IN THE DISTRICT COURT
AT WESTPORT

I TE KŌTI-Ā-ROHE
KI KAWATIRI

CRI-2018-086-000174
[2020] NZDC 8361

WORKSAFE NEW ZEALAND
Prosecutor

v

MCMANUS HOTEL LTD
Defendant

Hearing: 7 May 2020

Appearances: Mr Brennan for the Prosecution
Mr Taffs for the Defendant

Judgment: 14 May 2020

RESERVE JUDGMENT ON SENTENCE OF JUDGE S J O'DRISCOLL

Introduction

[1] The defendant company appeared for sentencing on Thursday 7 May 2020 in the Westport District Court, having pleaded guilty to two charges of failing in its duty as a person conducting a business or undertaking ("PCBU"), to ensure as far as is reasonably practicable, the health and safety of workers, pursuant to ss 36(1)(a), 48(1) and (2)(c) Health and Safety at Work Act 2015 ("HSWA").

[2] The charges state that the defendant failed to take reasonably practicable steps to ensure workers undertaking demolition at its site, were not exposed to serious illness or death from the risks of exposure to asbestos and being hit by falling objects.

[3] The maximum penalty is a fine of $1.5 million.

[4] I heard submissions and adjourned sentencing pending consideration of the submissions and now give my decision in this reserved decision.

Summary of Facts

[5] McManus Hotel Ltd ("the defendant") purchased Larsons Hotel, at 40-42 Palmerston Street, Westport, sometime in 2016/2017. The hotel was a two-storey building, built in the 1800's, with a one-storey three studio accommodation block, added sometime in the mid-1990's. The defendant bought the hotel with the intention of demolishing the old two-storey building and developing the site. McManus Hotel Ltd has two directors Barrie and Ross Forsyth.

[6] Shane Bennett is a sole trader operating under the trading name Dig In Contracting ("the contractor"). Mr Bennett approached the defendant and offered to demolish the hotel in return for salvage materials, which he intended to sell.

[7] The defendant told WorkSafe that the development was to be done on borrowed money and so they were pleased with Mr Bennett's offer and engaged him.

[8] The defendant and Mr Bennett conducted a walk-though of the site, but only for the purpose of assessing the value of the job. The defendant conceded to WorkSafe they did not discuss hazards or risk management controls during the walk-through.

[9] Mr Bennett told the defendant he was experienced in demolition. The defendant did not conduct any other pre-qualification checks on the contractor before engaging it.

[10] On 21 August 2017, the Buller District Council issued a building consent for demolition of "the old areas of the Larsons Hotel".

[11] The defendant did not carry out a systematic asbestos survey prior to demolition work starting. In explanation, the defendant said it knew asbestos was dangerous but did not give it consideration because of the age of the building.

[12] The defendant provided WorkSafe with an unsigned "job hazard analysis sheet" dated 21 August 2017, which had been completed by Mr Bennett. This did not identify the risk of exposure to asbestos. No demolition plan was prepared for the work.

[13] The contractor began demolition of the hotel sometime in July/August 2017. Prior to work commencing it erected a fence to limit access to the site. Mr Bennett told WorkSafe that the defendant was supposed to have done this prior to his arrival.

[14] The defendant supplied the contractor with two excavators; a Hitachi UH083 and a Hyundai 5.5 tonne excavator. The excavators were owned by Coastal Properties Ltd, one of Mr Ross Forsyth's other companies. The Hitachi UH083 excavator did not have front protection bars or falling object protection to protect workers from objects penetrating the operator's cabin.

[15] Mr Bennett was assisted in the demolition work by a Mr Rex Reid who previously worked for Mr Bennett. It is not clear who paid Mr Reid, but the defendant was aware he was assisting with the work on an ongoing and regular basis.

[16] On 6 September 2017, a member of the public contacted WorkSafe raising concerns about unsafe demolition practices.

[17] On 8 September 2017, WorkSafe issued a non-disturbance notice to the defendant.

[18] An asbestos sample was carried out by CBL-Air on 13 September 2017, which confirmed the presence of asbestos at the site.[1]

[19] Bulk asbestos sampling was carried out by TriEx Ltd between 26 September 2017 and 3 October 2017. Of 59 samples taken, 30 tested positive for asbestos.

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[1] It is assumed this testing was ordered by Worksafe, but the summary of facts doesn't make this clear.

Victim Impact Statement / Restorative Justice

[20] The identified victims are Mr Bennett and Mr Reid. Neither has supplied a victim impact statement to the Court. Restorative justice has not taken place.

The Law

[21] Section 48 Health and Safety at Work Act 2015 (“HSWA”) provides:

> **48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness**
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> (1) A person commits an offence against this section if—
>
> (a) the person has a duty under subpart 2 or 3; and
>
> (b) the person fails to comply with that duty; and
>
> (c) that failure exposes any individual to a risk of death or serious injury or serious illness.
>
> (2) A person who commits an offence against subsection (1) is liable on conviction,—
>
> (a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $150,000:
>
> (b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $300,000:
>
> (c) for any other person, to a fine not exceeding $1.5 million.

