

**SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS
JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE
PARAGRAPHS [28], [29], [35], [36], [39], [40], [54], [59], [61], [72], [75].
<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html>**

**IN THE DISTRICT COURT
AT WAITAKERE**

**I TE KŌTI-Ā-ROHE
KI WAITĀKERE**

**CRI-2023-090-001443
[2023] NZDC 25842**

WORKSAFE NEW ZEALAND
Prosecutor

v

CPA 2022 LIMITED
Defendant

Hearing: 13 November 2023
Appearances: S Cossey for the Prosecutor
H Pryde for the Defendant
Judgment: 13 November 2023

NOTES OF JUDGE M PECOTIC ON SENTENCING

[1] The defendant, CPA Limited, has pleaded guilty and is for sentence on one charge of “being a PCBU, having the duty to ensure so far as reasonably practical the health and safety of workers who work for the person conducting the business or undertaking (PCBU) including Jahden Nelson, while workers are at work, the business or undertaking, namely dismantling scaffolding, did fail to comply with that duty and that failure exposed workers to the risk of death or serious injury arising from the interaction between workers and overhead electric lines”.

[2] The particulars being:

- (a) That it was reasonably practicable for CPA 2022 Limited (CPA) to have ensured an adequate system was in place to capture, communicate and comply with the requirements of the Close Approach Consent (CAC) and Field Service Provider (FSP) safety briefings; and
- (b) To ensure the scaffold was dismantled in accordance with requirements of the CAC in the FSP's safety briefing.

[3] The maximum penalty for this offence is a fine not exceeding \$1,500,000.

[4] There is an agreed summary of facts before the Court. It is lengthy. For the purposes of sentencing, I must summarise this document and I do so as follows. CPA is a limited liability company. It was incorporated under a different name in 2018. On 6 March 2019 the company changed its name to Supercity Scaffolding Limited. Following this incident, the business was sold and on 7 October 2022 the defendant changed its name to CPA 2022 Limited.

[5] At the time this matter came before the Court, the defendant operated a scaffolding business with teams of scaffolders installing and dismantling scaffolding, primarily on residential properties across the Auckland region. The defendant had one director, Claire Attard. The defendant was engaged to erect and subsequently dismantle scaffolding at a dwelling house building located in Alidade Place, Massey in Auckland. The victim, Jahden Nelson, began working as a scaffolder for the defendant in February 2022.

[6] Renovations were taking place at Alidade Place in Massey which were carried out by a builder on behalf of the property owner. The builder engaged the defendant with work relating to replacing the roof of the house. On 11 March 2022, Claire Attard went to the site to provide a quote for the installation of the scaffolding. Given the proximity of the power lines running across the property, a CAC was required to install the scaffolding around the building. These consents are sought by third parties who intend to carry out work within a reduced minimum approach distance of overhead

power lines. Minimum approach distances are regulated by the *New Zealand Electrical Code of Practice for Electrical Safe Distances*.

[7] On 22 March 2022, Mr Thomas attended the site to undertake the CAC assessment process. He met the scaffolding crew that the defendant sent to install the scaffolding at the site. Mr Thomas obtained information from the defendant's lead scaffolder about the size of the scaffolding and how it was to be installed. Mr Thomas obtained the following measurements:

- (a) The distance between the ground of the property and the nearest overhead power lines to the house was 8.5 metres; and
- (b) The ground to the part of the building closest to the power lines, which was the moving line at the bottom left rear of the building, was 3.5 metres.

[8] These measurements met the required metres between the part of the building nearest to the lines and the power lines themselves.

[9] As each projection was being installed, Mr Thomas deduced the nearest point to the lines any workers would be able to get to was standing on the roof of the building. Mr Thomas briefed the scaffolders who were sent to carry out work by the defendant as they were the recipients of the CAC. This briefing lasted 45 minutes and covered numerous topics, which included:

- (a) Ensuring the scaffolders understood the safety instructions;
- (b) The voltage of the power lines being 33,000 volts and that they were not insulated and must be treated as live at all times;
- (c) Harm can be caused by contact with those lines;
- (d) The manner of which the scaffolding needed to be carried;
- (e) Each scaffolder was paired with their own safety observer;

- (f) The minimum approach distance that must be maintained at all times;
- (g) The weather conditions which the scaffolders could work in;
- (h) Only the recipients named in the CAC could work in the consent area;
- (i) The CAC was to remain onsite at all times; and
- (j) Mr Thomas was to be called if any clarification was required.

