**IN THE DISTRICT COURT**
**AT NORTH SHORE**

**CRI-2014-044-003588**
**[2015] NZDC 8468**

**WORKSAFE NEW ZEALAND**
Prosecutor

v

**INTER PRO GROUP LIMITED**
Defendant

Hearing: 3 February 2015

Appearances: S Woodhead and E Jeffs for the Prosecutor
K Badcock for the Defendant

Judgment: 3 February 2015

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**NOTES OF JUDGE L I HINTON ON SENTENCING**

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[1] Inter Pro Group Limited faces one charge under s 43 and s 50(1)(b) of the Health and Safety in Employment Act 1992 that having been given a prohibition notice, and controlling a place of work to which that notice relates, failed to ensure no action was taken in contravention of it. The maximum fine is $250,000.

[2] I have considered written submissions from Ms Woodhead on behalf of the informant WorkSafe New Zealand and from Mr Badcock counsel for Inter Pro Group.

[3] I have seen written other material including a declaration from the managing director of Inter Pro Group, and material from the company's accountant and a subsequent memorandum of counsel dated 30 January 2015. I have had the benefit also of submissions from Mr Badcock and Ms Woodhead this afternoon for which I thank them.

[4] The brief facts relating to this offending are that the defendant company was visited on 20 March 2014 at a property in Madison Terrace, Millwater where the company was building a house. Unsafe scaffolding was observed.

[5] The inspectors issued a prohibition notice, and gave it to Mr Zhu who was on site at the time. A further copy of the prohibition notice was attached to the front access area of the scaffolding. The concerns about the unsafe scaffolding and process for the prohibition notice were explained to Mr Zhu. The notice clearly prohibited in its terms any further work until lifted by a health and safety inspector. So that was on 20 March 2014.

[6] On 30 April 2014 one of the inspectors revisited the property and observed the brickwork and cladding on the house had been completed, and the scaffolding removed. The company had continued to use the scaffolding to complete the work required to pass a council pre-line inspection, and WorkSafe New Zealand had not further inspected the scaffolding or lifted the notice since it had been issued.

[7] Counsel here are, not surprisingly, agreed as to the approach to this sentencing exercise. Of course, the Sentencing Act 2002 applies with key items of deterrence and accountability and responsibility being relevant. The Courts must be consistent to the extent that it is possible in our sentencing, and we must impose the least restrictive outcome that is possible. The Courts must have regard to the ability of an offender to pay. Each of those matters are particularly relevant in this case, and I will refer to them presently.

[8] The gist here is an assessment of culpability against the backdrop of the purpose of and the policy underpinning the legislative provisions. Counsel are agreed on the application of the *Hanham & Philip Contractors* case. A fine must be fixed as a starting point on the basis of culpability with adjustment for aggravating and mitigating circumstances.

[9] A starting point in the low culpability range is said to be appropriate, that is a fine of up to $50,000. There is however, a real question mark over what that starting point should be based on the submissions which have been made.

[10] For the informant Ms Woodhead has set out well factors that are relevant in assessing the quantum of the fine. She identifies the practicable steps that the defendant company failed to take including ensuring the scaffolding was safe and complied with best industry practice guidelines, and were signed off by a certified advanced scaffolder. It is widely accepted, she submits, in the construction industry that that fall from high protection is required when working at height. The submission is made that the departure from industry standards in this matter is significant failure to have adequate scaffolding and against industry norms.

[11] The prosecutor submits that the potential for serious harm is particularly high and refers to the MBIE best practice guidelines at page 6 which states:

> Investigations by the Ministry of Business, Innovation and Employment into falls while working at height show that more than 50 percent of falls from less than three metres and approximately 70 percent of falls are from ladders and roofs. The cost of these falls is estimated to be $24 million a year – to say nothing of the human cost as a result of these falls.

[12] It is submitted that the possibility of a fall from a height is an extremely obvious hazard which could result in serious injury or death. There is, I note in that regard, no actual detail stated in the summary of facts as to the gravity of the departure here or the specifics of the prohibition notice. Although I allow that Ms Woodhead has this afternoon in her submissions referred to some component items of the prohibition notice.

[13] I do not think for my part that makes a lot of difference so far as this afternoon's sentencing exercise is concerned. For as I noted some of the items which I had assumed referred to in the prohibition notice were stated to have been addressed or remedied, and were stated to have been addressed or remedied in Mr Badcock's submissions.

[14] In any event there are then cases cited by Ms Woodhead which apparently support a starting point in the range of $40,000. Amongst those cases is a case of *Eziform* involving not a prohibition notice but failure of safe work procedures and lack of clear safety plans where an employee had suffered very serious injury

following a fall from height. In that case there had been a starting point of $60,000 in the District Court which was increased on appeal to $100,000.

[15] It is not immediately apparent to me what relevance that case has in the present exercise. Suffice to say one recognises that it illustrates, I guess, the proposition that falls from height are obvious and extreme hazards which can result in serious fines in the case of actual injury when appropriate charges are bought under different sections.

[16] I should note at this point that the further memorandum of counsel of 30 January 2015 had annexed to it a decision of Judge Farish in the District Court at Christchurch. This is a case called *Collings* and I understand from counsel that the reason for a previous adjournment of this sentencing was that the transcript of the Judge's decision was not available. The informant wished this placed before the Court as it apparently supports a starting point of $40,000. I understand that there is very little, if any, relevant other authority in relation directly to the question of a starting point in offending for failure to comply with prohibition notices.

