IN THE DISTRICT COURT
AT AUCKLAND

CRI-2014-004-011542
[2015] NZDC 17004

WORKSAFE NEW ZEALAND
Prosecutor

v

YAKKA CONTRACTING LIMITED
Defendant

Hearing: 19 August 2015

Appearances: L Moffitt for the Prosecutor
S Bonner for the Defendant

Judgment: 19 August 2015

NOTES OF JUDGE G A FRASER ON SENTENCING

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[1] Yakka Contracting has pleaded guilty to one charge of failing to take all practical steps to ensure the safety of its employees under s 6 Health and Safety in Employment Act 1992. The charge carries a maximum fine of $250,000.

[2] The relevant facts are set out in the summary of facts and I do not intend to traverse those for sentencing purposes. It is agreed that those are the facts relevant to the sentencing.

[3] Work and Safety have filed sentencing submissions and they submit they submit that a starting point in the region of $70,000 is where this matter should sit, acknowledging discount for mitigating factors and submitting that a number of people had been potentially exposed to asbestos fibres as a result of the defendant's breach but no realised harm has been identified.

[4] The prosecutor's submission in respect to reparation acknowledges that no harm has been occasioned in this instance but also indicates that there is a discretion despite that to make an award in respect of risk.

[5] Assessing the quantum, the prosecutor has referred to the culpability factors, identification of the operative acts or omissions, the fact that the defendant should have ensured that the employee was adequately trained and adequately supervised, the nature and seriousness of the risk of harm occurring as well as the realised risk, acknowledgement that a risk of harm from exposure of asbestos is significant and may be some years after exposure before any quantification of harm can be determined. In this case the prosecutor submits that the charge relates solely to the potential exposure to the employees of the defendant.

[6] The obviousness of the hazard is set out and that relates to the fact that the defendant held out expertise, employed approved certificate of competence holders, and the contractee should have been able to rely on the defendant to do the job properly without exposing other workers to potential harm.

[7] The degree of departure from industry standards provision is also submitted, and the prosecution submits that the conduct by the defendant company was a clear departure from the Best Practice Guideline.

[8] The availability cost and effectiveness of the means to avoid the hazard, the prosecutor submits that the means to do the job safely were available and the cost of the defendant would have been minimal. The defendant submits that there is a need for general deterrence, the need to send a strong message to all those involved in construction or demolition work where the risks from asbestos are apparent.

[9] Various authorities have been cited by the prosecutor to assist in terms of determining start points and the level of culpability. The prosecutor submits culpability falls at the mid-range of the medium culpability band, recognising that a start point fine in the region of $70,000 should be imposed, with discounts for the factors set out in the submissions and an early discount plea for guilty up to 25 percent.

[10] Further submissions have been made by Ms Moffitt today for the prosecution in regards to the breaking down of the asbestos sheets and the potential risks of fibres in the air as a consequence of that. There is also reference to the fact that there was no dampening down at the point of the breakage. Essentially the prosecution submits this is not the case of low level culpability, particularly when taking into consideration the expertise being held out by the defendant. The way in which the item was being handled in these circumstances was contrary to any guidelines or approved standards.

[11] Mr Bonner has also filed significant submissions. There is an acknowledgement that the employee was not following the company's approved methodology although it submitted there was no actual harm to any person and the risk of harm was minimal.

[12] Mr Bonner submits that Yakka has an impeccable safety record up until this time. That it has in place comprehensive health and safety procedures and it has developed a strong reputation in the asbestos removal and demolition industries. It is conceded that at the time the company had in place health and safety management plans and policy, had set up an employee and subcontractor health and safety handbook, a site specific safety plan and an approved methodology for the removal of ACM from the site.

[13] Mr Bonner submits that the culpability is at the lower end of the lower band for sentencing and on that basis a fine in the region of $5000 to $6000 is all that should be imposed. He submits a starting point where the prosecution suggest matters lie is out of all proportion to the gravity of the offending. The defence also submit that no order for reparation is required as no harm was caused to any person.

[14] Mr Bonner has made submissions in regards to the financial position of the company and has attached background material to substantiate that. He has made reference to steps that have been taken since the accident to ensure that better training and supervision systems are in place. He has also made reference to various authorities and as I have said acknowledges that the employee in question was inadequately trained or supervised, although has submitted today that there is

nothing that determines that supervision should be on site in the situation as we are presently dealing with, and that the company should have been able to rely on its procedures and guidelines in the circumstances. The company has accepted it could have taken additional practicable steps. He submitted no harm was suffered by an employee and there was no potential for those in the vicinity to be harmed and that all of the employees were wearing the appropriate PPE respiratory gear.

[15] It is acknowledged that there was a potential risk of harm to employees in the immediate asbestos removal area but they were also wearing the appropriate PPE gear as well. The potential for others to be harmed was minimal.

[16] The obviousness of the hazard is referred to. The employee in question was acting in good faith attempting to prevent any sharp edges protruding from or puncturing the polythene bags that the product was being placed in. Ironically the defendant submits that the employee's aim was to minimise the potential for asbestos fibres to be released into the air outside of the asbestos demolition area. The departure from industry standards, the defence submits, is not significant. The company acknowledges that they should have ensured that the employee had been better trained or more adequately supervised and that matters have been amended since the offending to determine that something like this does not happen again.

