IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2022-009-003036
CRI-2022-009-003022
[2022] NZDC 2844

WORKSAFE NEW ZEALAND
Prosecutor

v

INSPIRED ENTERPRISES LIMITED
First Defendant

LAWRENCE GREGORY GANNAWAY
Second Defendant

Hearing:	16 February 2023
Appearances:	T Braden for the Prosecutor J Lill for the First Defendant A Lang for the Second Defendant
Judgment:	16 February 2023

NOTES OF JUDGE A A COUCH ON SENTENCING

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[1] The defendants, Inspired Enterprises Limited ("IEL") and Lawrence Gannaway are for sentence on charges arising out of an incident on 21 June 2021 when vinyl flooring containing asbestos was broken and partially removed potentially releasing asbestos fibres into the air.

[2] The charge against IEL is under Health and Safety at Work Act 2015 ("HSWA"). It is that IEL failed in its duty to ensure, so far as is reasonably practicable,

the health and safety of other persons including the occupier of the property where the incident occurred.

[3] The charge against Mr Gannaway is under the Health and Safety at Work (Asbestos) Regulations 2016. It is that he failed to ensure that all asbestos that was likely to be disturbed was identified and, as far as reasonably practicable, was removed before the refurbishment was commenced.

[4] Both defendants have pleaded guilty.

[5] The summary of fact is detailed and relatively lengthy. While I take into account the whole of its contents, they need not be recited here. The essential facts are:

(a) The owner of a property in Malabar Terrace, Christchurch, wanted to have the floor coverings in her home replaced. She engaged IEL, which trades as Harrisons – Carpet and Flooring, to do the work. That company engaged Mr Gannaway, who trades as Simply Floors, to do preparation work on the floors.

(b) Neither IEL nor Mr Greenaway took steps to identify whether there may be asbestos material in the existing floor covering before work began.

(c) On 21 June 2021, after lifting the carpet and underlay in the dining room, old vinyl flooring was discovered.

(d) The vinyl was partially removed by Mr Gannaway by breaking pieces off it and taking them away in his vehicle. In doing so, he disturbed the backing, potentially releasing asbestos fibres into the air. During this process, Mr Gannaway recognised the risk that the vinyl may contain asbestos and told the owner this.

(e) The pieces of vinyl removed from the floor were subsequently placed in a bin provided by IEL which was not approved for asbestos disposal

and the operator who removed the bin was not informed of the possibility that it contained asbestos.

(f) The owner of the property had the old vinyl tested for asbestos. She received a positive test result which she passed on to IEL and Mr Gannaway on 28 June 2021.

(g) On 29 and 30 June 2021, another contractor engaged by IEL installed new flooring material over the asbestos vinyl. IEL did not inform that contractor of the positive test result.

Independent Enterprises Limited

[6] In *Stumpmaster v WorkSafe New Zealand* the High Court set out the approach to sentencing for offences under the HSWA:[1]

(a) assess the amount of reparation,

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

(c) determine whether further orders under ss 152-158 of the HSWA are required, and

(d) make an overall assessment of the proportionality and appropriateness of the "combined packet of sanctions" imposed by the preceding three steps.[2]

[7] The culpability bands to be used when fixing a fine under (b) are:

low culpability:	up to $85,000
medium culpability:	$85,000 to $200,00
high culpability:	$200,000 to $335,000
very high culpability:	$335,000 to $500,000[3]

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [3].
[2] This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.
[3] *East by West Company Limited v Maritime New Zealand* [2020] NZHC 1912.

[8] In assessing culpability, s 151 of the HSWA offers specific guidance:

> **151 Sentencing criteria**
>
> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
>
> (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
>
> (a) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (b) 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
>
> (c) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
>
> (d) 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.

[9] In *Stumpmaster*, the Court observed that these sentencing criteria are covered by the well-established culpability assessment factors identified in *Department of Labour v Hanham and Philp Contractors Limited*:[4]

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of 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 relevant industry.

(d) The obviousness of the hazard.

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[4] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC) at [54] cited in *Stumpmaster*, above n 1.

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

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

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

[10] It is appropriate to highlight the key purposes of the HSWA before embarking on the sentencing exercise:[5]

(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

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

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

[11] It must also be noted that ensuring the "the health and safety of workers" is the "primary duty of care".