[10] Mr Thomas filled out the CAC form, recording details which included the names of the scaffolders who had been issued the CAC and an acknowledgement that they understood their responsibilities. Due to COVID-19 precautions, the scaffolders did not sign the form but verbally acknowledged they understood the conditions. Mr Thomas did not forward a copy directly to Ms Attard. He provided the defendant with a copy of the form through the head scaffolder. Mr Thomas left the site. This consent was valid until 20 April 2022.

[11] Mr Thomas returned to the site on 29 March 2022 to undertake another assessment. He noted scaffolding around the building. The scaffold working platform had been erected lower than the roofline of the building, the working platform being further away from the overhead electric lines than the roof of the building itself. The re-roofing was completed around 11 April 2022 with no issue.

[12] On 19 April 2022, Ms Attard contacted Mr Lane, the builder, and made arrangements for the dismantling of the scaffolding. Ms Attard directed four scaffolders to the site to dismantle the scaffolding. These scaffolders were not the same as the ones named in the CAC and had not received the safety briefing from Mr Thomas.

[13] On arrival at the site, the scaffolders conducted an assessment. They returned to their truck and had a discussion. Staff involved have different recollections of what was discussed, ranging from it being a catch up to a tool box meeting in which hazards were discussed, including the power lines. The CAC and conditions were not discussed at this time. The weather was overcast with light mist at the time.

[14] At 8.30 am the manager of the site was alerted to the scene by a massive, loud sound. Mr Nelson was observed standing on the right-hand corner of the scaffold holding a long metal pipe vertically, the high end of the pipe contacting the lowest of the power lines crossing the property. A fireball travelled along the power lines and down the metal pipe toward Mr Nelson who fell into the scaffold platform. Emergency services were called. Mr Nelson was rushed to Auckland Hospital and later to the Middlemore Hospital Burns Unit. The defendant reported the accident to WorkSafe immediately.

[15] As a result of the accident, Mr Nelson received high voltage electrical burns to his upper and lower limbs, including an exit wound of the electrical charge through his left foot. Both arms have been amputated to the upper bicep. Mr Nelson will need daily assistance for normal activities for the rest of his lifetime due to the nature of his injuries.

[16] The relevant risk in this case is serious injury or death from electrocution as a result of contact with overhead electric lines.

[17] A WorkSafe investigation commenced on 19 April 2022, which identified that at the time of the incident, the defendant had no process in place to ensure the conditions of the CAC and safety briefings from the FSP were communicated internally. This failure created the opportunity for conditions not to be complied with.

[18] The defendant had a health and safety policy in place and provided this and other documents to WorkSafe. Those other documents were forms which included details on helping the defendant's workers to identify hazards, risks and controls. Had the pre-start safety plan form been used, it may have assisted the defendant to monitor how risk management processes were identified and could have been used to capture the conditions of the CAC and the safety briefing provided by Mr Thomas on behalf of the FSP, which were not captured in the CAC form but were verbally communicated.

[19] The risks associated with scaffolding and electricity are well known and the subject of significant industry guidance. There is a comprehensive guidance document

called *Scaffolding in New Zealand – Good Practice Guidelines* which outlines the hazards inherent to the scaffolding industry. In relation to live power lines, it includes information on identifying hazards and minimum approach distances when working near power lines or electrical conductors.

[20] The *New Zealand Electrical Code of Practice for Electrical Safe Distances* sets the minimum set distance requirements for overhead electrical line installations and other works associated with the supply of electricity. It also refers to the relevant safe distance requirements between electrical conductors and buildings, and other structures such as scaffolding installations and the minimum safe distance for persons working near live parts such as electricity lines.