[22] Section 36 of the HSWA provides:

> **36 Primary duty of care**
>
> (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—
>
> (a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and
>
> (b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.
>
> (2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

(3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—

(a) the provision and maintenance of a work environment that is without risks to health and safety; and

(b) the provision and maintenance of safe plant and structures; and

(c) the provision and maintenance of safe systems of work; and

(d) the safe use, handling, and storage of plant, substances, and structures; and

(e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and

(f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

(g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

(4) Subsection (5) applies if—

(a) a worker occupies accommodation that is owned by, or under the management or control of, a PCBU; and

(b) the occupancy is necessary for the purposes of the worker's employment or engagement by the PCBU because other accommodation is not reasonably available.

(5) The PCBU must, so far as is reasonably practicable, maintain the accommodation so that the worker is not exposed to risks to his or her health and safety arising from the accommodation.

(6) A PCBU who is a self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

[23] Section 151 of the HSWA requires the sentencing court to have regard to:

(a) Sections 7 to 10 Sentencing Act 2002 ("SA"); and

(b) The purpose of the HSWA;

(c) The risk and potential for illness, injury, or death that could have occurred;

(d) Whether death, serious injury or serious illness occurred or could have been reasonably expected to have occurred;

(e) The safety record of the offender;

(f) The degree of departure from prevailing standards in the offender's industry; and

(g) The offender's capacity to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[24] The guideline judgement on sentencing under s 48 of the Act where the defendant is a company is *Stumpmaster v WorkSafe*.[2]

[25] The Court held the approach is as follows:

1) Assess the amount of reparation;

2) Fix the amount of the fine by reference to the guideline bands and aggravating and mitigating factors;

3) Determine whether orders under ss 152-158 of the HSWA are required; and

4) Make an overall assessment of the proportionality and appropriateness of the penalty imposed on the offender.

[26] Under step one, the Court found that while the legislation had increased the level of fines, this did not mean reparation levels should be lessened, because the harm remains unchanged.[3]

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[2] *Stumpmaster v Worksafe* [2018] NZHC 2020.
[3] At [55].

[27] At step two, the starting point is determined by an assessment of the culpability falling within one of four bands and is then adjusted for mitigating and aggravating factors and any guilty plea.[4]

[28] The bands are:

- low culpability: a fine of up to $250,000;
- medium culpability: a fine between $250,000 and $600,000;
- high culpability: a fine between $600,000 and $1,000,000;
- very high culpability: a fine of more than $1,000,000.

[29] In determining the band, the Court held the following factors from *Department of Labour v Hanham and Philp Contractors*[5] (the guideline judgment under the previous Act) are still relevant, as they are encompassed in s 151 HSWA.[6]

(a) Identification of the operative acts or omissions at issue, usually the practicable steps which the Court finds it was reasonable for the offender to have taken in terms of s 2A of the HSEA and, latterly, s 22 of the HSWA;

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk;

(c) The degree of departure from standards prevailing in the industry;

(d) The obviousness of the hazard;

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard; and

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[4] At [53].
[5] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC).
[6] At [37].

(f) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[30] Step three, allows WorkSafe to apply for orders under s 152-158 of the Act including under s 152, for a sum towards the cost of prosecution including investigating the offending.

[31] Step four, requires an assessment of the proportionality and appropriateness of the combined package of sanctions imposed by the previous steps.[7] This includes an assessment of the financial capacity of the offender to pay. This may justify an increase under s 151(2)(g) of the HSWA or a discount under ss 8(h), 14(1), 40(1) and 41 of the SA.[8] Any discount should be taken off the fine not the reparation.

[32] I therefore adopt this approach in this case.

Sentencing purposes and principles

[33] The sentencing purposes most relevant to this case, are the need to hold the offender accountable for the harm done, denunciation, and individual and general deterrence.[9] The need to provide for the interests of the victim including through reparation, are important sentencing purposes in cases under the HSWA, but here their application is limited by the reluctance of Mr Bennett and Mr Reid to engage with the prosecution.

[34] The relevant sentencing principles are, the need to take into account the gravity of the offending, the culpability of the offender, the seriousness of the offence as indicated by the maximum penalty, the effects of the offending on the victim, whether the defendant's circumstances make an otherwise appropriate sentence disproportionately severe and the need for consistency in sentencing.[10]

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[7] At [3].
[8] At [23].
[9] Sentencing Act 2002, s 7.
[10] Sentencing Act 2002, s 8.

[35] The HSWA's purpose includes protecting workers against harm to their health, safety and welfare by eliminating or minimising risks arising from work.[11]

Step 1: Reparation

[36] Reparation may be imposed in relation to loss or damage to property; emotional harm or loss or damage consequential on any emotional or physical harm or loss or damage to property.[12]

[37] Mr Bennett and Mr Reid were both exposed to the risk of exposure to asbestos but do not seek reparation. WorkSafe has been unable to provide any information on any emotional harm suffered by them.

[38] In *WorkSafe v Hutt Construction*[13] and *WorkSafe v DKL Projects*[14] reparation for emotional harm was awarded to employees exposed to asbestos in the absence of victim impact statements.