[12] Against that background, sentencing under the HSWA will generally require significant weight to be given to the purposes of denunciation, deterrence and accountability.[6]

[13] Promoting a sense of responsibility and, in appropriate cases, providing reparation are also likely to be relevant purposes in these circumstances.

[14] The most relevant principles are the gravity of the offending, the seriousness of the offence, and the general desirability of consistency.

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[5] Section 3(1).
[6] *Stumpmaster*, above n 1, at [43].

[15] Following the guidelines in *Stumpmaster*, the first step is to assess reparation. In this case, no one was identified as having been actually affected by asbestos fibres. The culpability of the defendants lies in failing to identify and minimise the risk of harm rather than being responsible for harm occurring. I note that IEL reimbursed the owner of the property for costs she incurred in having the asbestos vinyl tested and in having remedial work done. The amount was $2,735.85.

[16] I have considered the Company's culpability by reference to the *Hanham* factors identified above.

(a) *Operative acts or omissions*. There were reasonably practicable steps IEL could have taken to identify whether asbestos was present in the old floor covering and to minimise the risk of harm resulting from it. In pleading guilty to the charge as laid, IEL accepts it could have taken the following steps:

  (i) To conduct an inspection prior to the refurbishment work being done to ensure any asbestos was identified and/or, if reasonably practicable, removed

  (ii) To ensure there was an asbestos management plan in place to appropriately manage any asbestos identified.

  (iii) To ensure appropriate controls were in place to manage the risk of exposure to asbestos fibres to others working and/or continuing to live at the premises.

(b) *Nature and seriousness of the risk of harm and the realised risk*. The risk of harm was exposure to asbestos fibres. This risk is potentially very serious as, in some cases, absorption of asbestos fibres in the lungs can lead to serious illness and death. As noted earlier, there is no suggestion that this risk has been realised but it is in the very nature of the risk of inhaling asbestos fibres that it may not result in any actual harm for many years.

(c) *Degree of departure from prevailing standards*. The risks associated with asbestos are very well known. There is also detailed information and guidance readily available online.

(d) *Obviousness of the hazard*. Asbestos was commonly used in floor coverings for many years. It must have been known to everybody working in the flooring industry, particularly those involved in replacing existing floor coverings that asbestos may be present in any property built during the period when asbestos was used. While material containing asbestos may not have been readily apparent to the casual observer, the duty to avoid the hazards associated with asbestos required careful inspection.

(e) *Availability, cost and effectiveness of means to avoid hazard.* Means of minimising the risks associated with asbestos in floor coverings were readily available at minimal cost.

(f) *Current state of knowledge of the risks and potential harm, and of the means to avoid the hazard.* There is no lack of knowledge about the risks and potential harm associated with asbestos in floor coverings or how the risk should be managed. No further discussion is necessary.

[17] Counsel are agreed that there are no decided cases which are directly comparable to this case. As they say, other cases involving potential exposure to asbestos have been on a much larger scale and involved demolition work.

[18] Counsel for IEL invites the court to take into account two other examples of asbestos being found in relation to floor covering work. It is said those cases were reported to WorkSafe but, to date, have not resulted in prosecution. I do not find this information helpful in deciding a starting point for a fine in this case. How WorkSafe exercises its discretion to prosecute is not the issue here and I am certainly not in a position to express any opinion about the relative culpability of the operators in those other cases.

[19] Having regard to all of the material before me, I assess the culpability of IEL as towards the upper end of the low band. I take a starting point of a fine of $75,000.

[20] There are no personal aggravating factors involving IEL.

[21] Counsel submits there are six mitigating factors. The first and most obvious one is that IEL pleaded guilty to the charge. Viewed in the context of health and safety prosecutions, the plea was prompt. I reduce the fine by 25 per cent on that account.

[22] The second factor mentioned is remorse. Counsel submits that that IEL is genuinely remorseful. I have read the extensive affidavit of Mr Cole, the owner of IEL. He describes in detail the personal impact on him of each aspect of the events in question and offers reasons for certain actions and omissions but I see little if any expression of concern or regret for the exposure of people to the potential risk of airborne asbestos fibres. This does not justify a reduction in sentence.