[21] The defendant was the PCBU as defined by the Act. As a PCBU, the defendant was obliged to ensure so far as was reasonably practicable, the health and safety of workers who worked for it while they were at work. This included the victim. The defendant failed to comply with its duty under the Act and this failure exposed the victim to risk of serious injury. The defendant failed to ensure the health and safety of its workers in that it failed to take the following reasonably practical actions:

- (a) To ensure an adequate system was in place to capture, communicate and prepare to comply with the requirements of CACs and provide safety briefings; and
- (b) To ensure the scaffold was dismantled in accordance with the requirements of CAC and the FSP's safety briefing.

[22] The defendant has not previously appeared before the Court. The defendant has cooperated with WorkSafe's investigation.

Victim impact statements

[23] This afternoon we have heard from Santana Tierney, who is the fiancé of Jahden Nelson, who was the victim in this matter. We also heard about the impact of the accident from Mr Nelson himself. I cannot properly capture the significant, wide ranging and devastating impacts that this offence has had on Mr Nelson and his

whānau. Those effects and impacts on him have resonated in the courtroom this afternoon through the words of both Mr Nelson and his fiancé.

[24] Mr Nelson is a young man. His fiancé, Santana Tierney, is also a young woman. They are parents to three young children. They share the burden of this traumatic event which will last with them for the rest of their lives. The impact on Mr Nelson, his partner and his whānau both immediate and extended has been immense and catastrophic. His injuries impact on every aspect of his life. What has happened to him affects him physically, emotionally, financially and in every way. He spent close to two years in hospital being treated for the injuries he sustained. It is an understatement to say he faces a long road ahead in his rehabilitation. Yet what impresses me is how motivated he is to rehabilitate and become independent and how very positive, despite his disabilities, he still remains. Through his words he shows a real fight for life and a determination to get on despite these significant injuries that he has sustained.

Restorative justice conference

[25] A restorative justice conference took place on 2 November 2023. Ms Attard attended by way of AVL link. Mr Nelson was unable to attend the conference but has agreed to meet with Ms Attard post sentencing. Ms Attard apologised to Mr Nelson and people present at the conference.

[26] Mr Nelson said he holds no anger towards Ms Attard.

Prosecution submissions

[27] I turn now to consider the submissions of counsel. I have received extensive written submissions from both. Firstly, I address the prosecution submissions on behalf of WorkSafe.

[28] Counsel refers to the relevant sections of the Sentencing Act 2002 as well as the Health and Safety at Work Act 2015 as they apply to this case. The prosecution refers to the guideline judgment of the High Court in the well known case of *Stumpmaster v WorkSafe New Zealand* which adopts a four step approach to

sentencing.¹ Firstly, in relation to reparation, counsel submits with respect to the emotional harm reparation that the appropriate figure is an award of [REDACTED]. In support of this figure, counsel refers to four cases, where amounts between [REDACTED] were awarded when the victims' injuries resulted in paralysis and rendered them reliant on others. Given the injuries suffered by the victim in this case, it is submitted that the emotional harm payment falls towards the high range of the cases referred to.

[29] It is known that the victim has also suffered consequential loss. While Mr Nelson receives accident compensation, this is calculated at 80 per cent of his weekly income. Based on the calculations made by a chartered accountant, it is submitted that the methodology as set out in the accountant's affidavit shows that the Accident Compensation Corporation (ACC) shortfall comes to [REDACTED]. This figure is reached on the basis that the injuries Mr Nelson sustained means he is unlikely to ever return to paid employment.

[30] Secondly, in relation to step two, the prosecution refers to four guideline bands as set out in *Stumpmaster* and the relevant factors listed in the case of *Department of Labour v Hanham & Philp Contractors Ltd*.² It is submitted that the defendant failed in the two ways which are described in the particulars of the charge to take reasonable actions to ensure the safety of its workers, who were exposed to risk of electrocution through contact with 33,000 volt power lines. The realised harm was catastrophic. Therefore, there was a significant departure from the industry standards in not complying with the requirements of the CAC or the FSP's safety briefing which was provided to the defendant.

