IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI 2018-404-423
[2019] NZHC 2570

UNDER	sections 244 and 247(b) of the Criminal Procedure Act 2011
IN THE MATTER	of an appeal against sentence
BETWEEN	YSB GROUP LIMITED Appellant
AND	WORKSAFE NEW ZEALAND Respondent

Hearing: 26 March 2019 and 31 May 2019

Appearances: E Harrison for Appellant
L Moffitt and A Simpson for Respondent

Judgment: 10 October 2019

JUDGMENT OF DUFFY J

This judgment is delivered by me on 10 October 2019 at 3.00 pm.

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~~Registrar~~ / Deputy Registrar

E Fairless
Deputy Registrar
Auckland High Court

Solicitors/Counsel:
Wynn Williams, Auckland
Lucy Moffitt, Barrister, Auckland
WorkSafe New Zealand, Auckland

[1] Section 36(2) of the Health and Safety at Work Act 2015 (the Act) imposes a duty on persons conducting a business or undertaking to ensure, so far as reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as a part of that business or undertaking. YSB Group Ltd (YSB) failed to comply with this duty, resulting in the death of Patrick Woolliams. Section 48 of the Act makes it an offence to fail in this way. YSB was charged and pleaded guilty to this offence. On conviction YSB was sentenced to pay a fine of $100,000 and $100,000 in reparation, as well as costs of $2,607.10.[1] YSB now appeals against the fine and the costs award. The reparation order is not challenged.

[2] YSB's insurer will indemnify it for $50,000 of the reparation payment. YSB says it has no more than $75,000 available to pay towards the sentence and the balance of the reparation order. It does not seek to disturb the reparation sum, but instead seeks to have the fine reduced to $15,000, which would leave it with $14,561 in its bank account.

Facts

[3] The deceased, Mr Woolliams was a retired man aged 77. He had required the assistance of a mobility scooter for the last 15 to 20 years of his life. On 6 March 2017, he was riding his mobility scooter on the Portage Road footpath. The portion of this footpath adjacent to 148 Portage Road Papatoetoe had been damaged by trucks crossing over it to access a property situated at 148 Portage Road. As Mr Woolliams attempted to avoid the damaged area he lost control of his mobility scooter, it toppled over causing him to fall and injure his head. Shortly after he died at the scene from this injury.

[4] YSB owned the 148 Portage Road property (the property). At the time of the accident YSB was in the process of constructing a residential development of three houses on the property.

[5] Singh Builders Limited (Singh Builders) is a company which contracts with YSB to provide labour for YSB's residential construction business. Singh Builders

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1 *Worksafe New Zealand v YSB Group Ltd* [2018] NZDC 26771.

employs its own builders and labourers. It had six workers working at the property at the relevant time.

[6] Mr Gurdeep Singh is a director of YSB and of Singh Builders. He was co-ordinating most of the work at the property, and he was the person in day to day control of the residential development

[7] YSB had engaged a drainage contractor, Caunce Consultants (NZ) Ltd (CCNZL), to undertake the necessary drainage work on the property, which included installing sewer and storm water connections for the new residential development to the public reticulation system. This work had required CCNZL to remove a section of approximately four metres of the concrete footpath adjacent to the property.

[8] On 13 December 2016 Auckland Transport approved a traffic management plan submitted on behalf of YSB and CCNZL for the work activity for the new sewer and storm water connections. The traffic management measures included warning signage and cones.

[9] On 28 December 2016, following a site visit, Auckland Transport issued a notice of non-conformance (the notice) to CCNZL. A copy of this notice was also served on YSB. The notice was issued because Auckland Transport considered the work site at the property did not meet accepted traffic management practices. The notice deemed the work site unsafe and work on it ceased immediately. One of the identified defects in the notice was "non-conforming temporary traffic management," which included "inadequate provision" for pedestrians. Those defects must have been corrected to Auckland Transport's satisfaction because the drainage works were completed in January 2017.

[10] In mid-February 2017 Mr Singh and CCNZL agreed that CCNZL would temporarily reinstate the part of the footpath that had been affected by the drainage works by only compacting the ground, but not sealing it. This was done (the temporary reinstatement). Permanent reinstatement (concrete sealing and provision of vehicle crossings) was not to be undertaken until the building development was completed, by

which time all vehicle crossings that used this part of the footpath to access the property would be completed.

[11] However, upon completion of the drainage work a "Works Completion Notice" should have been provided to Auckland Transport. To satisfy the requirements for this notice the footpath had to be fully reinstated and concreted to the appropriate standards. On receipt of this notice Auckland Transport would then have undertaken a compliance audit of the site. But, in the present case, because no "Works Completion Notice" was provided to Auckland Transport on completion of the drainage works, there was nothing to trigger this audit.

