppose the Davis Ogilvie Limited report perhaps increases the risk by adding in more technical information to that assessment. Having said that, I am not sure it materially changes the overall circumstances of this particular case. For that reason I am prepared to award an amount for that report but not at the level of the full amount.

[39] In respect of the Motivated Limited report, I have had some difficulty with that one because it seems to be quite a lot of money, $12,000 to essentially come to a conclusion which seems to be relatively straight forward and maybe I am taking too simplistic a view on that. I am not quite sure what went into that $12,000 figure but it does seem that if the cab was stronger then the possibility of [redacted] surviving seems at least open. I am not sure whether that report takes us much further than that in any event.

[40] For those reasons I have discounted those two amounts, not fully but I have reduced them to amounts which, in my view, would be appropriate in the circumstances.

[41] As I have outlined earlier, it is a case where all the other factors in this case in terms of the reparation amount for emotional harm, the consequential loss for ACC payments and so on have all been agreed. I am not going to take up time going through those and doing a detailed analysis.

[42] I am not going to go through the other steps required by the *Stumpmaster* guideline decision. I think there is about four of them which requires a totality adjustment or overview and all of those sorts of things, simply because they are an

academic exercise and I do not see any utility in taking up everyone's time listening to me going through legal steps which no one is going to take any notice of at a later time.

[43] For those reasons I will just go through and read out the final sentences imposed. Before I do that though I will record two other matters. The first is because it is a relatively lengthy and detailed decision, I will reserve the right to edit the transcript, not to change any of the results but to take out any repetition and so on.

[44] Secondly, I note that in particular in respect of the consequential loss issue relating to ACC top up payments, the actual figures were only received by the defence I understand late yesterday. They wished to reserve its position on that in terms of just checking and confirming the figures.

[45] The law says I am not able to split sentence. That means not impose part of a sentence and then come back and impose an additional sentence at a later time. To deal with that issue I will make an award for the ACC top-up consequential payments but note that under s 177 of the Criminal Procedure Act 2011, leave is reserved for the defence to come back and seek a re-sentencing on that issue only if there is a contentious issue around the amount involved with the ACC top-ups. I will leave that open until 22 December 2023. It is approximately two months from today to have that matter resolved but otherwise I am going to impose that as a formal order.

[46] Going through the formal orders I have recorded on the charging documents, I have a formal suppression of the names and identifying details of [redacted] and his wider whānau. There is suppression of the financial information for South Westland Earthworks Limited. The summary of facts with appropriate redactions to account for suppression orders are to be made available to the press upon request.

[47] I impose the agreed emotional harm reparation payment of $120,000 to [redacted] to be paid by 30 November 2023. There is a further direction to pay reparation for the ACC top-up of $72,917 as follows: to [redacted] $69,317, to [redacted] $3,600. That is to be paid by a lump sum, I have recorded 22 December 2023. That is to give time for consideration as to those amounts by the

defence. There is a fine of $20,000. I have not imposed any court costs. There are legal costs awarded of $5,824.05 and there is further reparation to [redacted] for the medical and associated other costs of $1,413.80 to be paid by 30 November 2023.

[48] In relation to additional costs, there is the Calder Forestry costs of $868.96. There is the Mcclimont Diesel Limited, that is $5,059.66. In respect of the Davis Ogilvie costs, I have awarded $2,000 in respect of that claim and in relation to the Motivated Limited claim I have awarded an additional $2,000 for that.

[49] That is the sentence imposed concurrently on both of the charges. In other words they are not doubled up but they are reflecting both the charges.

[50] I wish to finish by again, acknowledging the strength and courage it has taken to come and sit through today's proceeding, preparing for it in terms of the victim impact statements and having them read out, so I just really wanted to acknowledge you again for that.

[51] I will just acknowledge the South Westland team as well. I know it is difficult for you. You obviously never intended to be here today and if you could have it that way you would have [redacted] back as well I know, so these are very, very difficult cases for me basically given the particular nature of them and I just thank you for the contribution you have all made to helping me make my decisions today.

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Judge Q C S Hix
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 14/11/2023