IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-004417
[2019] NZDC 26448

WORKSAFE NEW ZEALAND
Prosecutor

v

TOWER SCAFFOLDING GROUP LIMITED
Defendant

Hearing:	3 May 2019
Appearances:	E Jeffs for the Prosecutor C Robertson for the Defendant
Judgment:	3 May 2019

NOTES OF JUDGE D J SHARP ON SENTENCING

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[1] The defendant Tower Scaffolding Group Limited appears for sentence having pleaded guilty to one charge under ss 36(1)(a) and (2)(c) Health and Safety at Work Act 2015, called the Act.

[2] The particulars of the charges are that the company failed to ensure so far as was reasonably practicable that the health and safety of persons was not put at risk from work carried out as part of the conduct of the business or undertaking, namely maintenance of a scaffold, and that failure exposed other persons to a risk of death or serious injury arising from the scaffold collapse, the particulars being it was reasonably practicable for Tower Scaffolding Group Limited to have ensured the structural integrity of the scaffold and implemented an effective system to adequately

monitor its workers, inspections, alterations and repairs to the scaffold. The maximum penalty for the offence is a fine not exceeding $1.5 million.

[3] The facts are that the defendant is a nationwide scaffolding company specialising in corporate and infrastructure work. It employs around 100 people and engages contractors as required. The defendant was contracted to supply and install aspects of fixed scaffolding and shore loading throughout the build of Parkside Residences, a 30 storey apartment building at 35 Albert Street, Auckland. The scaffold was approximately 26 metres long and 8.5 metres high. It had four lifts and two working platforms. It was lined with debris netting which is known as screening. This increased the dead load of the scaffold and the risk of the scaffold being subject to being blown over.

[4] The defendant undertook an inspection of the scaffold on 16 May 2017 and confirmed it was safe to use. On 18 May 2017 at approximately 7.45 am the scaffold came away from the building under construction and fell against the side hoarding, an adjacent tree and the council street lighting. No one was working on or adjacent to the scaffold at the time it collapsed. This was a matter of good fortune.

[5] The scaffold was seriously deficient in the following ways:

(a) The bracing was inadequate and did not comply with the manufacturer's instructions or the Good Practice Guidelines for Scaffolding in New Zealand. Only half of the scaffold was braced and the bracing only went half way up the scaffold.

(b) The number of ties used was inadequate to stabilise the structure given its size, nature and the construction of a scaffold. A minimum of 10 ties were required to ensure the stability of the scaffold. WorkSafe scene examination identified only a single tie. The defendant's position was that there were four ties in place when the scaffold was inspected on 16 May 2017.

(c) The ties that the defendant maintained were in place on 16 May 2017 were implied in locations that would not have afforded optimum stability for the scaffold.

(d) The ties were put log couplers, not of the recommended configuration, and box ties could have been used. Box ties are able to take a considerably heavier load than the ties which had been applied by the defendant company. The defendant company failed to comply with best practice.

(e) Additional ties and bracing should have been installed to take into account the additional dead load created by the screening on the scaffold.

Approach to sentencing:

[6] The Sentencing Act 2002 must be applied. I am required to deter persons who may offend in this way and the defendant company must also be deterred. To denounce offending of this kind and where people are put at great risk, as was the case here, there has to be a denunciation. Further, to ensure that the defendant company is accountable. In part the defendant company has shown accountability. It has pled guilty at an early opportunity. I have seen an affidavit which indicates the company has taken these matters very seriously and have put processes into place to ensure there is not a repetition. I have to treat this case consistently as far as is possible with other cases. I have to consider the opportunity for rehabilitation. I need to consider the means of the defendant. As the Act provides for monetary penalties the means to pay is a factor the Sentencing Act requires me to take into account. I am also required to impose the least restrictive outcome that is consistent with the principles and purposes of sentencing.

[7] The Act also sets out at s 151(2) matters which must be taken into account in sentencing. I have already referred to the Sentencing Act provisions but I also must take into account the risk of and potential for illness, injury or death that could have occurred. I must take into account whether death, serious injury or serious illness

occurred or could reasonably have been expected to have occurred. I must take into account the safety record of the company that is involved to the extent that it may show any aggravating factor. I note at this point that the company has no record of failure as far as the Act is concerned. I need to consider the degree of departure from prevailing standards in the industry sector and to consider that as a potential aggravating factor. I must also consider the company's financial capacity or ability to pay to the extent that it has the effect of increasing the amount of the fine.

