IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2018-016-001688
[2020] NZDC 5195

WORKSAFE NEW ZEALAND
Prosecutor

v

BLACKSTUMP LOGGING LIMITED
Defendant

Hearing: 17 October 2019

Appearances: A Longdill for the Prosecutor
L Lawson for the Defendant

Judgment: 20 April 2020

JUDGMENT OF JUDGE W P CATHCART ON SENTENCING

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[1] Blackstump Logging Limited (Blackstump) is for sentence having pleaded guilty to one charge of contravening of ss 36(1)(a) and 48 Health and Safety at Work Act 2005 (Act). The offence carries a maximum penalty of $1.5 million.

[2] The essence of the offending is captured by particulars in the charge. In allowing the operation of the log hauler on 18 August 2017, Blackstump failed to comply with the statutory duty to ensure, as far as reasonably practicable, the health and safety of its workers by allowing the hauler to be operated without guarding over moving parts and thereby exposed workers to a risk of death or serious injury. More particularly, the hauler was operated without guarding and thereby posed a hazardous

risk which it was reasonably practicable for Blackstump to have identified, assessed and eliminated or minimised through guarding.

[3] Two main issues arise in this sentencing:

(a) Assessing the quantum of the fine under *Stumpmaster* principles.[1]

(b) Determining what discount, if any, is appropriate under the proportionality assessment principle on the issue of Blackstump's financial capacity to pay the end fine.

[4] For reasons stated below, I fixed as a global starting-point a fine of $320,000. Then having recognised cognisable mitigating factors, including early guilty plea, reduced the fine to $180,000. Finally, having undertaken the proportionality assessment of Blackstump's ability to pay the fine, I concluded an end fine of $150,000 is appropriate plus Court costs of $130.

[5] Finally, I considered the prosecutor's request for an award of costs in the sum of $7,920 was both just and reasonable as a contribution to the costs of prosecution and I ordered accordingly under s 152(1).

[6] My reasons follow.

The undisputed facts

[7] Blackstump is a forestry contracting company which was contracted to clear and fell Pinus Radiata from the Te Marunga Forest in Tolaga Bay. The logging operation involved extracting manually-felled logs using a Madill 171 mobile yarder log hauler (hauler). The hauler includes five hydraulically driven drums mounted on its left side outside the winch frame.

[8] Mr Te Oho Mauri Piripi Bartlett started working for Blackstump from 8 February 2017 as a log maker/quality controller and was 23 years old when he died.

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[1] *Stumpmaster v WorkSafe* [2018] NZHC 2020, (2018) 3 NZLR 881 at [35].

[9] On 21 August 2017, Blackstump crew started work at the site. There were six workers in that crew, including Mr Bartlett. Between 1.50 and 2.50 pm a line change was completed. This involves the log hauler sending out a strawline (a thinner wire rope) which is used to shift the skyline (the line in which the wheel carriage operates) across the logging face. After the line shift was completed that day, the hauler operator and Mr Bartlett recovered the strawline. However, it became jammed on the edge of the strawline drum. The hauler operator and Mr Bartlett endeavoured to unjam it. The hauler operator stood above the drum and Mr Bartlett stood on the tracks at the front of the hauler. But they were unable to unjam it.

[10] The hauler operator decided it could be left in that condition and would continue the logging. He advised Mr Bartlett of this and returned to the cab of the hauler. He observed Mr Bartlett had moved to the left rear of the hauler.

[11] The hauler operator received the message ('three toots') from the breaker-out worker down the hill that he was ready to receive the carriage down the hill. The hauler operator then sent the carriage down the hill to the breaker-out worker where it was clamped and lowered for logs to be attached to it.

[12] The hauler operator noticed an unusual flash out of the corner of his eye. He got out of the cab and found Mr Bartlett lying injured on the steel platform next to the drum and clutch assembly. Mr Bartlett passed away prior to the arrival of emergency services as a result of a ruptured liver with hemoperitoneum and right tension pneumothorax.

