

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2021-090-001593
[2022] NZDC 21224**

WORKSAFE NEW ZEALAND
Prosecutor

v

KB PROJECT MANAGEMENT LIMITED
Defendant

Hearing: 20 October 2022
Appearances: A Simpson for the Prosecutor
No appearance by or for the Defendant
Judgment: 20 October 2022

**NOTES OF JUDGE J M JELAŠ ON SENTENCING
(REASONS)**

Outcome

[1] At the sentencing hearing the following sentence against KG Project Management Limited was announced:

- (a) CRN ending 0413
 - (i) Reparation to be paid to the victim of \$45,000.
 - (ii) Consequential loss reparation of \$36,399.00.

(iii) Fine of \$400,000.

(iv) Prosecution legal costs of \$3,474.09

[2] CRN ending 0412

(a) Fine of \$25,000

[3] CRN ending 0411

(a) Fine of \$15,000.

[4] What follows are the reasons for the above outcomes.

General Background

[5] A formal proof hearing for the charges brought by Mahi Haumaru Aotearoa (Worksafe New Zealand) against KB Project Management Limited took place on 1 July 2022. On that date I found all three charges against the company proved. The reasons for those findings of guilt were set out in my subsequent reserved decision.¹ At the end of my reserved decision I recorded the following paragraph:

I direct the registrar of the Court is to notify the defendant of the future sentencing date and I request that WorkSafe undertake the same.

I encourage the defendant to engage in the sentencing process. In the sentencing process I need to consider the defendant's ability to pay any fine that might be otherwise deemed appropriate. Without information from the defendant company, I will be unable to consider the financial circumstances of the company.

[6] Shortly after that decision was issued on 7 July 2022, KB Project went into liquidation on 22 July 2022.

[7] Counsel for Mahi Haumaru Aotearoa advises that an email copy of my decision was sent to the director of KB Project and the liquidators have also received the same. The liquidators have advised Mahi Haumaru Aotearoa of the following:

¹ *WorkSafe NZ v KB Project Management Limited* [2022] NZDC 12618.

We have no objection to WorkSafe continuing the proceedings against KBPM on the condition that the liquidators are not made personally liable for any adverse costs or award, fine/sentence as a result of the proceedings. For clarity, the liquidators will not take any steps in the proceedings and will abide by the Court's decisions.

[8] The liquidators have not endeavoured to place any financial information before the Court relating to KB Project's financial circumstances. The fact of KB Project being placed in liquidation raises obvious issues as to its financial viability but in the absence of any further information or request to file further information to the Court, this sentencing hearing has proceeded.

[9] I have received helpful submissions filed by counsel for Mahi Haumarua Aotearoa.

Summary of facts

[10] KB Project Management Limited (KB Project) is a project management firm specialising in residential construction. At the time of the accident the victim was almost exclusively contracted to work for KB Project.

[11] KB Project was the head contractor at a construction/accident site at 66 Clayburn Road in Glen Eden. The building work being undertaken was the construct of 11 two-storey units.

[12] On 5 March 2020 the victim was at the site and working on unit four. He was working with a colleague, Mr Jagjit Bains, who was also employed by KB Project. The victim and Mr Bains were laying the joists for the mid-floor which are 7.2 to 7.9 metres high. In order to carry out that work, both needed platforms below the mid-floor to work from. On site on this day was one mobile platform but that was being used by other construction workers.

[13] The victim told WorkSafe investigators that he felt he had no choice other than to erect a temporary wooden platform in order to get the joists finished. The victim asked scaffolders for a plank. The plank obtained and used by the victim was approximately three metres long. The victim placed the plank on nogs, nailed the ends

to secure it and made a dummy stud underneath it to hold the plank. Both the victim and Mr Bains were working from the makeshift platforms approximately three metres apart from each other. In order to reach the plank, the victim had to climb up a seven step A-frame ladder.

[14] At approximately 3 pm in the afternoon the victim states he had been working on the platform for about five minutes when the plank snapped in half. As a result, he fell straight down onto the concrete floor below, landing heavily on his feet. He then fell onto his right side. An ambulance was called, and he was taken to Auckland Hospital. He sustained serious leg injuries and underwent surgery.

[15] The defendant failed to notify WorkSafe of the incident and also failed to preserve the scene. The plank that the victim had been working from was never recovered or inspected.