[12] On 20 February 2017 substantive construction work on the property commenced. This included laying three concrete pads on which the three dwelling houses were to be built on. The pouring of concrete for these pads commenced on Thursday 2 March 2017.

[13] Temporary fencing had been erected around the property. However, on 2 March 2017 when Mr Singh arrived on site at about 7.15am he found a section of the temporary fencing had been removed to allow the larger of two concrete pump trucks to access the property. The gap created by this action was adjacent to the temporary reinstatement. The concrete pump truck was parked on the property next to the house site closest to Portage Road. Another truck, which was laden with concrete, had also driven on to the property to deliver concrete to the pump truck. Both trucks had entered the property by driving over the temporary reinstatement and the adjoining grass/dirt verge.

[14] Over the course of that morning fourteen 21 tonne concrete trucks accessed the property, with about ten of them doing so through the gap in the temporary fencing, which meant they crossed the temporary reinstatement. At any one time there was one concrete truck on site serving the concrete pump truck and another truck was parked on the road waiting to deliver its load of concrete to the pump truck.

[15] Throughout most of the morning of 2 March 2017 Mr Singh was present at the property. He knew the concrete trucks were on the property and he observed them

entering and exiting the property through the gap in the fence by crossing the temporary reinstatement. There was no site access plan or discussions about safe entry and exit of the property. The temporary reinstatement was not risk-assessed or checked for damage before or after it was used by the trucks.

[16] Mr Singh was not present at the property on Friday 3 March or during the weekend of 4 and 5 March 2017.

[17] On 6 March 2017 at about 10:30am, Patrick Woolliams was driving his mobility scooter on the footpath approaching the temporary reinstatement. As he drove around the wide corner, two workers on the site heard a noise and observed the mobility scooter toppling over and Mr Wooliams falling from it. He lay partly on the grass/dirt verge and partly on the road. He died at the scene shortly after the accident from the head injury he sustained in the fall.

WorkSafe Investigation

[18] The WorkSafe investigation identified numerous aspects in which YSB failed to ensure the health and safety of any person was not put at risk from work being carried out:

(a) There was a risk of workers and other footpath users (in what was a high-density pedestrian traffic area) being harmed when exposed to a risk of tripping or falling on the uneven terrain;

(b) YSB failed to undertake a risk assessment to identify risks to the public posed by the damaged footpath;

(c) YSB did not consider the possibility of damage to the temporary reinstatement that might be caused by trucks crossing it to access the property;

(d) YSB failed to adequately manage and control risks posed by the damaged footpath. Specifically, it should have blocked off the

damaged footpath using cones and established an adequate alternative pedestrian accessway;

(e) Mr Singh had not checked the footpath or identified it as a risk;

(f) There were no discussions between YSB (including Mr Singh) and the contractors regarding how the property was to be accessed;

(g) YSB should have developed, implemented and communicated a site access plan;

(h) There was no sign-in sheet for the workers on the day the concrete was delivered; and

(i) There was no site-specific health and safety documentation and the contractors were not provided with adequate health and safety information by YSB.

[19] WorkSafe found the work practices of YSB revealed departures from industry standards and guidance:

(a) There were significant applicable industry standards publicly available and readily accessible at the time of the incident;

(b) Guidance was available from overseas and predecessor legislation, including from Auckland Transport on working on the road corridor and constructing temporarily reinstated footpaths; and

(c) Hireage of ground protection was easily available but not used.

Grounds of appeal

[20] YSB appeals against the sentence on the grounds the fine imposed was manifestly excessive. It submits the sentencing judge erred by:

(a) adopting too high of a starting point; and

(b) improperly assessing the financial capacity of YSB.

Relevant law

[21] In *Stumpmaster v Worksafe New Zealand* this Court sitting as a full court recently issued a guideline judgment for sentencing under s 48 of the Act.[2] The judgment outlines a four-step process for sentencing:[3]

(a) Assessing the amount of reparation to be paid to the victim;

(b) Fixing the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

(c) Determining whether further orders under ss 152–158 of the Act are required; and

(d) Making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[22] The level of fine bands outlined in *Stumpmaster* are:[4]

(a) Low culpability, a starting point of up to $250,000.

(b) Medium culpability, a starting point of $250,000 to $600,000.

(c) High culpability, a starting point of $600,000 to $1 million.

(d) Very high culpability, a starting point of $1 million plus.

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2 *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020; [2018] 3 NZLR 881.
3 At [35].
4 At [53].

