IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-011015
[2022] NZDC 26088

WORKSAFE NEW ZEALAND
Prosecutor

v

1962 TREES LIMITED
Defendant

Hearing: 13 December 2022

Appearances: A Simpson for the Prosecutor
G Christie for the Convicted Company

Judgment: 13 December 2022

NOTES OF JUDGE S J MAUDE ON SENTENCING

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[1] Canam Building Limited is charged that on 29 November 2017 having had a duty to, as far as reasonably practicable, ensure the health and safety of its workers working on a construction site at Alexandra Park failed to comply with that duty, exposing workers to the risk of death or serious injury by falling through what I will describe as a gap, or what has been described in the summaries of facts as a void.

[2] The company, Canam Building Limited, now known as 1962 Trees Limited, has pleaded guilty to the charge.

[3] Today, WorkSafe is represented by Ms Simpson and I have detailed submissions from WorkSafe, and the company by Mr Christie who, while seeking leave to withdraw, has made some brief submissions around the issue of some contest

as to the responsibilities and where they lay for the offending, I simply pointing out, as I do in this decision, that today has not been scheduled as a disputed facts hearing but rather as a sentencing and that I accordingly must sentence the company on the summary of facts agreed for the purposes of sentencing.

[4] In summary, worker Mr Le Noel-Gray fell through two voids or gaps left on the building site that he was working on. Mr Christie in the submissions filed for WorkSafe urged that the sentence to be imposed should compose of:

(a) emotional harm reparation of between $2,000 and $5,000;

(b) a start point for a fine in the order of $450,000 and $500,000;

(c) 10 to 15 per cent discount for guilty plea; and

(d) award of costs in favour of WorkSafe with relation to both external and internal costs incurred by it.

[5] While Mr Christie had sought to withdraw, I do observe that he, in written submission, urged that:

(a) the company was in essence insolvent;

(b) the related company was already in liquidation;

(c) the company believed it was not guilty but had pleaded guilty for convenience. I have observed of course already that I sentence on the summary of facts presented to me;

(d) Canam Construction Limited was the head contractor;

(e) Canam Building Limited the contractor;

(f) Canam Construction engaged Steel & Tube Holdings Limited who engaged in turn Outlaw Reinforcing Limited;

(g) Outlaw was responsible for the employment of the victim; and

(h) Steel & Tube and Outlaw did not follow agreed procedures and that the platform created was not handed over by Canam Building to Canam Construction to authorise it for use.

[6] The above is a summary of the written submission received from Mr Christie and I simply repeat that my responsibility is to sentence on the agreed facts pleaded to, which I now narrate, and I summarise what is a detailed caption summary.

[7] Canam Construction Limited is a company with its registered office in Auckland. Canam Building Limited is a company with its registered office in Ellerslie. Both Canam Construction and Canam Building are wholly owned by Canam Group Limited.

[8] Canam Construction was building more than 100 units in an apartment complex near ASB Showgrounds in Greenlane, Auckland at the relevant time.

[9] Canam Construction was responsible for managing the co-ordination of subcontractors. It engaged Canam Building to complete concrete and carpentry work on site.

[10] Canam Construction engaged Steel & Tube Holdings Limited to undertake steel fixing work at the development.

[11] Steel & Tube, as I have already indicated, in turn engaged Outlaw Reinforcing Limited as a subcontractor to undertake steel fixing work at the Alexandra Park development.

[12] Canam Construction prepared safety documentation, including a site safety plan and a hazard register and had a hazard board on site that was updated as required.

[13] Canam Construction assigned a site manager to induct workers.

[14] Canam Construction held regular weekly meetings with representatives of all subcontractors on the work site. Subcontractors would hold toolbox meetings with their own staff.

[15] Mr Van Wyk worked with Outlaw to ensure that work did not start until it was safe to do so.

[16] Steel & Tube also prepared a site-specific safety plan, which Outlaw signed.

[17] On the day of the accident, Mr Le Noel-Gray was working for Outlaw at the Alexandra Park building A site. It was his second day working on the lift or core area. There were others also working there.

[18] Before commencement of work on the morning of 29 November 2017, the Outlaw workers noticed that the floor section was incomplete. It was then covered, but the void next to where they were going to be landing steel was not covered. They had not been told about the open void before they went up to the work area.

[19] Outlaw asked for the void to be covered before their work commenced. A Canam Building worker then covered the void with two pieces of plywood that were not secured. Canam Building site foreman, Mr Faaui, then advised Outlaw that it was safe to work in the area.

[20] No one told Mr Le Noel-Gray not to work near the planks covering the void and no one told workers not to walk on the plywood cover.

[21] At one stage, two Canam Building workers stood on the plywood.