[39] In *WorkSafe v Essential Homes Ltd* this year, Judge Macdonald held there was no evidential basis for a reparation order where employees had declined to provide victim impact statements detailing any emotional harm suffered.[15]

[40] His Honour noted that while reparation for emotional harm can be ordered in the absence of a victim impact statement, this usually occurs in the criminal jurisdiction where a description of events and the physical injuries sustained make it easy to infer the extent of emotional harm suffered. Where the harm is exposure to risk, absent any evidence of emotional harm, harm is not necessarily something that can be inferred.

[41] Judge Macdonald also doubted whether the employees met the definition of a victim, as neither were physically injured or had an offence committed against them.[16]

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[11] Health and Safety at Work Act 2015, s 3(a).
[12] Sentencing Act 2002, s 32.
[13] *WorkSafe New Zealand v Hutt Construction 2013 Ltd* [2016] NZDC 3652.
[14] *WorkSafe v DKL Projects* [2016] NZDC 25800.
[15] *Worksafe v Essential Homes Ltd* [2020] NZDC 5873.
[16] Sentencing Act, s 4 defines victim as a person against whom an offence is committed by another person and a person who through or by means of, an offence committed by another person, suffers

[42] I find, in this case, at this stage, there is an insufficient evidential basis for a finding that there has been any physical harm to Mr Bennett or Mr Reid or to infer they have suffered any emotional harm from the prospect that physical harm may occur in the future. It is clear the "victims" have not been cooperative in this prosecution.

[43] I therefore make no order for reparation.

Step 2: Fine

[44] The prosecution submit it is appropriate to adopt a global starting point as the two charges relate to the same incident or demolition. I raised this issue with Mr Taffs who did not take issue with this methodology.

[45] I raised this with counsel as while there were two acts, it may have been argued there were different levels of culpability relating to the respective charges. Nothing turns on the however.

[46] The prosecution submits the totality of the offending falls within the middle of medium culpability band in *Stumpmaster* and a starting point of a fine of $450,000 is appropriate.

[47] The defence did not identify a band in the written submissions but when I asked Mr Taffs about this, he said the offending should fall within the lowest band of culpability. The written submissions focussed on the defendant's financial capacity and emphasised that a fine of any level would be self-defeating due to the impecuniosity of the defendant.

Operative acts or omissions

[48] In relation to the risk of exposure to asbestos, WorkSafe have identified that it was reasonably practicable for the defendant to have:

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physical injury, or loss of, or damage to, property.

(a) followed an adequate contracting process that identified the risks associated with the demolition;

(b) ensured the contractor had the expertise to complete the job;

(c) carried out a systematic asbestos survey prior to work starting; and

(d) developed an adequate demolition plan prior to work starting.

[49] The defendant accepts that it did not identify the risks associated with the demolition, as it assumed that an old building would not contain asbestos and failed to turn its mind to the risk asbestos was present from subsequent renovations. The defendant also accepts that as a result, it did not conduct an asbestos survey prior to work starting.

[50] The defendant accepts that it cannot avoid ultimate liability for the failings of its contractor, but submits it relied on Mr Bennett's claimed expertise in demolition, including in providing a compliant plan of operations and proper supervision.

[51] It appears that the defendant was attracted by the idea that it would not have to pay for the demolition services and made no attempt to verify the experience or expertise of the contractor or to check an adequate demolition plan was prepared prior to work being commenced.

[52] It also appears that having engaged the contractor, the defendant failed to appreciate the need to supervise the demolition and the contractor, despite being the person in charge of the site.

[53] In relation to the risk from falling objects, WorkSafe submits it was reasonably practicable for the defendant to ensure the excavator was fit for the job.

[54] The defendant alleges that the excavator was fit for purpose, given a gradual platform approach to demolition was used.

[55] In his affidavit, Mr Reid states he started at the single storey part of the building and used the dislodged material to continuously raise his working platform relative to the building. This meant the only time he was reaching above the cab height, was during the initial first storey demolition but even then, the digger's nine metre reach meant the digger was too far away for material to have fallen onto the cab.

[56] No expert evidence was offered as to this practice, but it appears the absence of protective guards is inconsistent with industry guidelines, discussed below.

[57] As the diggers were provided by Coastal Properties, one of Mr Forsyth's other properties, the defendant cannot claim complete ignorance about the machinery.

Nature and seriousness of the risk of harm occurring and realised risk.

[58] In *Stumpmaster* the Court noted the risk of serious injury or death is a necessary element of a s 48 offence.[17] However, the Court held that in placing the offence within the bands, it is important to consider the nature of the actual risk and the actual harm caused. That a "victim" is not hurt, does not absolve the offender of liability, but it is still a relevant sentencing factor. I accept there is a distinction between the "risk of harm" and "actual harm".

[59] The key difference between the parties' positions relates to the seriousness of the risk of harm.

[60] WorkSafe's position is that any exposure to asbestos adds to the risk of disease, including fatal diseases such as lung disease, mesothelioma and cancer. Therefore, while the risk of harm developing may be low, the level of potential harm means the seriousness of the risk of harm will always be high.

[61] The defendant's position is that the testing it commissioned from HD Geo shows a low level of asbestos and therefore the risk of the workers developing an asbestos related illness is also low.