[13] There were no witnesses to the incident. Forensic pathologists were unable to agree on the cause of Mr Bartlett's fatal injuries.

[14] To assist me in understanding the core facts, the summary included a reconstruction of the position where Mr Bartlett was located (a different worker-obviously) depicted in a photograph.

[15] WorkSafe was notified of the incident on the same day and commenced its investigation.

[16] The investigation revealed:

(a) None of the drums on the hauler were guarded;

(b) Depending on the application being used, with the exception of the skyline drum, each of the drum, or parts of the drum, rotate;

(c) The steel platform next to the drums had been shifted from its normal position to allow access to the manual clutch lever underneath the drum assembly. It had been out of position for some time;

(d) There were scratch marks on the top of the Wichita clutch which were consistent with the steel spikes on the sole of the boots worn by Mr Bartlett at the time of the incident;

(e) The platform area to the left of the drums could easily be accessed by workers by stepping on to the tracks at the rear of the hauler;

(f) There were no barriers preventing workers from accessing the platform;

[17] At a general level, Worksafe's investigation revealed Blackstump had arranged for guarding on the drum some five to six weeks prior to the incident; the guards manufactured had not been installed as they were being painted. Also, there was no evidence of any checks on guarding. But the hauler had been regularly maintained in the months prior to the incident namely in February, May and July 2017.

[18] And Blackstump's risk management register recognised the risk of unprotected machine components with potential outcomes, including fatality. And relevant controls of those risks were identified, including the need to "install protective guarding to isolate hazards". The register also recognised the risks of workers on or near machinery with the identified controls including, "Never getting on or off moving equipment. Never get on to equipment that has stopped without notifying the operator."

[19] Following the incident, Blackstump installed guarding over the moving drums and repositioned the steel floor plate.

[20] The material omission by Blackstump related to the removal of the guarding for the moving parts of the hauler to gain access to the lower working of the hauler. This left the drums unguarded at the time of the incident. Blackstump thereby exposed its workers, including Mr Bartlett, to a risk of fatality or serious harm. Guard covers were available nearby but had been temporarily removed to enable the log hauler to be shifted on its axis during the extraction exercise.

[21] Blackstump's usual practice was for guarding to be in place. This was supplemented by other policies and procedures and training mechanisms including a direction to all employees they were not to get on to or move around the hauler platform at any time the hauler was operating (ie, hauling).

[22] Prior to the incident, Blackstump had not received any warnings or compliance notices nor guidance from WorkSafe in relation to its guarding practices.

[23] Significantly, there is no evidence the drums were moving at the time Mr Bartlett was injured or that he became entangled in the drums. The cause of Mr Bartlett's injuries and subsequent death by Blackstump failing to guard the drums was not directly established in evidence.

Relevant purposes and principles of sentencing

[24] Section 151 of the Act sets out the criteria I must consider in the sentencing exercise.

> **151 Sentencing criteria**
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> ...
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
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> (a) sections 7 to 10 of that Act; and
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> (b) the purpose of this Act; and

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

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

(e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and

(f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[25] And certain purposes and principles of the Sentencing Act 2002 are relevant also. I must hold Blackstump accountable for the harm done by the offending, promote in it a sense of responsibility for that harm, deter both it and others generally. And deterrence at a general level must be a significant factor here. This must be the case given s 151(2)(b) obliges a sentencing Judge to have particular regard to the purposes of that Act.

[26] One of the principles to be taken into account is that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.[2]

[27] Also, I must take into account the gravity of the offending, the degree of Blackstump's culpability and seriousness of this offending, as against the maximum prescribed penalty. And I must also consider issues of rehabilitation and reintegration given Blackstump's good track record.

[28] Finally, I must take into account the particular circumstances of Blackstump in dealing with its ability to pay the fine. The outcome cannot be disproportionately severe taking into account a proper assessment of Blackstump's ability to pay.

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[2] Section 3(2) of the Act.