[31] It is submitted that the defendant's conduct represents a significant departure from the *Scaffolding in New Zealand - Good Practice Guidelines* and the *New Zealand Electrical Code of Practice for Electrical Safe Distances*, as well as its own health and safety procedures. It is submitted that the risks arising from exposure to live overhead electric lines is well documented in industry guidance. The harm that can result

¹ *Stumpmaster v Worksafe New Zealand* [2019] DCR 19; (2018) 15 NZELR 1100; [2018] 3 NZLR 881; [2018] NZHC 2020.

² *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.

includes serious injury or death. The defendant had previously identified the hazard presented by the live overhead electric lines, yet did not comply with the requirements of the CAC nor the safety briefing from the FSP.

[32] It is submitted that it was not cost prohibitive for the defendant to ensure that the requirements of the CAC or safety briefing from the FSP were complied with, nor would it have been costly or difficult to develop a system to ensure that these requirements were communicated to the defendant's workers. It is submitted that there is ample guidance for the risks and harms that can eventuate from contact with live overhead electric power lines. Counsel referred to a number of cases by way of assistance in determining the defendant's level of culpability.

[33] It is submitted this case falls at the higher level of the cases referred to, the defendant's culpability falls within the high culpability band, and a starting point of \$620,000 is appropriate.

[34] It is submitted that there are no aggravating features which would increase the starting point. It is submitted that there are five mitigating factors which are the plea of guilty, cooperation with authorities, reparation, previous good safety record and remorse which would reduce the starting point by 45 per cent.

[35] In relation to step four which relates to the assessment of proportionality and the appropriateness of sanctions, the prosecution acknowledges that the company was sold on 7 October 2022 through a vendor finance agreement. The agreement states that if the purchaser is unable to finance the outstanding principal rate by the expiry date of 6 October 2023, the defendant can charge interest at the rate of 14 per cent on the outstanding principal which would be [REDACTED]. This equates to [REDACTED] per annum.

[36] Therefore, it is submitted the defendant is capable of paying the lump sum payment of [REDACTED] from the funds it currently holds and pay a fine with a vendor finance agreement arrangement in place under three years, meaning the defendant has the capacity to pay a substantial fine. It is submitted that the costs in the sum of \$3,208.54 represent half the prosecutor's legal costs, should also be imposed.

Defence submissions

[37] The defence agrees with the purposes and principles of sentencing as set out by the prosecution and submits the Court must also impose the least restrictive outcome which is appropriate in the circumstances of the case and one which is consistent with other similar sentencing decisions. The defence refers to the four step approach as described in the lead decision of *Stumpmaster*. The defence agree that the emotional harm reparation submitted is appropriate by the prosecution.

[38] The defence submits that following the event, the defendant and its director provided immediate and positive support to the victim, Mr Nelson, as well as other employees in the immediate aftermath of the accident. Ms Attard has provided an affidavit in this regard. She immediately went to the site when she was informed of what occurred. She offered support and comfort to the employees present. She assisted emergency services to transfer Mr Nelson to the ambulance. The defendant has paid Mr Nelson the equivalent of 40 hours of work every week once advised by ACC the maximum amount she could pay so it would not impact on his ACC allowance. She kept in contact with the family until such time as it became untenable.

[39] With references to cases similar to this, it is submitted the figure of [REDACTED] by way of emotional harm reparations is appropriate.

[40] The defendant accepts the consequential loss figure based on the statutory shortfall is appropriate. The defence have engaged their own expert and submit that based on their expert's calculations, the consequential loss reparation should deduct the figure paid so far by way of top up to the ACC parameters and consequential loss reparation should be [REDACTED].

[41] The defence submits the consequential loss calculations proposed by WorkSafe have failed to account for three factors. Firstly, the top up amount was calculated subject to the ACC tax rate of 18.95 per cent instead of the marginal rate of 30 per cent. It is suggested there should be a 13.64 per cent reduction to the calculated amount to reflect the appropriate tax rate.