District Court sentencing

[23] The Judge assessed the culpability to be towards the top of the medium band and set a starting point of $550,000.[5] He identified five culpability factors.

[24] The first factor was the overarching responsibility of YSB to supervise the work site. In this regard, the Judge rejected YSB's submissions that its culpability was akin to a breach of s 34 because YSB had taken no part in the decision to remove temporary fencing and, therefore, the other contractors should also bear responsibility for what occurred.[6] The Judge found:[7]

> I have some difficulty with counsel's assessment that the company's conduct was only marginally more serious than that contemplated by the offence under s 34. In my view, that misunderstands the obligations of the defendant and its overarching responsibilities.

[25] The second factor was the obviousness of the hazard, the availability of the means to avoid the hazard, and the current state of knowledge of the risk. The Judge considered it relevant that Auckland Council had been involved earlier on, that Auckland Transport had issued a notice of non-conformance to CCNZL relating to traffic management practices, and the site was deemed unsafe. Particularly, because the non-conformance included inadequate provision for pedestrians. In the Judge's view, the fact that in December 2016 Auckland Transport had been to the site, assessed matters and drawn YSB's attention to the need to pay specific attention to the footpath confirmed there was an obvious hazard that was clearly notified to YSB. The Judge was satisfied that "the fact that damage would be caused to the footpaths by such a number of large concrete trucks was so obvious it had to go without saying".[8]

[26] The third factor was the risk for potential harm. The Judge accepted that injury was the most likely outcome, but that death was possible.[9]

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5 *Worksafe New Zealand v YSB Group Ltd*, above n 1, at [37].

6 Section 34 imposes upon a PCBU (Person Conducting a Business or Undertaking) a duty to cooperate and coordinate with all other PCBUs with duties in relation to the same matter. Contraventions of s 34 render individuals liable on conviction to a fine up to $20,000 and other persons up to $100,000.

7 *Worksafe New Zealand v YSB Group Ltd*, above n 1, at [19].

8 At [36].

9 *Worksafe New Zealand v YSB Group Ltd*, above n 1, at [25].

[27] The fourth factor was that the victim died.

[28] The fifth factor was the degree of departure from prevailing industry standards. The Judge considered the previous involvement of Auckland Transport to be relevant to this factor as well. Further, the Judge noted there was a significant number of industry standards, particularly in relation to footpaths and pedestrian facilities.[10]

[29] The Judge gave a discount of 25 per cent for personal mitigating factors. These were: the offer to make substantial payments shortly after the guilty plea was entered, which attracted a ten per cent discount; there was genuine remorse, which attracted a five per cent discount; YSB's co-operation with the investigation attracted a further five per cent discount; and finally YSB received a five per cent discount in recognition of its previous good record.

[30] From the starting point of $550,000 the 25 per cent discounts for personal mitigating circumstances left a fine of $412,500. YSB received a further 25 per cent discount for its guilty plea, which brought the fine to $309,375.

[31] Finally, the Judge assessed the allowance to be made for YSB's financial position. He considered the important principles to be:[11]

(a) It is important to determine a provisional fine or starting point before adjustment to reflect a defendant's financial capacity.

(b) Fines may be made in instalments but should not be ordered for any length of time and that 12 months is normally an appropriate lengthy maximum period.

(c) A fine ought not to place a company at risk.

(d) A fine should be large enough to bring home the message to directors and shareholders of corporates.

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10 At [27].
11 At [52].

(e) One must avoid a risk of overlap that in a small company the directors are likely to be the shareholders and therefore the main losers if a severe sanction is imposed on a company. The Court must be alert to make sure it is not in effect imposing a double punishment.

[32] The Judge's consideration of YSB's financial circumstances led him to reduce the fine from $309,375 to an end fine of $100,000:[12]

> I am particularly mindful, with respect to the principles I have outlined a moment ago, that one ought to be careful not to put the company in a position where it would in fact go out of business by imposing an unrealistic fine.
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> I am satisfied that the fine that I would otherwise have awarded, which is a fine of $309,375 should be reduced to reflect the financial situation of the company and its ability to pay. The final fine that will therefore be imposed is a fine of $100,000.

Discussion

[33] At the hearing the focus of the appeal narrowed to the question of whether the Judge had made sufficient allowance for YSB's ability to pay a fine. YSB maintained its position that after the payment of $100,000 in reparation the fine imposed should have been no more than $15,000.

[34] This was a responsible position for YSB to take. There can be no quarrel with the starting point the Judge adopted or his assessment of the culpability factors. Even if the starting point had been significantly adjusted downwards, and a larger discount for mitigating factors adopted, YSB's fine would have remained well above the $100,000 it was ordered to pay. The end sum of $100,000 simply reflects the Judge's assessment of the sum YSB was able to pay.