[29] In all of this I must strike a balance between the competing principles engaged in a manner that leads to the least restrictive outcome justified in the circumstances.[3]

Approach to sentencing

[30] The guideline judgment in sentencing for s 48 offences is *Stumpmaster v WorkSafe New Zealand* (*Stumpmaster*).[4] The *Stumpmaster* Court set out four steps for the sentencing Judge:[5]

(a) Assess the amount of reparation to be paid to the victim;

(b) Fix the amount of the fine, by reference to guideline bands and then having regard to aggravating and mitigating factors;

(c) Determine whether orders under ss 152-158 of the Act are required;

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Step 1: Reparation

[31] This issue can be shortly determined. No one knows how Mr Bartlett sustained his fatal injuries. The prosecutor accepts WorkSafe cannot establish that the admitted failures by Blackstump as to guarding the hauler played a causative role in Mr Bartlett's death.

[32] And Blackstump has already made contributions to Mr Bartlett's family after the incident:

(a) An insurance pay-out of $50,000;

(b) Funeral costs paid through insurance of $6000;

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[3] Sentencing Act 2002, s 8.
[4] *Stumpmaster v WorkSafe* [2018] NZHC 2020, (2018) 3 NZLR 881.
[5] *Stumpmaster* at [3] and [35].

(c) Meeting the cost of transferring Mr Bartlett's body from the hospital to the funeral home – $560.63.

(d) Providing a Pak'nSave voucher to the family – $1000.

(e) Hiring vans to transport family to Mr Bartlett's tangi – $1583.47.

[33] The total amount paid by Blackstump to Mr Bartlett's family totals $59,144.10.[6]

[34] The prosecutor takes the pragmatic position that in these circumstances WorkSafe does not seek a reparation order. I agree with the parties the financial assistance already provided is significant and may well exceed what may have been reasonably ordered in this case.

[35] This conclusion is supported by two cases. First, *Civil Aviation Authority v The Helicopter Line Ltd* (*The Helicopter Line*) involving a helicopter crash.[7] In that case, the offender's failings were not causative of the crash and therefore a sentence of reparation under s 32 Sentencing Act was not sought by the prosecutor. And in *The Helicopter Line* the offender had already made voluntary reparation payments totalling $365,000 to the victims including a payment of $165,000 to the family of the deceased victim.[8] No further reparation was ordered.

[36] Second, *WorkSafe NZ v Sullivan Packaging Limited*[9] In that case a machine operator was trapped inside a machine and died the following morning. Several pathologists were engaged to assess the cause of death. It was determined the victim had significant pre-existing coronary artery disease. The prosecution was not able to prove the heart attack (and death) was caused by being trapped in the machine. The Court noted the offender had reasonably accepted it ought to pay reparation totalling $20,000. No further reparation was ordered.

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[6] Affidavit of Wayne McEwan dated 8 October 2019 at [21].
[7] *Civil Aviation Authority v The Helicopter Line Ltd* [2018] NZDC 3559.
[8] *The Helicopter Line* at [13].
[9] *WorkSafe NZ v Sullivan Packaging Limited* [2017] NZDC 12092.

Step 2: Quantum of the fine

[37] *Stumpmaster* sets out four guideline bands for culpability:[10]

- Low culpability : starting-point of up to $250,000;
- Medium culpability : starting-point of $250,000 to $600,00;
- High culpability : starting-point of $600,000 to $1 million;
- Very high culpability : starting-point of $1 million plus.

[38] These bands are only guidelines because all sentencing is case specific under the principle of individualised justice. Nevertheless, consistency demands reasoning as to how the banding approach was employed in fixing culpability. The contentious issue was whether the offending fits within the low culpability band or the medium culpability band; and where within the selected band.

[39] In addressing the low culpability band, *Stumpmaster* observed:[11]

> ...[It] will typically involve a minor slip up from a business otherwise carrying out its duties in the correct manner. It is unlikely actual harm will have occurred, or if it has it will be comparatively minor...

[40] I reached the view Blackstump's offending falls within the lower end of band 2 and fixed a figure of $300,000. My reasons follow. They address the relevant factors under the Act.