Victim impact statement

[16] The victim, Mr Darshan Shah, was 31 years old at the time of the accident. He has a wife and two children. He has not yet and is unlikely to be able to return to work. He describes the injuries he sustained as follows:

Compound fracture to his right ankle which resulted in the ankle basically shattering into a number of small pieces. He was in hospital for 24 days initially. On 6 March 2020 he had an open reduction and internal fixation surgery to stabilise the bones. On 16 March 2020 the ORIF metal stabilisation was removed, and surgeons installed four titanium plates and 22 screws.

After a further 10 months, surgeons removed all of the metalware due to ongoing problems with inflammation and discomfort in the ankle which made it hard to walk. The victim then had to wait three months to see if there was any improvement. There was not.

[17] On 23 May 2022 surgeons removed all ligaments in the ankle and inserted three screws and fused the victim's ankle.

[18] In addition to the significant injury the victim has sustained, he has suffered a lot of stress and financial pressure. At the time of the accident, he was the sole income earner for his family. The family had purchased their home in 2019. After the accident the bank gave the victim and his wife a mortgage holiday for six months, after which

they had to continue paying the mortgage again. His wife has had to start part-time work from August 2021 in order to provide sufficient income for the household. Mortgage repayments are approximately \$800 a week and the ACC payments are \$1,070 per week.

[19] Other impacts on the victim will be referred to when assessing the level of reparation and fine to be imposed.

Relevant sentencing provisions and methodology

[20] The sentencing framework under the Health and Safety at Work Act 2015 (HSWA) is informed by s 151(2) and s 151(2)(b) HSWA.

[21] Section 151(2) HSWA provides:

(2) The court must apply the Sentencing Act 2002 and must have particular regard to—

- (a) sections 7 to 10 of that Act; and
- (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.

[22] The prosecution submit that the most relevant s 7 principles of the Sentencing Act 2002 applicable to this case is:

- (a) the need to hold KB Project to account for the harm caused by the offending;
- (b) promote in KB Project a sense of responsibility for that harm;
- (c) provide for the interests of Mr Shah, including reparation; and
- (d) to impose an outcome that deters both KB Project and others generally.

[23] Pursuant to s 8 of the Sentencing Act, relevant principles of particular importance for this case are:

- (a) the gravity of the offending and degree of KB Project's culpability;
- (b) the seriousness of the offending; and
- (c) the effects of the offending on the victim.

[24] Section 151(2)(b) of the HSWA requires consideration of the purposes of the HSWA. Those purposes are set out in s 3 of the Act as follows:

- (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
 - (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
 - (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
 - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
 - (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
 - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

- (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

(2) In furthering subsection (1)(a), regard must be had to the principle 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.

[25] The four step process for sentencing under the HSWA was established in the guideline judgment of *Stumpmaster v WorkSafe New Zealand*.²

Assessing reparation

[26] A court may impose a sentence of reparation where the victim of the offence suffers emotional harm and consequential physical harm. There can be no doubt that the victim, Mr Shah, has suffered significant and permanent physical harm as a result of falling at height onto concrete. Mr Shah will be permanently disabled as a result of his injuries. As a result of his right ankle being fused, he can now only move his right foot slightly up and down. He is not able to move his ankle sideways or rotate the foot. He has been advised by medical specialists that there is nothing further they can do and there will be no improvements in his mobility.

[27] As a result, he can only walk on flat ground. Mr Shah can no longer run, walk up flights of stairs is difficult and only if there is a handrail available. Standing on a ladder for any time longer than 10 minutes is also challenging. His balance is also affected as his right leg is approximately five millimetres shorter than the left one. Working on building sites on uneven ground and carrying heavy items is extremely difficult, if not impossible, for him. Further, he still gets ongoing pain with his ankle if he stands for too long or does too much physical activity. Again, this is unlikely to change for him in the near future.

[28] It is well over two years since the accident occurred. In the last two months Mr Shah has been able to return to part-time work. He is working with friends who

² *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

have their own construction business and who understand his post-accident work limitations. He can only assist with light renovation work. For example, kitchen and bathroom renovations. He is unable to participate in any heavy physical labour aspects of construction.

[29] Mr Shah will not be able to return to full-time employment in the construction industry. He has further lost the ability to engage in physical activities for his wellbeing and with physical activities that he would normally engage in with his children. For example, in his victim impact statement he states that before the accident he used to enjoy playing social cricket and doing long adventure walks and tramping and climbing up mountains. However, since the accident he can no longer play cricket or do any outdoor walking activities. He is no longer able to engage in fun, physical play with his children such as kicking the ball with his kids. His son misses being able to play soccer with his father in the park.