[8] The decision in *Stumpmaster v WorkSafe New Zealand* mandates a four step process.[1] First, the assessment of reparation. This is not an issue in this case as fortuitously no one was hurt or killed. Secondly, to fix the amount of a fine having regard to guideline bands. The guideline bands are, for low culpability, up to $250,000, medium culpability $250,000 to $600,000, high culpability $600,000 to $1 million, and very high culpability $1 million plus. I need to take into account aggravating or mitigating factors in relation to the events. I need to decide if there are any further orders that might be required. The only further order that might apply in this case is an order for costs and counsel have sensibly and appropriately agreed on an order for the same. There is a further step of making an overall assessment of proportionality and of the appropriateness of the sanction that is applied.

[9] As regards fine, the prosecutor and defence counsel submit that this offending is within the medium band of culpability. My own assessment of the failures that are present on the part of the defendant company is consistent with that and then it must be a matter of looking within the medium culpability band. The prosecutor submits that a fine of $550,000 as a starting point should be selected and the defence has suggested $300,000 is an appropriate starting point.

[10] The assessment involves consideration of the Good Practice Guidelines for Scaffolding in New Zealand and the manufacturers' instructions for assembling scaffolding. These provide known and effective methods of avoiding the type of situation that occurred here. The nature of the risk that is present and the type of harm that may result from a failure in standards is manifest. Working at height is a situation

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

that almost always will involve considerable peril and the need that appropriate standards are observed.

[11] The particular acts and omissions that are here need to be considered. There was inadequate bracing and the bracing which was provided did not comply with the manufacturers' instructions or best practice. The number of ties which were provided were inadequate and that is whether WorkSafe's investigation is taken as a basis or what the defendant believed was present when the inspection was carried out on 16 May 2017. The put log couplers were not the best couplers that could have been applied. The use of box ties would have provided a more robust structure. Particularly as the wind loading of the scaffold was increased by the screening there was a need to ensure that a robust means of controlling the structure was in place. The ties which were placed were inadequately spaced and diagrams have been provided showing how the method that had been applied was short of what was needed. Additional ties were needed because of the loading requirements that the screening had created.

[12] The complete failure of the scaffold was something which was almost inevitable given the fact that the defendant did not have a work methodology which included plans for the scaffolding and a work scale at the time that involved job sheets and other factors to regulate the proper application of the known standards. The scaffold did not have manufacturers' instructions alongside it for the workers who were involved. These are departures from what could reasonably be expected.

[13] The requirements to maintain the proper standards for the scaffolding in terms of the health and safety of workers and passers-by were to ensure structural integrity, implement an effective system for monitoring and inspecting the structure, and ensuring that there was no compromise to the nature of the scaffold. The nature of the risk and the severity of the risk are matters that are relatively obvious. The risk of working at height and the risk of the structure causing damage to workers or passers-by was manifest. Only good fortune meant that death or serious injury was avoided.

[14] The departures from industry standards were material. The failures were as have been set out above. The hazard must have been obvious on any consideration of the circumstances and it would not have been an overly costly or onerous burden to

have put into place best practice and to have ensured that the structure was sufficiently stable to remove the risk of conditions that would be regarded as ordinary destabilising the scaffold with the risks resulting to workers and passers-by.

[15] The consideration of these matters also includes consideration of case law. Both counsel had referred to *Department of Labour v Eziform Roofing Products Ltd.*[2] In this case there was a significant lack of training. There were no safety methods in place when the injured workman went up onto the roof. The High Court did not consider carelessness on the part of the workman could provide adequate reasons for the assessment to be anything less than at the cusp of the medium to high band for fines.

[16] Counsel for the defendant argues that although the failures here are significant, they were not a complete failure to provide a system designed to protect against the risks that were known to exist. This was a situation, on the defence submission, of inadequacy rather than absence or a situation in which no thought was given to the requirements of safety.

[17] In *WorkSafe New Zealand v Syron & Priority One Construction Limited* a scaffold was used on a building site.[3] The scaffolding had areas which were incomplete including a guard-rail. This was a clear and obvious hazard. The victim fell and was injured suffering multiple fractures. Culpability was found in the middle band.

[18] The defence submit the defendant here is less culpable given the failure of a safe system rather than the absence of a portion of a safe system. This, on the other hand, be argued by the prosecution to be a case where these were professional scaffolders and they had a duty as part of their core business to ensure a safe system and so in such cases the matter is looked at through the lens of people who are in a high degree of knowledge about the requirements and have no illusions about the failures to provide such systems.