Identification of the operative acts or omissions by Blackstump and the practical steps that was reasonable for Blackstump to have taken in terms of s 22

[41] As noted above, the material omission underlying the s 48 charge was Blackstump's failure to ensure guards were in place on the hauler at the material time.

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[10] *Stumpmaster* at [53].
[11] *Stumpmaster* at [52].

It was reasonably practicable for the guarding to be in place at that time. However, it is accepted Blackstump ordinarily used drums to operate the hauler.

Nature and seriousness of the risk of harm as well as the realised risk

[42] Clearly, the unguarded drums posed a risk of death and serious injury to workers nearby. Blackstump's own risk management register identified the potential outcome of unprotected moving machine components as being fatal. And of course, here Mr Bartlett died. I accept his death in all the circumstances cannot be characterised as a realised risk under this heading. However, the observations of Dobson J in *Jones v WorkSafe NZ* are instructive:[12]

> Certainly, the degree of harm that has occurred has to be taken into account. In determining the level of culpability, however, it would rarely be justified to treat the lack of actual harm as transforming the band of culpability into which a particular case would otherwise fit. The nature of the risk that the defendant out to have been aware of, and the extent to which that risk was realised by actual harm being inflicted, are two components of the culpability analysis.

[43] And the *Stumpmaster* Court, whilst acknowledging the level of actual harm can be a matter of chance, remained of the view that what actual harm occurred is a relevant and important feature in fixing placement within the bands. As the *Stumpmaster* Court put it:[13]

> That the defendant is lucky no one was hurt does not absolve it of liability under s 48, the actual harm caused is still a relevant sentencing factor in determining how serious the offence was.

[44] I accept, as I must, there is no evidential link between the lack of guarding and Mr Bartlett's injuries and subsequent death. That materially reduces the seriousness of the offending. It places Blackstump's culpability outside those cases where injuries and deaths can be directly attributable to the lack of or inadequacy of guarding. Having said that, the relevancy of actual harm occurred remains so and is still an important feature in fixing placement within the bands. The nature of the fatal risk Blackstump ought to have been aware of here, and the extent to which that was realised in the actual death of Mr Bartlett, are relevant components in the culpability analysis.

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[12] *Jones v WorkSafe NZ Ltd* [2015] NZHC 781 at [28].
[13] *Stumpmaster* at [40]; and s 151(2)(d) of the Act.

[45] And it must never been forgotten—the life of a young man has been lost at the workplace. The sacredness of life remains a fundamental tenet of law, long recognised by common law. It is evidenced by recognition in s 8 Bill of Rights. I therefore do not consider a case like this where a worker dies should be characterised as low culpability under *Stumpmaster* involving "a minor slip up" from a business otherwise carrying out its duties in the correct manner. After all low culpability cases said *Stumpmaster* generally involve those where it is unlikely actual harm will have occurred, or if it has, it will be comparatively minor. That is clearly not the case here.

[46] In my view, therefore, this factor in combination with other factors discussed in this judgment places this case clearly in the medium culpability band under *Stumpmaster.*

Departure from industry standards

[47] Risks associated with machinery are well known and the subject of industry guidance here. This included specific guidance for cable logging. I accept this is not a case of wholesale ignorance, or disregard of industry standards by Blackstump. Clearly, guarding was a feature in Blackstump's operating environment. This is not a case where workers were exposed to such a risk on an ongoing basis. Nevertheless, as it applied to the incident on that day it was a significant departure from industry standards.

The obviousness of the hazard

[48] The hazard presented by the unguarded drums was obvious.

Means necessary to avoid the hazard were available and effective

[49] In this case the means necessary to avoid the hazard were both available and effective. The guards were taken off the hauler and should have been replaced. I accept Blackstump prior to the incident had taken steps to organise guarding in the five- to six-week period prior to the incident. And I accept on the evidence before me Blackstump had taken steps towards a new and improved guarding process.