[35] Whilst YSB did not attempt to upset the reparation order, it submitted that the sum should have been $80,000 rather than $100,000 because the higher sum has a "flow-on effect when considering the overall impact of the sentence imposed". I reject this submission. I do not consider that the reparation sum had any effect on the level of the end fine. The difference between the reparation figure which YSB suggests and

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12 *Worksafe New Zealand v YSB Group Ltd*, above n 1, at [54]–[55].

the reparation that was imposed is no more than $20,000. Here the fine was reduced to approximately one third to reach the end sum of $100,000. For YSB to succeed on appeal it needs to show why the end fine should have been reduced even further.

[36] WorkSafe submits the financial information of YSB shows that since the accident YSB has paid $480,000 to shareholders and proposes to pay $255,000 to directors. WorkSafe submits that money that either has gone or is planned to go towards these payments could have been used to pay the fine. However, the Judge found on this point:

> [53] ... I am left with the conclusion that this is not a case where the directors have unreasonably taken funds from the company as WorkSafe submitted.

[37] WorkSafe argues to the contrary, and in doing so it relies on two cases: *EXFC16 Ltd (in liq) v New Zealand Customs Service*[13] and *Mobile Refrigeration Specialists Ltd v Department of Labour*.[14]

[38] In *ExFC Ltd (in liq)* the appellant companies were involved in bulk importation of garments from China, which they on-sold to customers. Charges were laid after New Zealand Customs became aware the appellants were running a double invoicing system to evade payments of GST; this had enabled them to avoid payments of duties and GST amounting to approximately $680,000, of which $190,111.06 remained outstanding. The appellants went into voluntary liquidation. The sentencing Judge assessed the culpability as high, with which Lang J agreed, because of the breach of trust involved and the honesty required by customers of importers and their agents.[15] It was uncertain whether the companies would be able to pay any fine.[16] Despite that uncertainty, Lang J found:[17]

> When the rewards are great and the risk of detection is low there must be a temptation on the part of others to engage in similar conduct. I consider these factors place this case firmly within the category of cases in which the principle of general deterrence required significant fines to be imposed regardless of the fact that they might never be collected

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13 *EXFC16 LTD (in liq) v New Zealand Customs Service* [2017] NZHC 577.
14 *Mobile Refrigeration Specialists Ltd v Department of Labour* (2010) 7 NZELR 423.
15 *EXFC16 LTD (in liq) v New Zealand Customs Service*, above n 14, at [36].
16 At [18].
17 At [36].

[39] In *Mobile Refrigeration Specialists Ltd v Department of Labour* Heath J referred to the varying circumstances that may influence whether a corporate offender appears impecunious or not: [18]

> There are dangers in interpreting the Sentencing Act in a manner that allows corporate offenders to readily escape financial penalties on grounds of alleged impecuniosity. For example, a company may be incorporated with no working capital of its own, to undertake a particular venture. If that venture were to go wrong and harm was caused to its employees, the absence of liquid funds might tell against a fine. Yet, if that same company had been funded during its trading life through the provision of shareholder advances, it would not be unjust to put the shareholder to the choice of providing funds to pay the fine or leaving the company to go into liquidation. Similarly, if a parent company stood to gain significant taxation advantages from losses incurred by a subsidiary, it would seem wrong in principle for those benefits to be retained by the parent to the exclusion of the company's obligation to pay the fine. Again, the parent company could make a decision whether to advance moneys to pay the fine or to place the company into liquidation.
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> Those considerations suggest that, in the case of a company, the Court should require clear evidence of financial incapacity, supported by appropriate disclosure of all material facts (most of which will be in the exclusive possession of the offender), before imposing a sentence below that appropriate to mark the offending. Disclosure would need to address issues such as any benefits accruing to a parent company through the insolvency of a subsidiary. In contrast to a human offender, a fine imposed on a company, while not a provable debt in a liquidation, will rarely be recovered subsequently. A company is not usually revived from liquidation. An individual who is adjudged bankrupt remains liable to pay a fine, even after discharge from bankruptcy.
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> ...
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> While, generally, a Court should impose a fine within the offender's ability to pay, there is authority for the proposition that, in appropriate cases, fines may be imposed at a level beyond the company's apparent means. An instructive example is *R v F Howe & Son (Engineers) Ltd.* Scott Baker J, delivering the judgment of the Court of Appeal, expressed the view that "there may be case where the offences are so serious that the defendant ought not be in business".
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> (citations omitted)