[17] S*tumpmaster v Worksafe* above n 2 at [39].

[62] Following the issuing of the non-disturbance notice on 8 September 2017, TriEx undertook testing between 26 September and 3 October 2017. 30 of the 59 samples taken tested positive for asbestos and 13 had high risk assessment scores which exceeded the BRANZ guidelines.

[63] The defendant has submitted a report by HD Geo entitled "40-42 Palmerston Street, Westport, Soil Investigation Report". HD Geo conducted a soil analysis at the site to determine if it was suitable for re-development. Asbestos was found in three of ten samples, with only one above the BRANZ guideline for assessing and managing asbestos in soil. It appears these samples were gathered on 3 May 2019.

[64] The report records HD Geo was previously engaged after the non-disturbance notice, to identify asbestos in the materials which were still stockpiled on site and oversee their removal. This work is reported in a separate report "40-42 Palmerston Street, Westport, Debris Removal" which was not provided. However, the positive sample from 3 May 2019 was collected in the area where the materials containing asbestos had been stockpiled.

[65] It therefore appears that the TriEx sampling is more likely to be accurate in terms of assessing the level of asbestos the victims were exposed to, because it was undertaken when demolition was still under way and the contaminated materials present on site.

[66] In *WorkSafe v Crafar Crouch Construction* the defence offered expert opinion evidence as to the high levels of exposure required to cause harm.[18] WorkSafe accepted that with asbestos exposure the probability of harm is always low but argued because the level of harm where it eventuates is so high, exposure creates a high risk of harm. Judge Zohrab noted:[19]

> The clear conclusion to be drawn from all the material is that the exposure needed to cause most asbestos diseases has to be quite large, and requires either intense exposure for some months, or as a lesser degree of exposure for many years. Neither of those scenarios apply to the facts of this case….

[18] *Worksafe v Crafar Crouch Construction Ltd* [2018] NZDC 26800.
[19] At [42].

> However, having made that observation, one can well understand WorkSafe's concerns about asbestos because, despite the low probability, there is no safe level of exposure to asbestos, and the potential consequence is death. Furthermore, the purpose of the Act as stated in s 3(1)(a) and (2) must be borne in mind.

[67] In *WorkSafe v Hutt Construction Ltd* Judge Hastings noted:[20]

> The risk of harm from exposure to asbestos is significant, the physical harm is unlikely to eventuate for decades. Immediate lack of harm would rarely reduce the level of culpability where the focus of the statute is on prevention of harm in the first place and where the nature of the risk is one the defendants ought to have been aware of in the first place.

[68] As Judge Couch observed in *WorkSafe v Blakely Construction Ltd,* while there may be no evidence of actual harm, asbestos is insidious and those exposed may be entirely unharmed or develop very serious illness decades later.[21]

[69] The best assessment in this case from consideration of comments made in other cases, is that the risk of serious harm from asbestos was "real and appreciable".

[70] In relation to the charge of exposing workers to the risk of falling objects, there was also a risk this could have caused serious harm. The extent of the harm would be very much determined by the size and nature of any falling object, should the object have made contact with the excavator or its operator. The defendant supplied Mr Bennett with the diggers, at least one of which did not have front protection bars or falling object protection. It is not clear whether the defendant checked the contractor's competence to operate such equipment safely.

[71] I accept the techniques used by the operator to some extent mitigated the risk of harm from falling objects and no harm did in fact occur. However, the purpose of the legislation is to reduce the risk of harm to its workers.

Degree of departure from prevailing standards

[72] Regulation 21 of the Health and Safety at Work (Asbestos) Regulations 2016, ("the regulations") creates a duty on a PCBU with management or control of a

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[20] *Worksafe v Hutt Construction 2013 Ltd* 13 at [22].
[21] *Worksafe v Blakely Construction Ltd* [2015] NZDC 24902.

workplace to ensure that all asbestos likely to be disturbed by the demolition, is identified and removed before demolition begins. This applies to any structure constructed before 1 January 2000. A PCBU who contravenes this requirement commits an offence and is liable to a fine not exceeding $50,000.

[73] The Ministry of Business Innovation and Employment's "A principal's guide to contracting to meet the Health and Safety in Employment Act 1992 (May 2010)", provides guidance on the process principals should follow to ensure the safety performance of their contractors. This recommends principals:

(a) Scope the works including an appraisal of the significant hazards and likely risks;

(b) Assess the health and safety management of potential contractors and depending on the significance of the risk, their technical competence;

(c) Select the contractor and provide them with information on the likely risks and develop a draft health and safety plan;

(d) For larger jobs develop a health and safety plan; and

(e) Monitor the project to ensure health and safety standards are complied with and conduct a post project review.

[74] The "Best Practice Guide for Demolition in New Zealand" highlights the need to develop a demolition plan setting out step by step, how the demolition contractor intends to safely demolish the building.[22] It is the responsibility of the contractor to prepare this, but a copy should be given to the principal as part of contractor selection and monitoring. WorkSafe also cite best practice guidelines for demolition, management and removal of asbestos and conducting asbestos surveys and a fact sheet on where asbestos might be found in a NZ home.