Current state of knowledge of the risks, nature and seriousness of the harm and the means available to avoid the hazard or mitigate the risk of its occurrence

[50] Blackstump's own risk management register identified a control mechanism as including installing of protective guarding to isolate hazards. Blackstump's state of knowledge about the need for protective guarding is apparent—reflected in its steps prior to the incident to replace the guarding. Also, Blackstump issued directions to staff not to be around the log hauler during the extraction exercise to manage risk of harm.

[51] However, I am not prepared to infer Mr Bartlett acted contrary to this direction as suggested by Blackstump. There is an absence of evidence either way.

[52] Nor do I accept the guarding was viewed by the forestry industry at the time as a *secondary* risk management tool with contractors commonly using other methods to minimise risk during log hauling exercises. The weight of inference points to a different conclusion. If Mr Bartlett had been standing on the hauler at the crucial moment no injury would have befallen him if the guards had been in place. The weight of inference thus points to guarding as the *primary* risk management tool. In saying that, I accept Blackstump had not received any guidance or warnings from WorkSafe in relation to its practices with guarding prior to the incident.

Comparative case law

[53] I was asked to compare Blackstump's offending with four cases.

[54] First, *Stumpmaster v Niagara Sawmilling Company Ltd* which was part of the review on appeal by the *Stumpmaster* Court.[14] In *Niagara Sawmilling Company Ltd* a worker's glove was caught in a machine when he tried to dislodge a snagged piece of wood resulting in partial amputation of two fingers. There was a fixed guard installed, but it failed to block access at one end. An external specialist had previously recommended changes. But the company's health and safety advisor did not agree and considered the proposed change would create other risks, so no changes were

[14] *Stumpmaster* at [89]-[97].

made. There was no real risk of a worse outcome such as death, and workers had been provided with intensive training that exceeded industry norms. The High Court on appeal accepted that placement of the offending within the medium band and a starting-point of $500,000 was correct, observing "the breach here is a fundamental one, long recognised – the need to adequately guard machinery."[15]

[55] Here, Blackstump had effective guarding. As noted earlier, the material omission was on a single occasion where it breached its duty under s 48 to re-attach the guarding. It was not an ongoing compliance issue, nor was there any deliberate conscious rejection of expert advice as in *Niagara Sawmilling Company Ltd.* Blackstump's offending is clearly less serious than *Niagara Sawmilling Company Limited.*

[56] Second, *WorkSafe New Zealand v Ron Frew Family Partnership Ltd.*[16] In that case, a worker on a potato harvester sustained serious injuries (fractures to his tibia and fibula) after his foot was pulled into the unguarded converging rollers. The company had failed to adequately guard the nip points of the counter rotating rollers and to have a formal standard operating feature for the harvester. The company had identified the hazard of nip points from the counter rotating rollers but discounted them because of a metal conveyor belt directly above the rollers, which was thought would prevent workers from accidently coming into contact with the machinery.

[57] The accident occurred through a combination of steps. The tractor driver acted contrary to instruction and the victim acted contrary to instruction by putting his foot towards the roller. Also, the harvester had a shear bolt in place preventing more serious injury and certainly preventing death. A starting-point of $350,000 was adopted.

[58] For several reasons, Blackstump's offending is less serious than that in *Ron Frew Family Partnership Ltd.* In the latter case: there was no formal standard operating procedure in place for the machine to ensure staff safety; the formal processes would have been effective as would a guard in managing the risk of

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[15] *Stumpmaster* at [94].
[16] *WorkSafe New Zealand v Ron Frew Family Partnership Ltd* [2018] NZDC 20330.

complacency amongst staff; and the injury was directly attributed to that company's failures. That is not the case here.

[59] Third, *WorkSafe New Zealand v Richard Stodart Building Ltd.*[17] In that case, the worker was cutting timber pegs with a radial arm saw which had a guard over the top of a section of the blade but no adjustable nose guard or peripheral guard protecting the lower section of the blade. His left arm came into contact with the saw, amputating his index and middle fingers and wounding his thumb. The Judge fixed the company's culpability by a starting-point of $400,000 fitting firmly within band 2 of *Stumpmaster.*

[60] Blackstump's culpability is less than that in *Richard Stodart Building Ltd.* In the latter case the company: failed to implement a health and safety system; had not undertaken a formal risk assessment of the saw; nor identified the need to adequately guard it. The realised harm thus was significant. And it was the victim's first time using the saw and meaning his vulnerability was heightened.

