**IN THE DISTRICT COURT**
**AT TIMARU**

**I TE KŌTI-Ā-ROHE**
**KI TE TIHI-O-MARU**

**CRI-2022-076-000352**
**[2023] NZDC 21962**

**WORKSAFE NEW ZEALAND**
Prosecutor

v

**WILSON BUILDING TIMARU LIMITED**
Defendant

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| Hearing: | 29 September 2023 |
| Appearances: | J Kirtlan for the Prosecutor<br>T Nation for the Defendant |
| Judgment: | 29 September 2023 |

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**NOTES OF JUDGE C D SAVAGE ON SENTENCING**

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[1] Wilson Building Timaru appears for sentence having pleaded guilty to contravening ss 36(1)(a) and 49(1) and (2)(c) of the Health and Safety at Work Act 2015. The maximum applicable penalty is a fine of $500,000. I have received submissions from both the prosecutor and on behalf of the defendant which have been of significant assistance to me in determining the appropriate starting point and any adjustments from that starting point.

[2] This prosecution arose out of the defendant's conduct when undertaking earthquake strengthening work on a local commercial property. It became apparent reasonably early on in the task that the presence of asbestos could well be an issue. The defendant had a duty to ensure, so far as reasonably practicable, the health and safety of those men and women that would be required to carry out physical work on

the property. The defendant has admitted, by its guilty plea, that it did fail to comply with that duty.

[3] The particulars of the duties that it failed to comply with are that:

(a) it did not seek an asbestos management plan from the building owner at any time;

(b) the defendant did not ensure that a competent person determined whether or not downstairs vinyl flooring in the building situated at 266 Stafford Street contained asbestos prior to removing it;

(c) the defendant did not engage a licensed Class A asbestos removalist to remove the asbestos in the downstairs vinyl flooring at the building; and

(d) nor did it effectively consult and co-ordinate activities with the other PCBUs involved in the work on site concerning the presence and removal of asbestos.

[4] The agreed summary of facts outlines the background which includes the presence of asbestos in the building, the steps taken to remove the asbestos, the hazards and risks created, those exposed to those hazards and risks, the applicable industry standards and the steps not taken by the defendant. Briefly, the steps not taken by the defendant are those four reasonably practicable steps that I just outlined. These failures exposed workers to the risk of death or serious illness through the ingestion of asbestos fibres.

[5] I now turn to the sentencing criteria which are outlined helpfully in paragraph [4.1] of the prosecutor's submissions. The things that I need to take into account are:

(a) the purpose of the Act itself;

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

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

(d) the safety record of the person to the extent whether or not it shows an aggravating feature is present;

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

(f) the defendant's financial capacity or ability to pay any fine.

[6] I must also take into account s 7 and 8 of the Sentencing Act 2002 and these are sections that I am very conversant with.

[7] The purposes that I should be bearing in mind as the most relevant for present purposes are outlined by the prosecution and I agree and those purposes are holding the offender accountable for the harm done by the offending and promoting in the offender a sense of responsibility for that harm. In addition, I need to denounce the conduct which the defendant company was involved in and I need to impose a sentence which will offer deterrence both in a general sense and in a specific sense to this particular offender.

[8] The real issue here is that I must make an assessment of the gravity of the offending and the seriousness of the type of offence as indicated by the maximum prescribed penalty. Clearly, the real thrust of the Health and Safety at Work Act is to encourage the protection of workers from harm or harmful situations in the workplace by minimising the risks they are exposed to whilst at work. The penal provisions of the Act provide for a series of sanctions for those who fall short in their obligations to their employees or subcontractors.

[9] I have been referred to the *Stumpmaster* case in which four guidelines for culpability are set out and these culpability bands are:[1]

(a) Low culpability which would attract a fine of up to $85,000.

(b) A medium culpability which would attract a fine in the $85,000 to $200,000 range.

(c) High culpability would see a fine in the $200,000 to $335,000 range.

(d) At the upper end of very high culpability, fines range from $335,000 all the way up to the maximum penalty of $500,000.

[10] The prosecution urges upon me a finding that the defendant's culpability in the current case is in the medium range and that I should set a starting point at the upper end of that range and start with a fine of $200,000. Mr Nation, in his submissions, takes issue with the setting of the starting point as he points out that the culpability of this particular defendant differs from those in decided cases where people were placed in appropriate parts of a band.

[11] I acknowledge the defendant company was venturing into new areas of the construction business as a consequence of the need to take on what work it could in the post-COVID environment. Its motivation was laudable and is evidence of its commitment to the general wellbeing of its employees and subcontractors. I hear what Mr Nation said this morning and I agree that it could have all been so different if the defendant company had been provided with all relevant information at the commencement of the April 2021 part of the project.

[12] It is all about setting a level of culpability. I am most helped here by the *Page* case.[2] There is a bit of toing and froing with the numbers involved because I note the starting point there was something in the region of $75,000 but the Court said it

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.
[2] *Peter John Page* DC Auckland CRI-2014-004-004462, 12 December 2014.

should have been higher up the range and perhaps at the top of the medium part of the band and something in the range of $100,000 to $125,000.

[13] I am going to set the starting point as a fine of $120,000.

[14] I certainly do not see any features that would justify an increase in the starting point. There is common ground between the parties that there are reductions warranted because of the timeliness of the plea, the cooperation with the investigation, the defendant's clear remorse and the previous conduct of the defendant company.

[15] The prosecution concedes that total reductions of about 40 per cent are appropriate and that would be made up of 25 per cent for plea, five per cent for assistance with the prosecution, five per cent for remorse and five per cent for previous conduct. The defence seeks a reduction of 25 per cent for plea and a global reduction of 20 per cent for the other matters. I have no difficulty whatsoever with the 25 per cent reduction for plea because it came in a very timely fashion.

[16] I see parallels between the conduct of the defendant, once the prosecution was initiated in this specialist area, and the conduct of other defendants in areas of criminal law that I am much more familiar with. A further reduction of 20 per cent is certainly not out of order for a remorseful offender with a blemish-free record who comes to the Court having assisted the prosecution to accurately assess its level of culpability rather than seeking to avoid responsibility for what they may have done wrong. I am prepared to allow that further reduction of 20 per cent and that would reduce the fine to one of $66,000.

[17] The prosecution also seeks a contribution to their legal costs in the amount of $7,825.39. I have been assured by counsel for the prosecution this morning that the costs that a contribution is sought for relate only to the prosecution of this defendant and not the other defendants, so I am prepared to and will order those costs.

[18] Mr Nation seeks a further reduction to give this outcome some proportionality and consistency with those meted out in the other prosecutions related to this building.

There is some justification for an adjustment (albeit a small one) and I would reduce the level of the fine to $60,000.

[19] The end result is that the defendant shall be fined $60,000, ordered to contribute $7,825.39 to the cost of the prosecution and I also make a direction, without opposition, that the summary of facts may be released to the media or others in the industry.

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Judge CD Savage
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 13/10/2023