[30] Counsel has submitted in their fulsome written submissions various cases for consideration where reparation in the range of \$35,000 to \$50,000 was imposed. In two of the cases the victim was able to return to work within a six to seven month period. In the remaining two cases neither victim would be able to return to their prior accident employment.

[31] I consider the case of *WorkSafe New Zealand v Ron Frew Family Partnership Ltd* and *WorkSafe New Zealand Ltd v Hydrotech Ltd* to offer some guidance.³ As I have noted, both of the victims in those cases were significantly injured and able to return to their earlier employment. Reparation in the sums of \$40,000 and \$50,000 were imposed, although I note the sum of \$50,000 in *Hydrotech Ltd* had been agreed to by the company and/or repaid at time of sentencing. Hydrotech had also supported the victim in multiple other ways set out in that judgment.

[32] For Mr Shah, he has suffered a significant injury that will continue to plague him into the future. It is likely that he will suffer a level of lifelong pain and has lost a significant amount of mobility. In time he will need to find alternative employment.

³ *WorkSafe New Zealand v Ron Frew Family Partnership Ltd* [2018] NZDC 20330; and *WorkSafe New Zealand Ltd v Hydrotech Ltd* [2017] NZDC 11920.

He has lost the ability to enjoy the benefits of physical activity for himself and with others. He has many challenges ahead, with no immediate relief in sight despite the significant passage of time since the accident occurred.

[33] In all the circumstances, I consider the appropriate amount of reparation to be imposed is \$45,000.

[34] Supplementary submissions were filed by counsel. On consequential loss reparation, a court is entitled to make awards of reparation to cover consequential loss for victims in respect of loss that is not covered by any entitlements received under the ACC scheme. Mr Shah has received ACC of 80 per cent of his weekly wage. Mr Shaw, a chartered accountant, has calculated the shortfall between Mr Shah's pre-accident wage and ACC payment between the period 12 March 2020 and 20 October 2022. The shortfall calculated is \$36,399.

[35] I make an order for consequential loss reparation of \$36,399.

Assessing the quantum of the fine⁴

[36] *Stumpmaster* identified four guideline bands for the assessment of culpability those bands being:

- (a) Low culpability – starting point of up to \$250,000;
- (b) Medium culpability - starting point of up to \$250,000 to \$600,000;
- (c) High culpability - starting point of up to \$600,000 to \$1,000,000;
- (d) Very high culpability - starting point of up to \$1,000,000 plus.

[37] Mahi Haumaru Aotearoa (Worksafe New Zealand) submit KB Project's culpability falls in the medium culpability band. A starting point in the vicinity of

⁴ The balance of this sentencing decision was re-constructed in Chambers after the court recording system failed.

\$500,000 is submitted as within the appropriate range. Under the Act the following are factors relevant to assessing culpability.

Identification of the operative acts or omissions at issue and the “practicable steps” it was reasonable for KB Project to have taken.

[38] It is submitted KB Project failed to take the following reasonably practicable steps.

- (a) Adequately planned the work at the site to manage the risk of a fall from height.
- (b) Ensured compliant controls, for example mobile scaffolds, temporary working platforms or scaffolding, were in place to manage the risk of a fall from height.
- (c) Ensure regular monitoring of the approach to working at height.

[39] I accept the submission that a failure to ensure compliant controls were in place before work at height commences is serious. Workers should be protected from the risk of fall from height. As demonstrated in this case the consequences for the worker can be serious, if not fatal.

The nature and seriousness of the risk of harm occurring as well as the realised risk. Whether death, serious injury, or serious illness occurred or could reasonably have been expect to have occurred.

[40] KB Project failed to adequately plan the required work could be undertaken safely from at height. KB Project failed to ensure that there was compliant equipment available for the victim and also failed to monitor the work at height. The risk from falling at height is serious with the obvious potential risk of serious injury or death. In this case this risk was realised. The risk was readily foreseeable.

[41] It is noteworthy that the need for working at height with compliant equipment had been previously brought to KB Project’s attention.

[42] The agreed summary of facts records the following in respect of past investigations of KB Project's WorkSafe practices:

On 4 October 2018, WorkSafe observed a temporary makeshift platform at the defendant's site and issued a prohibition notice to KB Project's Limited after concluding there were inadequate controls in place to manage the risk of workers working from height. On 28 August 2019, WorkSafe issued a prohibition notice to KB Project's Limited after observing workers using ladders and makeshift wooden platforms to undertake the task of installing floor joists on the second level. Also on 4 October 2019, WorkSafe issued a sustained compliance letter to KB Project's Limited after observing workers working on unsafe makeshift single wooden work platforms.