[17] Counsel submits a starting point is at the lower end, in the region of $10,000 to $15,000.

[18] Mitigating factors are referred to, co-operation and remedial action is referenced, remorse is acknowledged, no previous convictions, early guilty plea and there is reference to financial capacity including a loss sustained on the project, although that is not directly relevant. Ultimately, as I say, the end point fine submitted by the defence is in the region of $5000 to $8500.

[19] It is accepted the principle as set out in *Department of Labour v Hanham Contractors Ltd* (2009) 9 NZELC 93,095 are to be followed for any sentencing in this regard, firstly, fixing the amount of reparation, then the amount of the fine and then, finally, an overall assessment.

[20] Looking at reparation it is accepted in this case no reparation arises. There is no identification of any evidence that indicates an employee or for that matter anyone has been harmed or injured as a result of the commission of the offence. It is accepted the Court can also make a reparation order in respect of risk of harm but it is accepted that it was minimised by appropriate safety systems and equipment and accordingly any such risk was negligible.

[21] Despite the passage of time, WorkSafe has not identified any identifiable victim as such and it is accepted by the Court that no actual harm has occurred and any risk of harm was minimised. No emotional harm is imposed. There are no identifiable victims and in the circumstances no reparation will be fixed for the offending.

[22] In terms of fixing the fine, having regard to the *Hanham & Philp* culpability factors in terms of identification of the operative acts or omissions and practicable steps, the employee was inadequately trained and supervised. The offending occurred within a controlled area not accessible to others except employees unless they were wearing appropriate safety gear. All employees were wearing appropriate safety gear and in all other respects were complying with the defendant's methodology and the Best Practice Guidelines and the 1998 asbestos regulation. The area was covered by an end of day site cleanup by an industrial vacuum which, it is submitted, would clear any residual asbestos fibres.

[23] A site induction was not undertaken along with training prior to the employee site involvement. A certificate of competence holder visited the site to check for correct procedures. The company accepts the employee failed to follow the company procedures and acknowledged it could have taken additional steps.

[24] The nature and seriousness of the risk of harm. It is accepted and cannot be argued that the risk of harm from asbestos exposure is significant. Here the risk of harm was minimised in the way that I have articulated and the Ministry accepts that one-off exposure to asbestos in a ventilated area has minimal health effects and in this case no actual harm has been caused.

[25] In terms of the obviousness of the hazard it is recognised by the employer that procedures had been put in place to deal with the hazard. The employee was acting in good faith handling the non-friable asbestos which is distinguished from friable asbestos although the risk of release of fibres into the air from non-friable asbestos is much less. But when broken it is friable.

[26] The degree of departure from industry standards, the means available to mitigate the risk. The defendant's conduct which facilitated the breakage of AC sheets has been explained. The defendant has submitted that there were not whole sheets that were being dealt with here but essentially areas of what might be described loosely as off-cuts which were being broken in order to be accommodated within waste bags. The defence submits ironically this action was occurring in order to prevent exposure and difficulty at a later point when the bags would be handled by others.

[27] It is conceded unnecessary breakage should have been avoided and the conduct was a clear departure from industry standards. The defendant acknowledges the employee could have been better trained or more adequately supervised but the steps taken since have been put in place to reduce the risks of a one-off incident as in this case.

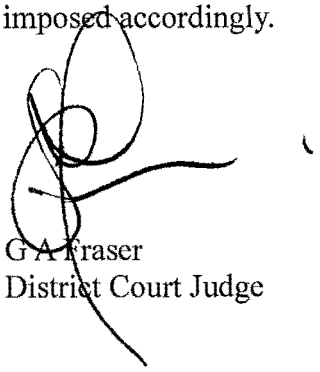
[28] The availability cost and effectiveness, the means to avoid the hazard. The means to do the job safely were available and any cost to the defendant would have been minimal.

[29] Turning to the starting point and recognising these factors, I agree with the defence this is a case of low culpability where there is a starting point fine of up to $50,000. Of all the cases cited the most analogous to the present case is clearly that of the *Department of Labour v Ward Demolition* (District Court Auckland, 21 August 2009). It is accepted though in *Ward Demolition* that the circumstances were more concerning, broken pieces of asbestos in that case were not cleaned from the path of machinery and were liable to be run over and crushed, potentially releasing asbestos fibres into the air and the soil. The defendant accepted in that case that some pieces had not been cleared up methodically as work progressed. The distinguishing

features from that and the present case is that in the case today all of the asbestos was being bagged and the only release of possible fibre occurred at the point of breakage when employees were wearing protective gear.

[30] I weigh up the facts of this case against the culpability factors, having regard to the maximum penalty, the level of penalties originally contended for by the prosecution and the sentencing decisions cited, particularly that of *Ward Demolition*. I also take into account the principles and purposes of sentencing as set out in the Sentencing Act 2002. In doing so, in recognition of all of that, I fix a start point at $15,000. I give credit for co-operation, remorse, remedial action and financial loss in the sum of $2250. I further credit a favourable safety record and no previous convictions in the sum of $1275, less a credit for a guilty plea of $2868 which leaves an end point of $8607.

[31] I accept and determine that is within the defendant's means and that fine is imposed accordingly.



G A Fraser
District Court Judge