[23] Counsel notes that IEL "has no prior convictions or any relevant health and safety interactions with WorkSafe". I interpret this as an implicit submission that IEL should otherwise be regarded as of good character. That is an awkward concept in the context of a company being sentenced for a health and safety offence. If a company had a history of such offending, that would be an aggravating factor but the simple absence of that aggravating factor does not, of itself, constitute a mitigating factor. In saying that, I am not overlooking the letter of support from Mr Shaw of Upstream. I regard that as a character reference for Mr Cole rather than the IEL.

[24] It is submitted that IEL co-operated fully with the WorkSafe investigation. Given that s176 of the HSWA imposes a statutory duty to assist inspectors, enforceable by fine, it is difficult to see IEL's cooperation as any more than discharging its statutory duty. I have not seen evidence that the Company has gone beyond the extent of its duty of cooperation to the extent necessary to regard it as a mitigating factor.

[25] Counsel says that IEL is not insured. That is a factor which may be relevant to assessment of the ability to pay a fine, but it is not a mitigating factor.

[26] The final factor raised in mitigation is that IEL has worked with its franchisor to improve the processes used to manage asbestos in its business. The nature and extent of what has been done is set out in Mr Cole's affidavit. I accept that this is a modest mitigating factor and reduce the fine by five per cent on that account.

[27] That leads me to an end point of a fine of $52,500. That figure reflects the degree of culpability I find on the part of IEL.

[28] In the course of submissions, counsel for IEL has suggested that IEL should be discharged without conviction. That suggestion is, however, unsupported by any evidence or focussed submissions. Neither is there a written application as required by Rule 2.12 of the Criminal Procedure Rules 2012. Notwithstanding that, I think it is appropriate to deal with the suggestion.

[29] The court has a discretion under s 106 of the Sentencing Act 2011 to discharge a defendant without conviction. That discretion is subject, however, to s 107 which provides that a discharge must not be granted unless the court is satisfied that the consequences of conviction would be out of all proportion to the gravity of the offending.

[30] In assessing the gravity of the offending, the court must have regard not only to the seriousness of the offence and the facts in the particular case, but also the aggravating and mitigating personal factors relating to the defendant.

[31] In assessing the consequences of conviction, the court must take into account not only consequences which are inevitable but also those which are reasonably likely to occur.

[32] In this case, my assessment of the gravity of the offending is reflected in the end point of a fine of $52,500.

[33] What the consequences of conviction may be in any case must be established by evidence or be obvious. In this case, there is no evidence of consequences of conviction for IEL over and above those which normally flow from conviction for a criminal offence. These include loss of reputation and distress as a result of the investigation and prosecution process.

[34] In the absence of any likely consequences over and above those which normally flow from conviction, I cannot and do not find that the test in s 107 is met. Accordingly, IEL will not be discharged without conviction.

[35] That leaves as the final step in the sentencing process an assessment of IEL's ability to pay the fine I have found is appropriate. Addressing this issue, an affidavit has been sworn by Mr Cassidy, a chartered accountant. He concludes:

> Based on my analysis of the Company's financial position, cashflow and the economic and sales constraints ahead, my view is that the company has very limited resources and is incapable of funding a fine. Any penalty would effectively be funded by the shareholders through reduced drawings.

[36] Attached to Mr Cassidy's affidavit is a letter from him providing reasons for his conclusion. Attached in turn to that letter are numerous financial statements prepared by the accountant for IEL, Ms McKay.

[37] A recurrent theme in the submissions of counsel and in Mr Cole's affidavit is that IEL is a closely held company. Mr Cole is the only director of the company. Mr Cole and his wife are the only shareholders and employees. Counsel describes the business as a "one man band". Building on that description, counsel submits:

> "To treat this case as being in the nature of sentencing a corporate entity is to ignore the reality of the business. Essentially, any penalty should be weighed in the same way that a fine on an individual would be."

[38] There is some force in that submission given the conclusion reached by Mr Cassidy that IEL does not currently have liquid assets sufficient to make immediate payment of a significant fine and that payment would have to be funded by the shareholders.

[39] The financial statements of IEL show that it has traded very profitably during the years ending 31 March 2018, 2019, 2020 and 2021 and 2022. Net profit has been between $[redacted] and $[redacted] each year.