[43] I accept the submission that it is an aggravating feature that the requirements and risks associated with non-compliant work from height had previously been put in direct issue with KB Project.

The degree of departure from standards prevailing in the relevant industry

[44] Best practice guidelines for working at height in New Zealand were published in 2012. The introduction to these guidelines sets out factors contributing to injuries. Some of those factors include lack of adequate planning, hazard assessment, incorrect protection or equipment choice and suitable equipment being available.

[45] The guidelines specifically allow for the construction of temporary platforms for working from height. The guideline emphasises that design, fabrication, erection of temporary work platforms from building materials must meet sound design and construction principles. The specifics of those temporary work platforms are specified in the guidelines. The specificity provided in the guidelines includes the minimum width of any scaffold planks used.

[46] The summary of facts records that while WorkSafe did not receive the opportunity to inspect the plank used by the victim the evidence establishes it did not comply with the guidelines in particular it was a single plank (that fell well short of the minimum width) and there were no guardrails, toe boards, or mid-rails.

The obviousness of the hazard

[47] I accept the submission made that the risk of allowing workers to work from height without appropriate controls is obvious. And, those risks had previously been brought directly to KB Project's attention.

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

[48] I further accept the submission that the necessary controls for working at height is not cost prohibitive nor was planning and monitoring the work at height. Safe measures could readily have been put in place by materials easily accessible and available to a construction company.

The current state of knowledge of the risks, nature and severity of harm and the means available to avoid the hazard or mitigate the risk of its occurrence

[49] The risks associated with working from height without appropriate controls is obvious. The guidelines have been in place for some time and KB Project has previously had the direct relevant guidelines brought to its attention and discussed at length with it.

Analysis

[50] Having regard to all of the above factors I accept that the risks posed to the victim were blatantly obvious and there were no steps to minimise or mitigate those risks which could have readily been available without any unnecessary costs or hardship being suffered by KB Project. A further aggravating factor is KB Project's awareness of these issues through its recent involvement with WorkSafe. The consequences for the victim have been lifechanging. In all the circumstances a fine of \$400,000.00 is appropriate.

Offence of failing to give notice of a notifiable event and failing to ensure the site of the notifiable event was preserved

[51] I accepted the starting point sentences submitted for the remaining two offences of failing to give notice and failing to preserve the site when a notifiable event occurs. KB Project took no steps to notify WorkSafe or preserve the scene despite its obligations to do so. It was not until five months later that WorkSafe were alerted to the incident when conducting other investigations and speaking with the victim. KB Project has acknowledged it was aware of its statutory obligations and its failure to comply.

[52] I find a fine of \$25,000 is appropriate for failing to give notice and a further fine of \$15,000 is appropriate for failing to preserve the site on which the event occurred.

Mitigating factors

[53] No mitigating factors have been noted in Mahi Haumarua Aotearoa's (Worksafe New Zealand) submissions and none have been identified by me.

Prosecution costs

[54] Mahi Haumarua Aotearoa's (Worksafe New Zealand) seeks a contribution towards prosecution legal costs of \$3,474.09. This claim is entirely reasonable and falls well short of the true costs incurred.

Proportionality assessment

[55] The last step in the sentencing process requires consideration of the total imposition of fine, reparation and other orders upon KB Project. The total imposed must be proportionate to the circumstances of the offending and KB Project. The fact KB Project has been placed into liquidation raises obvious immediate issues about its ability to pay. The liquidator had been invited to make submissions about the financial means of KB Project none have been received. A similar situation confronted the

Court in *Commerce Commission v Appenture Marketing Limited*.⁵ Like the Court in *Appenture Marketing Limited* case I do not intend to make reductions for no or limited financial capacity. The liquidator who is well versed with KB Project's finances has not opted to make submissions. Hence I have no information upon which to assess KB Project's financial capacity in an informed way.

Outcome

[56] KB Project were therefore fined as follows:

- (a) CRN ending 0413 failing to comply with duty.
 - (i) Reparation to be paid to Mr Shah \$45,000
 - (ii) Consequential loss reparation \$36,399.00
 - (iii) Fine of \$400,000
 - (iv) Prosecutors cost \$3,474.09
- (b) CRN ending 0412 failing to give notice.
 - (i) Fine \$25,000
- (c) CRN ending 0411 failing to ensure the site was preserved.
 - (i) Fine \$15,000

Judge J Jelaš
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/05/2023

⁵ *Commerce Commission v Appenture Marketing Limited* [2018] NZDC 1853 92 February 2018.