[61] Fourth, *WorkSafe New Zealand v Atlas Concrete Ltd.*[18] In that case, the worker was injured by a concrete crushing unit. There were no guards or barriers on exposed sides of the conveyor belt of the machine. A piece of concrete had become stuck in the conveyor belt. The worker was on restrictive duties at the time. He had been directed to turn off the machine if there were any issues and seek assistance from the site supervisor. Instead of doing so, he attempted to push a wire through the conveyor belt to free the concrete obstruction. He started the conveyor again to advance the belt along a bit. His left glove became caught and he was dragged around the outside of the drum causing injury to his left arm. He eventually pulled his arm free but was severely injured.

[62] The relevant risk was exposure to the crushing unit's moving parts. The relevant failure by the company was the failure to fit the conveyor with an appropriate guarding barrier and to install appropriately located emergency stops on the conveyor.

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[17] *WorkSafe New Zealand v Richard Stodart Building Ltd* [2019] NZDC 4119.
[18] *WorkSafe New Zealand v Atlas Concrete Ltd* [2017] NZDC 27233.

[63] The Judge in *Atlas Concrete Ltd* also placed weight on the fact the worker had disregarded instructions and recognised the company had not received prior notice from WorkSafe there was a concern about the adequacy of the guard rails and the stopping mechanisms on the machine. A starting-point of $300,000 was considered appropriate.

[64] Many of these features are not present here.

Summary on comparative cases

[65] Fixing a starting point is not an exact science. But on a comparative analysis with the above cases, taking into account all relevant factors noted above, I reached the view the appropriate starting-point for Blackstump's medium culpability was $320,000. Anything less does not take into account the actual harm realised—the tragic death of a young man; whilst recognising there was no causative link between that death and Blackstump's material omission.

Mitigating factors

[66] Ms Longdill for WorkSafe rightly emphasised the principle any discounts for cognisable mitigating factors needed to be assessed against gravity of offending. There is always the trap that routine standard discounts can distort individualised justice by reducing starting-points to outcomes too low in the circumstances. A balance must be struck.

[67] There are several relevant mitigating factors. First, the voluntary reparation paid by Blackstump to Mr Bartlett's family. It was paid out of an insurance policy. But, in addition Blackstump has made further voluntary payments. The total sum of all payments, as noted, was $59,144.10. I consider this justifies a five percent discount.

[68] Likewise, a similar discount for Blackstump's co-operation with WorkSafe's investigation and prosecution.

[69] Blackstump has no previous convictions nor any adverse safety history with WorkSafe. A five percent discount is justified.

[70] I also accept there is a genuine expression of remorse. I am told that in addition to voluntary reparation, Blackstump gave the crew involved the week off after the accident on paid leave. Blackstump's director attended Mr Bartlett's tangi. And he has been willing to undergo a restorative process. As against the gravity of the offending, a five percent discount is appropriate.

[71] However, there were further steps taken by Blackstump. Significantly, it has taken remedial steps since the offending beyond the underlying deficit that led to the incident. And given its real prospects of rehabilitation I consider a further discount of five percent is appropriate for these factors.

[72] Mitigating factors prior to consideration of the guilty plea thus equate to 25 percent of the starting-point fine.

[73] A guilty plea was promptly entered following withdrawal of the more serious charge along with a significant concession by the prosecutor the lack of guarding could not be linked to Mr Bartlett's fatality. In those circumstances, a discount of 25 percent under *Hessell* principles is appropriate.[19]

[74] Applying all these discount results in a figure of $180,000.

Step 3: Ancillary orders—prosecutor's costs

[75] The prosecutor seeks a contribution to WorkSafe's costs in the sum of $7920 representing half of its external legal costs in relation to the prosecution. This is permissible if I am satisfied of the criteria under s 152(1) of the Act. Section 152(1) provides:

> On the application of the regulator, the Court may order for the offender to pay the regulator the sum that it thinks just and reasonable towards the cost of the prosecution (including the cost of investigating the offending and any associated costs).