[22] Best Practice Guide for Demolition in New Zealand at 4.7.

[75] The "Best Practice Guide for Demolition in New Zealand" recommends that all excavators used for demolition work are fitted with a falling object protective structure.

[76] It appears likely that a small-scale hotel company might not be familiar with many of these good practice guides. Ross Forsyth owns a half share of Coastal Properties Ltd which may suggest a degree of expertise, but as this was not relied on by WorkSafe so I do not give it any weight.

[77] It appears the culpability in this case, lies in the failure to identify possible demolition hazards and engage a competent contractor who could identify and mitigate those risks, including exposure to asbestos or falling debris.

[78] For this reason, this case can be distinguished from many of the cases cited by WorkSafe, where the defendant was a construction or demolition company and was or should have been familiar with industry practice. However, the defendant's lack of experience in demolition, increased its responsibility in terms of selecting a competent contractor and verifying their expertise.

[79] The defendant says Mr Bennett claimed to have expertise in demolition and in providing a safe and compliant demolition plan. However, he had to be loaned equipment and he offered to do the work for free. It appears that if the defendant didn't consider other companies or attempt to check the contractor's expertise because it was attracted by the idea of free demolition services. It appears the defendant was at least wilfully blind to any failings in the contractor. The defendant also did not ask to see the demolition plan or take any steps to supervise the work on site.

[80] In terms of the defendant's culpability, and I may be doing the defendant a disservice, I infer the defendant decided to just let the contractor get on with the demolition job, hoping no issues would arise at the site. I also infer that as no money was being exchanged between the parties, those involved saw this as a relatively low-key arrangement between them. I infer there was a "she'll be right" attitude between the parties.

Obviousness of the hazard

[81] The risks associated with asbestos are well known beyond the construction industry. The defendant was aware of these risks but wrongly assumed asbestos would not be present in an old building. It failed to identify it might have been used in renovations. This risk could have been identified if the defendant had undertaken a proper hazard identification process and engaged a contractor with the expertise to identify and mitigate these hazards. The defendant's failure to do so meant asbestos wasn't identified as a potential hazard by either principal or contractor with the consequence that a survey of the site was not completed prior to demolition.

[82] The diggers belonged to one of the director's companies. The hotel was a two-storey hotel so a risk of falling debris was relatively obvious. However, as noted above it appears the Mr Reid had at least turned his mind to this risk and felt he had mitigated it, even if the absence of protection was still recommended industry practice.

The availability, cost and effectiveness of the means necessary to avoid the hazard.

[83] Guidelines on the means to avoid the risk of exposure to asbestos are readily available on the WorkSafe website.

[84] As already noted, the hazard would have been avoided had the defendant engaged a suitably qualified contractor and surveyed the site prior to demolition, albeit at a cost. However, as noted by Judge Gilbert in *WorkSafe v Stoneyhurst Timbers Ltd*:[23]

> The fact that there is a moderate cost of remedying these issues is not an excuse. To suggest otherwise would be to sacrifice employee safety on the altar of profitability which is something that is clearly unpalatable.

[85] It is not the case that the defendant considered the risk of asbestos but ignored it to save costs. However, it failed to establish or verify its contractor's competency because it offered its services for free. It should not have undertaken a development it could not afford to complete in a safe manner. Its initial cost saving has been short

[23] *Worksafe v Stoneyhurst Timbers Limited* [2016] NZDC 17200.

sighted as it has subsequently had to pay for removal of contaminated material and remediation of the site.

The current state of knowledge of the means available to avoid the hazard or mitigate the risk

[86] It is accepted that there are available guides on the means available to avoid or mitigate the risks associated with asbestos.

Comparable cases

[87] There have been other cases involving exposure to asbestos through demolition under the HSWA.

[88] In *WorkSafe v Crafar Crouch Construction Ltd* the defendant was a construction company who carried out demolition at two sites, Budge Street and Queen Street.[24] A director of the defendant company held a "certificate of competency in handling asbestos" under the regulations and was aware of the new guidelines for the management and removal of asbestos. In relation to the Budge Street, Judge Zohrab found the building was old and the risk of asbestos was noted on the LIM. A visual walk through was therefore insufficient and inconsistent with guidelines. In relation to Queen Street, the defendant relied on the fact that as the property had been damaged by fire and condemned by an engineer, any asbestos would have been identified. His Honour found that given a non-disturbance notice had been issued on Budge Street, he should have had a heightened awareness of the risk of asbestos. When a textured ceiling was discovered, workers were told to treat it as asbestos and given protective equipment to remove it, but no testing was undertaken, and training and health monitoring were not provided. The Court imposed a fine of $250,000, the bottom of the medium culpability band. The defendant in that case was also charged with breach of the Health and Safety at Work (Asbestos) Regulations 2016.

[89] Judge Zohrab observed that in assessing culpability, a distinction can be drawn between commercial demolitions and small scale or residential demolitions. This is

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[24] *Worksafe v Crafar Construction Limited* [2016] NZDC 26800.

because the risk is higher with larger contaminated properties, with a greater number of people likely to be exposed where dust is spread over multiple properties. His Honour also made a distinction between defendants who were in the business of demolition and defendants who were by contrast naïve and inexperienced.