[40] I find the above two cases to be helpful. They identify the need to ensure deterrence of corporate offenders (both generally and in the particular case) as well as the need to be aware of how corporate offenders can structure their financial circumstances so as to appear less able to pay a fine than they would be with an alternative approach. Here for example, there have been large drawings from YSB's

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[18] *Mobile Refrigeration Specialists Ltd v Department of Labour*, above n 15, at [54]–[58].

funds with payments to shareholders and proposed payments (with funds set aside) for directors. Unlike the Judge, I consider the payment of the fine to be a higher priority than payments to shareholders and directors of the company. There is little if any difference between this expectation and the general expectation that a company must pay its third party creditors before it pays its directors and shareholders. In both cases the company has incurred a liability to a third party which it should discharge ahead of any discretionary payments that it may chose to make to its directors and shareholders.

[41] Moreover, the evidence given by YSB's accountant, Jafar Ali, suggests to me that here the directors and shareholders are the same persons, which reinforces my view that those persons should not be paid ahead of the fine. The current plan would see a total payment of $480,000 with a subsequent total payment of $255,000 being made to them.[19] Mr Ali says the $480,000 was a distribution to shareholders to repay them for the contributions they each provided to the company to enable it to commence its development project. Once the property is sold the intention is to use the proceeds to make the further total payment of $255,000 as a director's fee. The ability of the company to make such payments satisfies me that it has ability to pay the $100,000 fine. I see no reason for the five shareholders/directors to take precedence over the company meeting its financial responsibilities to third parties, particularly in the form of a financial penalty. This is not a case where the company genuinely lacks funds to pay a fine; it is simply a case where there is money to pay the fine imposed, but this will mean shareholders and directors will receive less than they otherwise would have received had the company not offended in the way that it did. That is no reason to reduce the fine below its present level.

[42] There is further reason to reject YSB's argument it cannot afford to pay the $100,000 fine. In his second affidavit Mr Ali refers to the sum of $215,000 which was then available to YSB. Mr Ali says those funds could not be used to pay the fine because they came from the sale of trucks and were needed to repay a loan on the trucks. However, he has not identified the sum borrowed, nor is there any information in the company's accounts that are in evidence that might throw light on this loan. It

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[19] Mr Ali says that there are five persons who are directors and shareholders and these persons are a group of family members and friends.

is unsatisfactory for the company's accountant to say funds of $215,000 are required to pay a loan without identifying the loan in the company's accounts or the sum due. Accordingly, I place little weight on this evidence.

[43] I reject the submission YSB cannot afford to pay the fine imposed on it. It follows that there is no basis for finding the level of fine is manifestly excessive in the circumstances, or that it has otherwise been arrived at through error on the part of the sentencing Judge.

Costs

[44] YSB submits that an award of costs was inappropriate. This is because two of YSB's directors provided affidavits and a WorkSafe interview. Regarding costs the Judge found:[20]

> Turning to the final step in the sentencing process, I have submissions from WorkSafe seeking costs in its favour of $2607.10. That has been opposed by the company. However, I consider it to be reasonable. So costs in favour of WorkSafe of that amount are ordered.
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> ... [T]he final step in this process is for me to stand back and undertake a proportionality assessment. I am satisfied that the final outcome, being a payment of [reparations, fine] and WorkSafe's costs of $2607.10 is a proportionate response to the offending involved and takes into account the financial position of the defendant.

[45] Section 152 of the Act provides:

> **152 Order for payment of regulator's costs in bringing prosecution**
>
> (1) On the application of the regulator, the court may order the offender to pay the regulator a sum it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).

[46] I refer to and rely upon the comments of this Court in *Stumpmaster*:

> [106] The costs challenge is without merit. As noted, the Act allows for these orders [s 152] and the manner in which WorkSafe is presently calculating them, which is to focus only on lawyer litigation expenses, is modest. We are not to be taken to be encouraging or otherwise higher claims, but think it likely the legislations contemplates more cost recover than that.

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20 *Worksafe New Zealand v YSB Group Ltd*, above n 1, at [55]–[56].

> [107] [counsel's] challenge was that no features were identified that made a costs order appropriate. The defendant had been co-operative, there were no unnecessary steps taken and accordingly no reason for an order. However, we do not consider this type of order is to be reserved for cases where extra punishment is merited. There is nothing in the legislative scheme to suggest that and costs orders in the regulatory context are common place.

[47] Here the total costs were $2,607.10. I consider the sum of costs awarded falls within the comments of this Court in *Stumpmaster*, and therefore I see no reason to disturb the costs order. Neither do I find that any grounds have been identified to suggest the Judge was acting in error when finding that a costs award was just and reasonable.

Result

[48] The appeal against sentence and costs is dismissed.

Duffy J