[42] Secondly, no allowance was made for the time value for money where a prudent but non-expert investor can reasonably be expected to invest a lump sum and over time produces after tax returns that exceed the rate of inflation by one per cent to three per cent per annum. Is it suggested that each payment should be discounted to take this factor into consideration.

[43] Thirdly, no allowance was made for life expectancy based on population mortality tables and the sum should be adjusted to reflect this.

[44] In relation to step two, fixing the fine, the defendant refers to the four bands in the lead decision of *Stumpmaster* and the factors as set out in s 151 of the Act.

[45] The defendant acknowledges its failings and accepts that more practical steps it could and should have taken but did not. It is submitted the defendant recognised that a CAC was required for work to be undertaken and followed a proper process in obtaining this permit. An appropriate team led by an experienced scaffolder was sent and fully briefed by the FSP on the requirements of the CAC. The defendant submits that the copy of the CAC was not provided directly to CPA 2022 Limited by the issuing entity or the lead scaffolder, Mr Wilson. The CAC conditions were also not detailed in the CAC document itself.

[46] The defendant accepts it held the responsibility to ensure that there was an adequate system in place to capture, communicate and comply with the requirements of the CAC and FSP's safety briefings. It has also accepted that it is deemed to have that knowledge because its representative, Mr Wilson, was present for the Electrix FSP briefing and a copy of the CAC was provided to him at the site. However, it is submitted there are limitations to expecting scaffolders to recall such information accurately for future reference instead of recording the conditions of the CAC on the form itself and sharing this directly with CPA 2022 Limited, particularly in this case where there was a history of good communication between the director of the defendant company and Mr Thomas from previous work engagements.

[47] In making this submission, the defendant does not seek to excuse its conduct. The purpose of the submission is to support positive and constructive change that

results in the briefing and conditions being written in full on formal CACs in future which is shared directly to the relevant parties to facilitate a complete understanding of the conditions requisite for work safety.

[48] The defendant accepts that exposure to electrocution through contact with power lines carries a risk of serious harm to workers and that the realised harm to Mr Nelson was catastrophic. The defendant genuinely regrets that this has happened to Mr Nelson. The defendant acknowledges the risks associated with power lines or electrical conductors documented in industry guidance, including the fact that serious injury or death can result from contact with live electric overhead lines.

[49] The defendant submits it had identified the hazard and taken appropriate steps to address this by obtaining the CAC, but ultimately did not comply with its conditions or the FSP safety briefing. The defendant submits this is not a case of deliberate avoidance of compliance for the purposes of minimising costs. The defendant accepts its failure to meet required standards under the *Scaffolding in New Zealand - Good Practice Guidelines* and the *New Zealand Electrical Code of Practice* for electrical safe distances by not complying with the CAC requirements and the FSP safety briefing.

[50] With reference to the cases provided by the prosecution and further cases which the defendant provides, it is submitted that the defendant's liability falls at the high end of the medium culpability band and the starting point of \$550,000 is appropriate. It is submitted that the following mitigating factors apply:

- (a) The defendant has pleaded guilty;
- (b) Through Ms Attard the director, the defendant has expressed remorse;
- (c) The defendant offers reparation;
- (d) The defendant has cooperated with the investigation; and
- (e) The defendant has previous good character.

[51] The sum figure of these discounts would come to 45 per cent, which would result in an end fine of \$302,500.

[52] In relation to step three, the costs sought from WorkSafe are accepted as reasonable.

[53] In relation to step four, it is submitted that the defendant has no ability to pay a fine as it is no longer trading and has not been operational since shortly after the accident. On this basis, it is appropriate that the fine be reduced to nil.

[54] In response to the submission advanced by WorkSafe that a lump sum payment be made, it is submitted that based on financial statements there is no money available to pay this figure. In respect of the vendor finance submissions, the purchaser has not been cooperative in providing information under the loan security agreement, nor has it met its obligations to repay the outstanding balance or net interest payments. Further, the defendant also has total liabilities up to [REDACTED]. It is submitted that even if the vendor loan and accounts receivable are considered, the defendant still owes [REDACTED]. It is submitted that the defendant's only option once the Court case is over is liquidation.