[90] In *WorkSafe v Quick Earth Moving Ltd* the defendant was a civil works, earthmoving and demolition company, although it was accepted demolition was not part of its core business. It was engaged to demolish a residential building. A wall fell onto a neighbouring occupied property causing damage and a gas leak, necessitating its evacuation. A person in a wheelchair remained trapped until the fire service could evacuate her. Asbestos was subsequently found in the building. The defendant was found to have failed to engage a competent person to check for and remove asbestos and failed to develop a demolition management plan and identify the risk to the neighbouring property. The Court found that whilst demolition work was not part of its core work, the defendant was aware of the demolition guidelines as it had been previously issued with an improvement notice for demolition work. This meant that on occasions it was undertaking demolition it had even more responsibility to ensure all its workers understood the necessary obligations. A starting point of $400,000 was adopted.

[91] There are also a number of decisions under the previous Health and Safety in Employment Act 1992, where the medium culpability band as established in the guideline judgement of *Department of Labour v Hanham and Philp Contractors Ltd* was $50,000 to $100,000.[25]

[92] In *WorkSafe v Hutt Construction 2013 Ltd* a construction company bought a 1976 property for development and employed a demolition contractor.[26] The contractor used a digger to knock down the building and large amounts of dust covered neighbouring properties including a pre-school. Dust on one property tested positive for asbestos. The Judge found whilst the LIM had not indicated the risk of asbestos, the defendant had 35 years in the industry and knew a 1970's building could contain asbestos and the risks associated with such. Despite this, he had failed to identify

[25] *Department of Labour v Hanham and Philp Contractors* (2008) 6 NZELR 79.
[26] *Worksafe v Hutt Construction 2013 Ltd* at [13].

asbestos as a hazard, failed to ensure any asbestos was identified and removed before demolition started and failed to use a suitably qualified demolition company. The Judge found culpability was at the bottom of the medium culpability band and ordered a fine of $55,000.

[93] In *WorkSafe v Blakely Construction Ltd* the defendant was engaged to demolish some buildings, built within the era when asbestos was used in construction.[27] It identified loose sheets of asbestos on the site and engaged an asbestos removal company to take it away but did not conduct a full survey of the site. It relied on verbal assurances that the entire site had been cleared when allowing workers to return to the site and failed to heed an email warning that asbestos remained on site. When further asbestos was discovered it failed to immediately stop work. The offending was again characterised at the bottom of the middle category with a fine of $60,000.

[94] In *WorkSafe v P&M Demolition Specialists* the defendant was contracted to demolish a house and was provided with some initial tests results indicating asbestos in the garage. The supervisor and workers had no experience or training in removing asbestos or working at height and there was no comprehensive hazard assessment. The workers did not wet down dust to control the large quantities of dust and there was insufficient protective equipment and decontamination facilities. There were three charges relating to the risks associated with asbestos and working at height. A starting point of $70,000 was adopted.

[95] In *WorkSafe v Concrete Drilling & Cutting* the defendant was a small concrete cutting firm who had previously not undertaken demolition work.[28] It gave a price for demolition to the property owner but then subcontracted the actual physical demolition. The defendant was found to be a novice who had not carried out the necessary enquiries and relied on the owner, who was not motivated to tell him asbestos might be present. The defendant was found to have failed to undertake a hazard identification process and failed to identify and remove asbestos and ensure live electricity had been disconnected. The Judge found the defendant was unaware

[27] *Worksafe v Blakely Construction Ltd* above n **Error! Bookmark not defined.**.
[28] *Department of Labour v Concrete Drilling and Cutting* (1992) Limited CRI-2011-085-003423 13 December 2011.

of industry best practice and his failure to comply with industry standards was therefore less culpable than if it had been the result of indifference to a proper assessment of risk. A starting point of $40,000 in the lowest culpability band was adopted.

[96] In *WorkSafe v DKL Projects Ltd* the defendant was a earthworks, excavation and demolition company.[29] It was found to have failed to have implemented a systematic method to identify hazards, failed to train staff to identify hazards and failed to engage a qualified person to undertake an asbestos survey prior to demolition and remove any contaminated material. The Judge found that although there was not a conscious disregard for safety, the defendant through its work in the demolition sector should have been aware asbestos was a significant hazard in demolition. A starting point of $50,000 was taken.

[97] In this case, whilst the property was commercial in nature, it was small scale. There is no report that neighbouring properties were affected. The defendant is a small company. It does not operate in the demolition or construction sector.

[98] WorkSafe submit the defendant's culpability was more serious than in *Crafar Construction* because in that case some steps were carried out, if inadequate. I disagree with that assessment. There the defendant had a certificate of competency in handling asbestos under the regulations and was aware of the guidelines for managing and removing asbestos prior to demolition and failed to adhere to them. Further he had been issued a non-disturbance notice for one building and still failed to properly address the risk in the second building. The buildings were also large commercial buildings. There was therefore a much more conscious disregard for safety in *Crafar Construction.*

[99] WorkSafe also submit the defendant's culpability is greater than *Quick Earth Moving* because the exposure only lasted for four days and the building was a one storey residential building. However, again, whilst demolition wasn't the core business of the defendant, it was well aware of the demolition guidelines, having been issued with a non-improvement notice in relation to previous demolition work.