[22] At 12.30 pm while the victim was handling steel, he stepped on the partially covered void causing one of the two pieces of plywood which had been placed over the void to snap. The victim fell through the void hitting his head on the frame around it, which caused him to lose consciousness. He landed 3.3 metres below on the concrete floor. The fall caused him to have a seizure, as a result of which he rolled and fell through another open void, landing a further 3.32 metres below on the next

floor down. He then fell through the second void shown below. He ended up in the bottom of the ladder shown in the photograph in the summary.

[23] Emergency services were called. Fire and police and ambulance attended, and the victim was lifted out by crane. He was then transported from the scene by ambulance. He was treated at Auckland City Hospital and discharged the same day. He suffered a gash to his head, headaches and bruising all over his body.

[24] In terms of relevant industry standards, the construction industry is a high risk one. The degree of harm that might result from someone falling on a construction site is high. The hazard of falling on a work site where there is a void or a hole is an obvious one. The risks are well-known.

[25] There are a number of documents readily available that set out ways of eliminating or minimising the risk, including the best practice guidelines for working at height in New Zealand and several Australian documents such as the Safe Work Australia code of practice for managing the risk of falls in the workplace and the Australian Government national code of practice for the prevention of falls in general construction.

[26] It is the main contractor's responsibility to control hazards on the site. That was Canam Construction.

[27] Canam Building was also required to ensure, so far as is reasonably practicable, the health and welfare of workers whose activities in carrying out work are influenced or directed by it while they are carrying out that work.

[28] Canam Building failed to take the following reasonably practicable actions in compliance with their duties:

(a) to ensure that fall hazards were covered properly;

(b) to ensure that coverings over fall hazards had warning signs placed on them identifying a potential fall hazard if removed;

(c) to effectively communicate the risks of identified fall hazards to other workers who had cause to be in the area; and

(d) to ensure operating procedures regarding fall hazard and penetrations are implemented.

[29] The risks of falls were known to Canam Building.

[30] Mr Faaui acknowledged that he did not tell Mr Le Noel-Gray not to go on the manhole or climb up the cage. He said this was because Mr Le Noel-Gray did not work for Canam Building and Mr Le Noel-Gray had a boss up there.

[31] The cost of adequately covering or fencing off the void would have been grossly disproportionate to the risk.

[32] The cost of installing signage would have been negligible.

[33] The time taken post-accident to secure the cover was in factvless than 10 minutes.

[34] Additionally, the void on the floor should have been covered or fenced off as it was not in use on the day.

[35] The failure to take reasonably practicable steps exposed the victim and other workers to a risk of death or serious injury.

[36] The summary notes that in November 2017, WorkSafe had cause to inspect the Alexandra Park site, issuing improvement notices in respect of risk, both notices however complied with.

[37] That is a summary of the facts which I am referred to from which I am to sentence.

[38] The relevant law that I must have regard to firstly sets out the purposes of the Health and Safety at Work Act 2015 which require:

(a) the protection of workers against harm to their health, safety and welfare by eliminating risks arising from work;

(b) security compliance through effective and appropriate enforcement measures; and

(c) providing a framework for continuous improvement and progressively higher standards of work and health safety.

[39] I am referred also to the well-known sentencing principles contained within the Sentencing Act 2002 and, in particular, the need to hold the company accountable, to deter and denounce and to provide for victims.

[40] I am reminded that for this Court, sentence is a four step process. Firstly, to assess reparation; secondly, to fix a fine; thirdly, to make any ancillary orders necessary, in this case a submission for costs; and fourthly, to make an overall assessment as to the appropriateness of the arrived at outcome.

[41] In terms of reparation, no victim impact report is available. The courts however have operated without victim impact reports, but this victim was not contactable.

[42] In *Ocean Fisheries Limited v Maritime New Zealand* an outcome was reached where reparation was ordered in the sum of $5,000 in respect of emotional harm to siblings of a deceased.[1] In *WorkSafe New Zealand Ltd v Tree & Forest Ltd* an outcome of $2,000 reparation was arrived at in the absence of a victim impact report where a victim had required hospital treatment with a diagnosis of concussion.[2] Clearly, there is a need for a reparation order, albeit at this point the victim not being contactable.

[43] The nearest of the cases referred to me to the facts in this case is *Tree & Forest* where hospitalisation was required, as it was in this case, with no lasting injury. In that situation, reparation was fixed at $2,000. I fix reparation in the same sum.

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[1] *Ocean Fisheries Limited v Maritime New Zealand* (2021) 3 NZLR.
[2] *WorkSafe New Zealand Ltd v Tree & Forest Ltd* [2019] NZDC 25406.