Analysis

[55] I move now to my sentencing analysis. In sentencing, I consider the purposes as set out under s 7 of the Sentencing Act 2002. The purposes which I consider as part of this sentence are to hold the defendant accountable for the harm that has been caused and to promote responsibility and acknowledgment of that harm. I also consider the interests of the victim which includes reparation. In terms of principles as set out in s 8 of the Sentencing Act, I consider the gravity of this offending and the seriousness of this type of offence in comparison to other cases of a similar kind. I also consider the effects this offending has had on the victim and steps taken by the defendant in terms of remedying their systems.

[56] I also have regard to the purposes of the Health and Safety at Work Act and in particular s 151 of the Act, which caters for the need to protect workers and other person against harm to their health and safety and welfare by eliminating and

minimising risks arising from work, ensuring compliance of the Act through effective and appropriate compliance and preventative measures. I acknowledge the principle that workers and other persons should be given the highest level of protection against harm to their health and safety and welfare from hazards and risks that arise from work as is reasonably applicable.

[57] The lead decision for sentencing in cases of this sort is the case of *Stumpmaster*. A four step approach is taken for sentencing as follows:

- (a) Assessing the amount of reparation;
- (b) To fix the amount of the fine by reference to the guideline bands and then having regard to aggravating and mitigating factors;
- (c) To determine whether further orders are required under ss 152 and 158 of the Health and Safety at Work Act; and
- (d) To make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions as proposed by the preceding three steps. This includes consideration of the ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant.

[58] I now address the four steps.

Step one - assessing the amount of reparation

[59] Sections 32 to 38 of the Sentencing Act provide guidance on matters that need to be considered in imposing a reparation order. Reparation is compensatory in nature and is designed to recompense an individual or family for loss, harm and damage resulting from the offending. In this case, there is agreement between parties with respect to the emotional harm reparation. The figure which both parties submit is appropriate is [REDACTED]. Taking into account the particular circumstances of this case, I agree with counsel that the appropriate figure with respect to emotional harm reparation is [REDACTED]. This figure is entirely consistent with cases I considered.

[60] I turn to consider the consequential loss reparation. The victim is entitled to reparation for consequential loss. I adopt the approach with the High Court in *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* where the High Court held that the correct approach to fixing the quantum of reparation is the statutory shortfall approach, that being the shortfall between the pecuniary benefit the victim would have received calculated by reference to net income in the period prior to the incapacitating incident and the victim's entitlement to compensation under the Accident Compensation Act 2001 for the period to which they are entitled to such payments.³ The Court held that the assessment of lost earnings for reparation purposes was to be approached on a basis consistent with the principles of the Accident Compensation legislation and social contract.

[61] I do not accept the defence submissions based on the calculations tendered by Mr Davies. I prefer the approach submitted by WorkSafe in reliance on the calculations of Mr Hudson. I therefore agree with the figure of [REDACTED] by way of consequential loss reparation.⁴

Step two - to fix the amount of the fine by reference to the guideline bands, having regard to aggravating and mitigating factors

[62] In setting the starting point, I consider the aggravating features of the offending and the culpability of the defendant. In the case of *Stumpmaster*, the Court set out four guideline bands as follows:

- (a) Low culpability, up to \$250,000;
- (b) Medium culpability, \$250,000 to \$600,000;
- (c) High culpability, \$600,000 to \$1,000,000; and
- (d) Very high culpability, \$1,000,000 plus.

³ *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365; [2019] DCR 870.

⁴ This figure is reached as a result of deducting the top up payments already made by the defendant of [REDACTED]

[63] In *Stumpmaster*; the Court endorsed a number of factors which were set out in the decision of *Hanham & Philp Contractors Limited* as being of assistance when addressing this step. There is very little in dispute between the parties in terms of the *Hanham & Philp Contractors Limited* factors. The defendant accepts their failings in this case and has pleaded guilty to the charge. Those failings are set out in detail in the summary of facts which I have referred to. I have considered the background information provided by Ms Attard in her affidavit. I accept this is not a case where the defendant completely ignored its health and safety obligations.