[29] *Worksafe v DKL Projects Ltd* [2016] NZDC 25800.

Further, in comparison to other cases, the starting point in that case is at the higher end of the scale, perhaps reflecting the emotional trauma experienced by the trapped neighbour.

[100] WorkSafe submit the case is similar to *P&M Demolition Specialists* as the workers were exposed to two hazards, asbestos and working from height. I accept that. However, in that case the defendant was a specialist demolition company.

[101] In my opinion, the case is most similar to *Concrete Drilling & Cutting* where the defendant was a novice in demolition work. WorkSafe submit this case is worse as the defendant owned the site and engaged the contractor without verifying his experience to save costs.

[102] The HSWA created new categories of duty, with the primary responsibility and highest sanction falling on the PCBU, as the body with the greatest control over health and safety.[30] The defendant, accepts its error was in deferring to the contractors claimed expertise in demolition. I accept that in this respect, there was an element of wilful blindness as opposed to just naivety, although not to the presence of asbestos. However, *Concrete Drilling & Cutting* was placed in the lowest band of culpability.

[103] I must of course take a starting point based on the maximum penalty under the Health and Safety at Work Act 2015, as opposed to the maximum penalty under the Health and Safety in Employment Act 1992.

[104] In my opinion, the defendant's culpability is at the very bottom end of the medium culpability band in *Stumpmaster*.

[105] This was not a case where the defendant appreciated the risk of asbestos and recklessly ignored it. Nor did the defendant operate in the demolition or construction industry. Rather the defendant failed to appreciate the risks and its ongoing responsibilities from a lack of experience and relied on others to provide that expertise. The defendant might also have assumed that as the contractor was conducting the work himself, the contractor would not expose himself to danger.

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[30] Stumpmaster above n 2 at [15] and [20]

[106] However, because the consequences of exposure to asbestos can be fatal, it would be inappropriate for PCBUs to be able to rely on ignorance as a justification for placing them in the lowest culpability band.

[107] I therefore find a starting point in the region of $250,000 is appropriate.

Aggravating and mitigating factors

[108] The prosecutor accepts that the degree of departure from the prevailing standards is implicit in s 151 of the HSWA and it would be double counting to include it as an aggravating factor.

[109] The defendant has not previously appeared before the Court.

Mitigating factors

[110] In *Stumpmaster* the Court was concerned about the routine awarding of discounts in the absence of justification.[31]

[111] WorkSafe submits the defendant is entitled to a 5 percent discount for full co-operation with the investigation.

[112] WorkSafe submits that the defendant is entitled to 5 percent for remorse.

[113] In *Stumpmaster* the Court also noted that remedial action should only be taken into account to the extent that it goes the "extra mile", rather than correcting identified deficits.[32]

[114] The defendant submits that it has undertaken a full and professional investigation and mitigation of the site as supported by the report it commissioned. However, an investigation of the site should have been completed prior to demolition and the asbestos contained and removed. It is this failure that has required the site to be remediated.

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[31] Stumpmaster v Worksafe above n 2 at [57]
[32] At [62].

[115] The defendant has not previously appeared before the Court, so a good safety record of 5 percent is appropriate.

[116] Therefore, a total discount of 15 percent for personal mitigating factors is appropriate which brings the fine down to $212,500.

[117] The parties accept the offender is entitled to a full discount of 25 percent for the early guilty plea.

[118] This would result in a fine of $159,375.

Step 3: Other orders

[119] WorkSafe seek 50 percent of the legal costs of its prosecution being $1,520.43. Section 152(1) allows the Court to order a sum that it thinks just and reasonable towards the costs of prosecution including investigation.

[120] In *Stumpmaster* the Court held that cost orders in the regulatory context are common place and there is nothing in the legislation to suggest they should be reserved for where extra punishment is required.

[121] I accept that the costs sought for prosecution are reasonable and appropriate and award costs of $1,520.42.

Step 4: Proportionality

[122] In *Stumpmaster* the Court found the final step in sentencing is to stand back and make an overall assessment of the package of sanctions for proportionality. This includes an assessment of whether the quantum needs adjusting for financial capacity reasons.

Financial capacity to pay a fine

[123] The defendant claims it is effectively insolvent and trading at a loss and a fine of any significance would be self-defeating.

[124] Mr Taffs explained to me that a significant fine would likely result in insolvency for the company along with loss of employment for five staff in the Westport community.

[125] In *Stumpmaster* the Court held that s 15(2)(g) of the HSWA, which requires the Court to have regard to the defendant's ability to pay a fine only "to the extent it has the effect of increasing the amount of the fine", is not to be read as a statement that an inability to pay cannot be considered.[33] It held ss 8(h), s14(1), s 40(1) and s 41 of the Sentencing Act apply.