[17] In the *Collings* case there had been on my understanding no guard rails and working at height. A prohibition notice was issued and generated, a response described as belligerent by Judge Farish. At the time it was first issued Mr Collings a builder of some 39 years' experience had apparently advised the inspector that he proposed to continue to work. However, some modest response was made by him and an insufficient rail put in. The officials returned and confirmed to a still belligerent Mr Collings that the remedial work was not good enough.

[18] This was described by the Judge as a "serious and deliberate breach" which justified a starting point of $45,000. In the event substantial discounts were allowed Mr Collings and the end fine was considerably less.

[19] I mention that case because of its importance to the informant's analysis here but I do note that it appears to me distinguishable from the present situation. For Inter Pro Mr Badcock emphasises in his submission, and this is relevant in terms of my comments on the *Collings* case, that following the prohibition notice being

placed the company immediately replaced all missing rails and planks, and took steps to locate and arrange for the scaffolding subcontractor to install the missing safety gates and recertify the scaffolding for use.

[20] However, despite earnest attempts by the company the scaffolding subcontractor did not carry out the installation of the gates or re-inspection primarily because by that time it had apparently become impecunious. Faced with mounting time pressures on site the defendant used the scaffolding to finish the project. So that this is not a case of a belligerent response equating a serious and deliberate breach of the ilk that Judge Farish dealt with in the *Collings'* case.

[21] With respect to the culpability assessment that is required here Mr Badcock refers to the following matters in particular; first that the company had understood it had employed a competent scaffolding subcontractor experienced in such work to provide a complete and safe scaffold. The company had understood the scaffolding was initially signed off by the scaffolder. Without diminishing in anyway the seriousness of the offending, it is further submitted that the departure from industry standards was not as significant as the informant has suggested.

[22] Nevertheless, it is accepted that the breach of the prohibition notice was a significant departure from industry practice for which the defendant is extremely remorseful. Mr Badcock notes that here no harm or incident occurred.

[23] In summary Mr Badcock submits this afternoon that an appropriate starting point in relation to a fine is in the range of $20,000 to $25,000. So that on analysis in the final event having regard to the *Collings'* decision the distance between informant and defence on the starting point is not gross.

[24] The view I have taking into account the submissions from counsel, and the *Collings'* decision, is that a starting point of $25,000 is appropriate. I regard the *Collings'* decision as distinguishable for the reasons that I have mentioned earlier.

[25] I note that the defendant's submissions in relation to work undertaken following the issue of the prohibition notice are not challenged by the informant. I

accept that some steps were taken, albeit not optimal steps taken, that are relevant in the culpability assessment. This is not a case of Inter Pro Group's simply thumbing its nose at enforcement action instigated by the inspectors.

[26] From that starting point of $25,000 the company is clearly entitled to a discount of 25 percent for its guilty plea. There are in addition mitigating factors which may properly be recognised by the Court. These are summarised in Mr Badcock's submissions to include a good safety record with no prior prosecutions allowing nevertheless that there have been previous prohibition notices issued which are relevant in that assessment, so that the company cannot claim full credit that otherwise be available to it.

[27] Mr Badcock notes that Inter Pro Group was co-operative with the informant, and took remedial action to put in place formal procedures in relation to any future prohibition notice which may be issued. The company is, of course, remorseful for the offending and has accepted responsibility.

[28] In my view the company is entitled to a total discount of 40 percent in relation to these mitigating factors. I note that that discount level aligns with the discounts afforded by Judge Farish in the *Collings'* case on my understanding of it.

[29] So that working from a starting point of $25,000 allowing a discount of 40 percent or $10,000 the end sentence would be one of $15,000. Of course, the informant recognises that the Court must take into account the financial capacity of an offender to meet a fine.

[30] There is evidence before the Court in the form of a statement from Inter Pro Group's accountant, and a declaration from Mr Zhu which points to the company not being in a strong albeit not in a necessarily very weak financial position. This has been supplemented I understand by the production of further detailed financial statements, which were sought by the informant for review purposes in relation to the material that had already been filed. I am informed by Ms Woodhead this afternoon that the informant is satisfied that the company does not have the wherewithal to pay more than a modest fine, modest being something

which is, of course, for the Court to assess. I have no particular science or guidance from Mr Badcock in relation to what that could be although his submissions are in effect that a fine of between $5000 and $9750 is the appropriate range.

[31] I have not sought the financial statements. Both parties, informant and defendant, are agreed that a modest fine is appropriate, and that a discount should be made. The end sentence that I had was $15,000 and I regard it as appropriate that a deduction of $5000 be made from that. A modest fine will vary depending upon the circumstances.

[32] Ms Woodhead is however correct that fines must still "bite". There is no utility in no suffering being imposed under the circumstances, and she is right that the registrar can in appropriate cases allow time for payment. I would expect however that from a fine of $10,000 a reasonable amount of over more than 50 percent could be paid immediately by the company. I base this on advices from counsel this afternoon, but also on my brief assessment of the financial material such that it is that I have already seen.

[33] I have for completeness taken into account that this is not a large corporation or part of any franchise operation as Mr Badcock puts it at the start of his submissions, and that it is in fact a closely held company currently operated by a sole shareholder who spends long hours working in the business.

[34] I restate however that as I mentioned near the commencement of my decision this afternoon that the assessment of culpability here must be taken against the backdrop for the purposes of and policy underlying the legislative provisions. Prohibition notices are there for a purpose, they are to facilitate the prevention of self-evidently serious injury which can arise because of tumbles from heights.

L I Hinton
District Court Judge