[64] The defendant accepts there ought to have been an adequate system in place to catch, communicate and comply with the requirements of the CAC. This lack of communication and the lack of detail in the CAC form are factors I consider were key matters which contributed to the incident. There was no dispute between the parties with respect to risks and hazards to workers where they work around 33,000 volt power lines and the importance of following proper procedures in accordance with scaffolding guidelines. The harm to Mr Nelson was catastrophic. However, I accept the defence submissions that this is not a case where there is deliberate avoidance of compliance for the purpose of minimising costs.

[65] While recognising that each case needs to be determined on its own facts, I have been assisted by the cases of *WorkSafe New Zealand v Dong Xing Group Limited*, *Worksafe New Zealand v Fall Stop Scaffold Ltd* and *WorkSafe New Zealand v Atlas Scaffolding Timaru Ltd*.⁵ All three cases involve defendants specialised in scaffolding.

[66] This is a case where the company were aware of the risks present but did not comply with the safety measures imposed by the conditions of the CAC or the safety briefing from the FSP. I consider the explanation provided by the defendant and the fluidity in terms of the workers that turn up to work each day. However, the defendant did have systems in place which were not complied with. For example, the defendant

⁵ *Worksafe New Zealand v Dong Xing Group Limited* [2018] NZDC 22114, *Worksafe New Zealand v Fall Stop Scaffold Ltd* [2020] NZDC 3629 and *WorkSafe v Atlas Scaffolding Timaru Ltd* [2019] NZDC 12621.

did not complete their health and safety job safety analysis nor was a pre-start safety plan form completed for either the erection or dismantling of the scaffold at the site.

[67] I have reached the conclusion that the level of culpability of the defendant is properly assessed as being in the upper region of the medium culpability range. The appropriate starting point in my view is a fine of \$550,000.

[68] I turn now to personal aggravating and mitigating factors. There are no aggravating factors.

[69] I turn now to personal mitigating factors. There is the plea of guilty. This was done at an early opportunity in terms of formal charges laid before the Court. I grant a discount of 25 per cent. Secondly, I accept the defendant has fully cooperated with authorities and WorkSafe's subsequent investigation. I allow a further discount of five per cent. Thirdly, remorse. I accept remorse has been expressed by the defendant through Ms Attard. This is demonstrated by attendance at the restorative justice conference and conduct immediately after the accident. I allow a further five per cent discount.

[70] Reparation is accepted and there has been no dispute in terms of emotional harm reparation nor dispute with respect to the need to impose consequential loss reparation. The principle of payment of the consequential loss is accepted. It is accepted there is no dispute in terms of the emotional harm reparation and the given figure I have directed in relation to both in my view s 10 of the Sentencing Act applies and I allow a further discount of five per cent.

[71] The defendant has no previous history of non-compliance for previous convictions and it is appropriate to reflect this with a further discount of five per cent.

[72] This reduces the fine to [REDACTED]

Step three - determine whether further orders are required

[73] In this case the defence do not oppose the imposition of costs. The submission advanced by the prosecution is reasonable. Accordingly, I make an order for costs as sought by the prosecution of \$3,208.54.

Step four - make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps

[74] This includes consideration of the ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant. This relates to the payment of the fine only.

[75] In this case, I am assisted by the affidavits from Mr Irwin. He is the chartered accountant and tax advisor to the director of CPA. Mr Irwin's supplementary affidavit states that the defendant's net cash position is [REDACTED] and once CPA's overall financial position is considered (including the possibility of a finance arrangement) it will still have a net liability of [REDACTED]. Further, it is not in a position to pay a fine as it is unable to meet its current liabilities due to a lack of financial means.

[76] CPA is no longer trading. Its only option will be to liquidate. It would be open to the liquidator to seek repayment of any debts owed. Having regard to the totality of the offending, the potential penalty, the reparation that can be paid, the financial position of the CPA, in my view it is not in the interests of justice to impose a financial penalty in this case and I reduce that fine to nil. The conviction will be recorded and be marked against the defendant's name.

Judge M Pecotic

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 22/01/2024