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[19] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[76] Here, the sum sought reflects relates half of WorkSafe's external legal costs. As at the date of sentencing, it involved 66 hours at the Crown rate of $240 per hour. WorkSafe does not seek recovery of its additional internal legal cost, nor cost of the investigation or expert witnesses engaged in the investigation and prosecution. Also, Blackstump does have insurance in place which can be utilised in relation to these costs.

[77] Overall, I consider the amount sought by the prosecutor under s 152(1) is a just and reasonable contribution towards the cost of the prosecution. And I order Blackstump pay that sum to WorkSafe.

Step 4 – Proportionality assessment

[78] Essentially Blackstump argues it is not in a financial position to pay a large fine without a real risk of ceasing operation.[20]

[79] A proper evidential foundation must be laid out by corporate offenders on this score. As noted by Heath J in *Mobile Refrigeration Specialists Ltd v Department of Labour,* a sentencing Court should have clear evidence of financial capacity supported by appropriate disclosure of all material facts before imposing a sentence below that appropriate to mark the offending.[21]

Blackburn affidavit

[80] Mr Mark Blackburn is Blackstump's accountant. In accordance with his duty to the Court, he provided in his affidavit disclosure of all material financial information. The real issue is whether the financial picture revealed justifies imposing a fine below that appropriate to mark the offending. Here a fine of $180,000.

[81] Mr Blackburn is in a good position to provide insight into Blackstump's financial affairs given the company has been his client since 2012. And for many years he has worked extensively in the forestry industry throughout New Zealand, both on

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[20] Affidavit of Mark Blackburn dated 10 October 2019 (Blackburn affidavit) at [43].
[21] *Mobile Refrigeration Specialists Ltd v Department of Labour* [2010] 7 NZELR 243 at [55]/

behalf of clients, and for various industry organisations. In fact, his work has particular emphasis on costing and finance for logging operations. Over 70 percent of his clients are based in the forestry industry spread throughout New Zealand. He is clearly an expert in the area and has first-hand knowledge of Blackstump's financial picture.

[82] Mr Blackburn's opinion a fine of any significance has the potential to significantly compromise Blackstump's ongoing viability and employment of its workers was correctly based on factual material disclosed in his affidavit. Mr Blackburn says:[22]

> If the Court imposes a fine significantly above $50,000 it is [his] opinion that this would likely mean that the company would have to seriously consider cessation of trading. Given current trading issues and cash flows this would be particularly so should the fine be required to be paid immediately, payment of any fine over an extended timeframe would considerably improve company options to remain a viable trading entity.

[83] Several factors led Mr Blackburn to this view. He stated Blackstump recognised the future in the industry in the East Coast required significantly increased mechanisation including cable logging. However, such matters are "capital intensive operations requiring heavy financial investment."[23] Due to limited equity available, this resulted in Blackstump borrowing substantially with associated high debt repayment levels due to depreciation factors associated with such machines.

[84] And Blackstump essentially financed operations through the McEwan Family Trust. The Trust purchases the associated equipment and leases it back to Blackstump with the company lease payments providing sufficient cash flow for the Trust to meet its loan commitments. Thus, core assets were purchased by the Trust and financiers involved were happy to fund the additional debt required.

[85] However, post-March 2019 Mr Blackburn said trading conditions have deteriorated significantly due to two identified events. First, Gisborne Port was hit by an adverse series of weather events meaning it was closed to shipping for extended periods. Second, that whilst those port issues were occurring, a more significant event

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[22] Blackburn affidavit at [43].
[23] Blackburn affidavit at [27(c)].

with longer term impact developed; namely an unexpected and very large drop in export log prices. For instance, a 28 percent ($39.55 per ton) drop in benchmark A Grade export log prices over the 36-month rolling average. Mr Blackburn says the consequences of these events on logging contractors is significant and have impacted most adversely on Blackstump.[24]

[86] Thus, with high remaining debt servicing and current restrictive volumes, Mr Blackburn has "extreme concerns" for Blackstump's long-term financial viability should these conditions continue. Blackstump thus may need to consider refinancing or to await a substantial increase in log prices that encourages forest owners to allow for increased production and margins. Mr Blackburn says, it is "a balancing act" between how long these reserves will last and possible market pick-up arises.