[40] What the statements also show is that IEL has retained little if any of those earnings. Rather, the surplus has very largely been paid out each year to the shareholders. For the last four complete years, the total net profit has been more than

$[redacted] During that same period, Mr and Mrs Cole have taken shareholder cash drawings from the company of $[redacted].

[41] Full financial statements cannot yet be prepared for the current year. What is provided are figures based on draft statements to 30 November 2022. These show a net loss of $[redacted] before shareholder remuneration. Notwithstanding what appears to be a downturn in trading, which must have been apparent to Mr Cole, shareholder cash drawings during the eight month period have been $[redacted] That represents a higher rate of drawings than any of the previous four years when IEL was making good profits.

[42] In my view, it is not appropriate for the director and shareholders of IEL to take large amounts of money out of the company on one hand and then seek to have the fine reduced because of the company's apparent inability to make immediate payment. This is particularly so given the submissions of counsel urging the court to ignore the corporate veil.

[43] The fine will not be reduced on account of IEL's ability to pay. If the company does not have the cash available to pay the fine, the shareholders will need to facilitate payment. How this is done will be a matter for Mr Cole, as director, to arrange but the obvious means would by introducing shareholder funds, making a shareholder loan to the company or by guaranteeing further company debt.

[44] WorkSafe seeks a contribution to the costs of investigation and prosecution. That is conventional and, in this case, the modest sum of $1,235.84 seems appropriate. I make an order that IEL pay that sum to WorkSafe. There will also be an order to pay court costs of $130.

[45] In summary, the orders I make in relation to IEL are

(a) A fine of $52,500.

(b) An order to pay $1,235.84 to WorkSafe by way of contribution to the costs of investigation and prosecution.

(c) An order to pay court costs of $130.

Mr Gannaway

[46] The offence committed by Mr Gannaway is narrower in scope than that by IEL. It arises under the Health and Safety at Work (Asbestos) Regulations and carries a maximum penalty of a $10,000 fine.

[47] Counsel submits that Mr Gannaway ought to be convicted and discharged or, in the alternative, an appropriate starting point for a fine is in the range $1,500 to $1,700.

[48] The first aspect of the offence is that Mr Gannaway failed to identify that there may be asbestos in the existing flooring of the property. Given the age of the house and his knowledge of flooring materials typically used in the past, Mr Gannaway ought to have been more astute. Had that been the only breach of his duty, I might have agreed with counsel that, in the particular circumstances of this case, a conviction and discharge would have been appropriate.

[49] The second aspect of the offence was more serious. In breach of the Regulations, Mr Gannaway, broke off pieces of the asbestos vinyl and transported it to IEL where he disposed of it in a bin not intended for that purpose. When he did that, he knew that there was a real possibility that the material included asbestos. By breaking the vinyl in uncontrolled conditions and transporting it to another place, Mr Gannaway created a serious risk that asbestos fibres might be released into the air.

[50] In all the circumstances, I take a starting point of a fine of $1,800.

[51] Mr Gannaway entered a prompt guilty plea. The fine will be reduced by 25 per cent on that account.

[52] I accept that Mr Gannaway is remorseful. I also accept that, since the events giving rise to the charge, Mr Gannaway has implemented improvements in his procedure to reduce the risks associated with asbestos in his work. I reduce the fine by a further ten per cent on account of those factors.

[53] Counsel submits that there should be a further reduction to reflect Mr Gannaway's cooperation with WorkSafe's investigation. Given he had a statutory duty to cooperate and there is no evidence that he went significantly beyond that duty, I do not make a further reduction for cooperation.

[54] Counsel's final submission is that a further mitigating factor is Mr Gannaway's otherwise good character. While I accept that he has no previous convictions, recent decisions of the higher courts have made it clear that an absence of prior convictions alone is not usually sufficient to constitute a mitigating factor. There needs to be other evidence of good character. I have seen none in this case.

[55] Arithmetically, this leads to an end point of a fine of $1,170 which I round down to $1,100.

[56] In summary, the orders I make in relation to Mr Gannaway are:

(a) A fine of $1,100.

(b) An order to pay court costs of $130.

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Judge A A Couch
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 20/02/2023