[44] I turn then to consider the issue of what fine is appropriate. I am referred to the now well-known decision of *Stumpmaster v WorkSafe New Zealand* where reference was made to the various culpability factors that the Court should consider.[3] They are:

(a) the identification of the operative acts or omissions at issue;

(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 relevant industry;

(d) the obviousness of the hazard;

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

(f) the current state of knowledge of the risks and the nature and severity of the harm which could result; and

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

[45] I am referred also to sentencing bands referenced in *Stumpmaster* suggesting for low culpability a fine in the range of 0 to $250,000, medium culpability $250,000 to $600,000, high culpability $600,000 to $1 million, and very high $1 million to $1.5 million.

[46] I then turn to consider the culpability factors that I have referred to relating to this particular case.

[3] *Stumpmaster v WorkSafe New Zealand* [2019] DCR 19.

[47] The relevant acts and omissions are set out in the charging document and the agreed summary of facts.

[48] In terms of the nature and seriousness of the risk of harm, the void posed a risk of serious injury and death to the victim and approximately 10 other workers who were working at the relevant area. The risk was realised in the case of Mr Le Noel Gray who suffered a gash to his head, headaches and bruising over his body. He was very lucky not to have been more seriously injured.

[49] In terms of the degree of departure from standards prevailing in this industry, there are a number of relevant and publicly available guidelines relating to the risk of falls, including the risk of falling through open penetrations or voids and how these risks can be eliminated or minimised.

[50] In respect of the obviousness of the hazard, falls from height are a well-known and significant hazard in the building and construction industry area. That is plainly obvious.

[51] In terms of the availability, cost and effectiveness of any means to avoid the hazard, as indicated in the summary of facts the required steps necessary to have avoided this risk and this injury would not have been complex or expensive.

[52] In terms of the current state of knowledge of risks and the nature of severity, publicly available information relating to risks of falls are well-known and easily accessible, as I have also referred to in the summary.

[53] WorkSafe, in addressing the issue of start point sentences, refer me to *WorkSafe New Zealand v Shore Living Limited* where there were two open voids on a second storey of a house under construction, no edge protection or safety railings around the edge of the open voids and no safety nets installed.[4] A worker lost his balance and fell backwards and died as a result of injuries. The start point adopted was $600,000 as a fine.

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[4] *WorkSafe New Zealand v Shore Living Limited* [2021] NZDC 13214.

[54] I am also referred to *WorkSafe New Zealand v Style Construction Ltd* where a victim fell from the first floor to the ground floor through a void where a stairwell was yet to be built, suffering traumatic brain injury and skull fracture and a broken arm.[5] A start point of $360,000 was ordered.

[55] In terms of cases that I am referred to where no injuries occurred, I am referred to *WorkSafe New Zealand v Hobson Construction Ltd* where a start point of $450,000 as a fine was adopted.[6]

[56] Turning to this case, it is clear that the injuries suffered by the victim were not serious enough to cause any long term harm. There was requirement for hospitalisation but only for a brief attendance.

[57] WorkSafe submit a fine between $450,000 and $500,000 as appropriate.

[58] Mr Christie makes no specific submission as to quantum.

[59] The *Shore Living* case involved a death.

[60] *Style Construction* involved brain injury.

[61] I conclude that an appropriate start point in respect of this case is $400,000.

[62] There are not, beyond that assessment, aggravating factors and the only mitigating factor is an entry of plea in respect of which I allow a 15 per cent discount or $60,000, which would result in an end result fine of $340,000.

[63] I then turn to the issue of financial capacity of this company.

[64] WorkSafe, not the defendant company, have sought financial information as to the company's viability through Grant Thornton Accountants, such squarely raising the issue of availability of funds, indicating that there is no availability, but suggesting

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[5] *WorkSafe New Zealand v Style Construction Ltd* [2018] NZDC 26752.
[6] *WorkSafe New Zealand v Hobson Construction Ltd* [2020] NZDC 27274.

that there is not explored the possibility of accessing of funds through parent company Canam Group Limited.

[65] In the absence of any evidence as to the availability of funding from Canam Group and it being beyond this Court's ability to require the defendant company to access Canam Group Limited for resourcing, and in the further absence of this defendant company having provided any evidence of its own around financial capacity to access such funds, I form the view that the appropriate outcome is an outcome whereby I order a fine of $340,000 as assessed by me, leaving it then to WorkSafe to pursue and for the company to either seek support of its parent company or to liquidate, that a matter beyond the reach of this Court.

[66] Finally, I turn to the issue of costs and there is no opposition expressed with relation to the costs sought which, without detailing on a time basis, appear entirely appropriate to me. Accordingly, costs are awarded in the sum of $7,698.95 in respect of external costs and $2,956.85 in respect of internal costs, totalling a costs award of $10,665.80.

[67] To summarise therefore, reparation is ordered in the sum of $2,000, the company is fined $340,000 and ordered to pay costs in the sum just mentioned by me of $10,665.80.

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Judge SJ Maude
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 24/03/2023