[87] Essentially, his opinion is if the fine is "significantly above $50,000" it is likely Blackstump will seriously consider cessation of trading. But he adds, that payment of any fine over an extended timeframe would considerably improve company options to remain a viable trading entity. And whilst his opinion on these matters is substantially helpful to me, it is not determinative.

Analysis of financial information

[88] For a combination of reasons, I reached the view the fine of $180,000 should be reduced to $150,000 under this proportionality assessment.

[89] First, Mr Blackburn does not suggest the fine should be capped at $50,000 or liquidation is likely to follow, as starkly contended by Blackstump.[25] As noted, Mr Blackburn adds significant caveats to his opinion. A fine "significantly above" $50,000" is likely to lead to Blackstump seriously considering cessation of trading "particularly" if the fine was required to be paid immediately rather than by instalment.

[90] Second, Blackstump may avail itself of an instalment plan to pay the fine if the arrangement is approved by the Registrar in due course. If a fine is not subject to an

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[24] Blackburn affidavit at [29].

[25] Blackstump submissions on sentence at [8.3]: "a fine of $50,000 should be imposed with a direction for payment by instalments over time".

order for immediate payment, the Registrar may enter into an arrangement with a defendant or with a representative of the defendant to allow for greater time for payment. But the instalment arrangement cannot extend beyond five years after the date on which the arrangement is entered into.[26]

[91] Third, as emphasised by Ms Longdill, exhibit L to the Blackburn affidavit records drawings at a monthly rate of $2000 over the relevant financial periods pointing to greater capacity to pay the fine than claimed.

[92] In developing that argument, Ms Longdill relied on the affidavit of Mr Simon Waldron, a senior accountant for WorkSafe. Mr Waldron analysed Mr Blackburn's affidavit and reviewed three cashflow statements provided. On the basis of his analysis, Mr Waldron says a fine immediately payable would require a cash input from the shareholders or financed from a third party.[27] But, also fixed assets can be sold to service a fine. And Blackstump was profitable to the extent its shareholders were able to withdraw substantial cash over recent financial periods. Mr Waldron says Blackstump would be able to service a fine in the order of $240,000 in instalments over five years.

[93] *YSB Group Limited v WorkSafe New Zealand* is instructive.[28] In *YSB Group Limited*, Duffy J said that a Court needs to be aware of how corporate offenders can structure their financial circumstances so as to appear less able to pay a fine than they would be with an alternative approach. Significantly, Duffy J added at [40]:[29]

> I consider the payment of the fine to be a higher priority than payments to shareholders and directors of the company. There is little if any difference between this expectation and the general expectation that a company must pay its third-party creditors before it pays its directors and shareholders. In both cases the company has incurred a liability to a third party which should discharge ahead of any discretionary payments that it may choose to make to its directors and shareholders.

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[26] Summary Proceedings Act s 86. If an instalment arrangement is sought the s 86 process is more appropriate given the powers available to the Registrar under that statutory scheme.
[27] Affidavit of Simon Waldron at [16]
[28] *YSB Group Limited v WorkSafe NZ Ltd* [2009] NZHC 2570.
[29] At [40].

[94] In the end, payment of this fine by Blackstump must be given higher priority than payments to its shareholders and directors.

[95] When these all these factors were combined, I reached the view Blackstump is financially capable of paying an end fine of $150,000. Over a five-year instalment plan, it equates to about $2500 per month.

Conclusion

[96] Blackstump is fined $150,000 with Court costs of $130. Under s 152, Blackstump is ordered to pay costs in the sum of $7920 in relation to the prosecution.

WP Cathcart
District Court Judge