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[2] *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526.
[3] *WorkSafe New Zealand v Syron & Priority One Construction Limited* [2016] NZDC 27011.

[19] In *WorkSafe New Zealand v Totally Rigging Limited* there is a further instance of safety measures failing as opposed to not having any safety measures.[4] Again, this was found to be within the middle band as to culpability.

[20] The absence of death or injury is something which must be taken into account in terms of the culpability but it is one of a number of factors. The presence of good fortune and the absence of a predictable outcome is still a factor that *Stumpmaster v WorkSafe New Zealand* says I need to take into account.

[21] The fixing of starting points within a band is always going to be something of a difficult exercise. In this case I come to the view that a starting point of $400,000 is fair having regard to the culpability, the business interests that the defendant has which include minding the safety requirements of the scaffolding as a primary responsibility, but also taking into account the fact that this was a failure of a system that was designed to make safe and that in the end fortunately no one was harmed.

[22] From that position I then move to consider whether there are any mitigating aspects within the offending and I see nothing within the offending itself to be mitigating.

[23] Moving to the personal characteristics of the defendant company, it has a good record as far as safety is concerned. Mr Terry Jenkins has filed an affidavit showing the efforts to ensure that this is something which will not recur on the company's business. Both the prosecution and the defendant agree that a 10 percent discount for mitigating factors is in order and I see that as appropriate.

[24] The defendant company is entitled to a 25 percent discount for early guilty plea and the defendant seeks a contribution to costs in the sum of $1794 and I make an order as far as costs is concerned.

[25] The calculation of the fine which would be appropriate needs to take into account the means of the company. I have had affidavit evidence which has been filed on the part of the company indicating the company's financial position. The company

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[4] *WorkSafe New Zealand v Totally Rigging Limited* [2016] NZDC 21266.

has traded for a period of time. It has 100 employees. I have been given details of published accounts for 2015 and 2016, cash book accounts beyond that date and draft accounts for 2018.

[26] I had initially some concerns that the company's records showed expenses that might have been able to be reduced to put it in a position to meet a fine that is closer to that which I calculate as being the appropriate level of penalty taking into account the factors that went to the setting of a fine and consideration of mitigating aspects.

[27] The company has a historical and significant GST debt which is significant in as far as its continued existence is concerned. It faces competition from a former director of the company who is attacking the company for business and luring employees away making the company's position difficult. Further, financial working capital from banking institutions has been difficult to obtain and there is a significant loan which has been made by directors of the company to enable the continued survival of the company.

[28] The affidavits are detailed. They have the support of published accounts and accounts that have the appearance of meeting the appropriate ratios between gross profit, net profit and expenses. The prosecution have not sought to cross-examine the person who has provided the financial records and the conclusion from Mr Chen who has provided the records is that the company can pay a fine of $48,000 if allowed to pay the financial penalty at the rate of $2000 per month.

[29] I take those submissions into account. I am compelled to consider what the fine would have been otherwise and what a company in good financial standing would have had to pay and I am prepared to significantly compromise the amount which is due to be paid, given the financial position of the company and the fact that I do not consider this to be a case in which the company's performance is so poor that restrictions that might indeed end its ability to trade and would take away the jobs of the employees who work for the company is an approach that I should take.

[30] Accordingly, I reduce the sum of the fine which is payable to the sum of $60,000. That is to be paid at the rate of $2000 per month. The monthly payments of

fines will commence on 1 July but on 1 June the costs which have been awarded will be due to be paid. So while I have exceeded the amount which the company has suggested itself, I have taken into account the financial capacity of the company to meet the fines that are available.

[31] I will make an order that the financial affairs of the company which have been provided by Mr Chen are to be sealed, are not to be available for inspection by any party save with the leave of a Judge. The reason I make the order in that form is if there was something wrong with what was provided and that was provable, the prosecution would need to have access to it, but, save for that, it is restricted as to who may see it.

[32] That is the affidavits that are supplied because the company will not want its records available to competitors so that is the purpose of the order, to restrict access to the affidavits of Mr Chen. It does not relate to submissions about the offending or anything in relation to that. Mr Jenkins' affidavit is available for people to see but the records of the company's trading will not be available except with the order of a Judge.

[33] Within the sentencing notes I refer to some information about the company. It is the affidavits and the accounts that are not to be seen. What is in the sentencing notes will be able to be printed. And I speak in generalities in that in any event.

D J Sharp
District Court Judge