[126] Section 8(h) of the SA requires the Court to take into account whether the defendant's circumstances, make an otherwise appropriate sentence disproportionately severe, s 14(1) allows the Court to decide not to impose an otherwise appropriate fine if the offender cannot pay, s 40(1) allows the Court to have regard to the financial capacity of the defendant, and s 41 allows the Court to order a declaration as to the financial capacity of the defendant.

[127] The Court accepted that it was likely that with the increase in fines under the HSWA adjustments for financial incapacity were more likely.[34]

[128] In *Mobile Refrigeration Specialists v Department of Labour*, Heath J held that the Court would need clear evidence of a company's inability to pay, before it would exercise its discretion to lower or refrain from imposing a fine for that reason.[35]

[129] On 19 November,2019, Judge Walsh ordered a financial declaration from the defendant be filed with the Court.

[130] The defendant had a net operating profit of $101,636 in 2018 and $76,717 in 2017. It paid management fees to Norbar Ltd of $98,077 in 2018 and $96,154 in 2017. No confirmatory evidence has been provided on the nature or purpose of these payments, despite them being queried by Judge Walsh.

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[33] *Stumpmaster v Worksafe* above n 2 at [23].
[34] At [56].
[35] *Mobile Refrigeration Specialists v Department of Labour* HC Hamilton CRI-2009-419-94, 29 March 2010 at [57].

[131] No financial report has been provided for the year ended March 2019. The charges were filed on 3 September 2018. Therefore, it is not possible to conclude whether further payments were made to Norbar Ltd, subsequent to the charges being laid on 3 September 2018.

[132] Norbar Ltd is a 50 percent shareholder in the defendant. The other shareholder is Coastal Properties. Norbar Ltd had two directors and equal shareholders, Barrie and Norma Forsyth.

[133] At the sentencing hearing before me, Mr Taffs explained that the 2018 financial reports were still being prepared. He also said the payments to Norbar Ltd were payments that were then made to hotel staff for salary and wage payments

[134] Ms Sandra Lee, a chartered accountant with WorkSafe, reviewed the defendant's accounts and concluded there is limited or no capability to pay a fine without further financial support from shareholders or a third party.

[135] The defendant's accountant advises that since the downturn in the Buller economy, the hotel has struggled to maintain turnover and over the past six years it has relied on the financial support of its directors and shareholders.

[136] In *YSB Group Ltd v WorkSafe New Zealand* the appellant was convicted under s 48 HSWA and appealed a fine of $100,000 on the basis the Judge had given insufficient allowance to its ability to pay.[36] It had recently made payments of $480,000 to shareholders and proposed to pay $255,000 to directors. The defendant submitted these payments were to repay contributions to a development project. The Court held:

> The ability of the company to make such payments satisfies me that it has the 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 the case where the company genuinely lacks funds 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.

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[36] *YSB Group Ltd v Worksafe New Zealand* [2019] NZHC 2570.

[137] The Court in *YSB Group Ltd* found that the need for general deterrence may require the Court to impose significant fines even if they may not be able to be collected. Further, that where a 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 or leaving the company to go into liquidation.

[138] In *YSB Group Ltd* the payments to shareholders and directors were much higher than in this case, relative to the proposed fine. Further, there were five shareholders, so any advances would be shared. In this case the two shareholder companies are in effect owned by the directors.

[139] In *WorkSafe v Benchmark Homes Canterbury and Bowness Built Ltd,* I commented that it is open to the Court to impose a fine beyond the company's apparent means to pay, if the company's conduct is so serious that it should no longer be in business.[37]

[140] In my opinion while the defendant's conduct was serious, it did not deliberately or recklessly avoid incurring costs involved in checking for asbestos or ensuring the excavator had protective bars. Therefore, it was not the case that it sacrificed safety on "the altar of profitability". Further, the company has not previously appeared before the Court and is it is unlikely to reappear on similar charges.

[141] Even if the 2019 financial accounts had been presented to the Court, I doubt the company's financial situation would have dramatically changed for the better.

[142] I do not think the company's financial situation has been manufactured to look bad for the purpose of reducing any fine that the Court might impose.

[143] However, the risks associated with asbestos are extremely high. Unless there is sufficient general deterrence, developers will seek to avoid the costs associated with identifying and safely removing asbestos. This would be inconsistent with the HSWA's purpose of protecting workers and the duty it places on PCBUs.

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[37] *Worksafe v Benchmark Homes Canterbury and Bowness Built Ltd* [2016] NZDC 7093 at [188].

[144] I therefore take a fine of $250,000 as the appropriate starting point in assessing the culpability of the defendant on both charges. This is generally in line with other cases placed before me. That figure is also required to meet the requirements of general deterrence. The appropriate fine after mitigating factors and guilty plea would therefore be $159,375.

[145] However, in this case, I fine such a fine would be disproportionately severe. Ms Lee on behalf of WorkSafe accepts the defendant does not have the financial capacity to pay a fine of this quantum sought by WorkSafe.

[146] For this reason, I intend to reduce the fine from what it ordinarily would have been and impose a fine of $50,000.

Conclusion

[147] The defendant is ordered to pay a fine of $50,000 and costs of $1,520.43.

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Judge S J O'Driscoll
District Court Judge

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