IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2024-092-002985
[2024] NZDC 30045

WORKSAFE NEW ZEALAND
Prosecutor

v

ALL SMART KITCHENS & GRANITE WORKS LIMITED
Defendant

Hearing: 29 August 2024

Appearances: A Everett for the Prosecutor
J Williams & R Davison for the Defendant

Judgment: 29 August 2024

NOTES OF JUDGE G A FRASER ON SENTENCING

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[1] All Smart Kitchens & Granite Works Limited is in the business of manufacturing kitchen benchtops. On 29 March 2023 Mr Dinesh Chand was seriously injured when a stone slab fell on him while he unloaded a shipping container. The defendant was subsequently charged under ss 36(1)(a), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015. The maximum penalty for this offending is $1,500,000.

[2] The charge reads that the defendant being a person conducting a business or undertaking having a duty to ensure so far as is reasonably practicable the health and safety of workers who work for the PCBU including Dinesh Chand while the workers were at work in the business or undertaking namely devanning stone slabs, did fail to

comply with that duty and that failure exposed the workers to a risk of death or serious injury.

[3] The particulars of the charge set out that it was reasonably practicable for All Smart Kitchens & Granite Works Limited to have:

(a) A completed and adequate risk assessment to identify the risk of the panels falling.

(b) Developed and implemented an adequate safe system of work for the unloading of the stone slabs.

(c) Ensured workers were trained in the safe system of work or supervised by a trained person.

[4] The defendant has pleaded guilty to the charge and now appears for sentence. The facts of the offending are that Mr Chand, the victim, is a good friend of Mr Nitin Patel, the sole director of the defendant. They have known each other since 2007 or 2008 and over the years Mr Chand has regularly helped out the defendant's business on a voluntary basis.

[5] On 29 March 2023 Mr Chand was helping the defendant unload three containers of stone slabs. Each stone slab was 3200 x 1850 x 30 mm and weighed more than 400 kilograms. At the time of the incident Mr Chand has five slabs left to unload, having already unloaded 175 slabs over the course of three days. Mr Chand walked to the back of the container where the last five slabs were contained in the last section of wooden framing.

[6] Following a process that had been discussed and followed over the past three days, Mr Chand used a bar to make a gap between the stone slabs to allow space for a clamp to be placed. Mr Chand guided the clamp over the top of the stone slab closest to the centre of the container. He then began to move out of the way so that the forklift could lift the stone slab. At this point, five stone slabs fell towards the centre of the container, overturing the wooden framing and then falling on Mr Chand's right lower

leg. Once the forklift driver had switched out the forklift boom for extender forks, he was able to lift the stone slabs slightly. Other workers assisted by putting pieces of timber under the slabs allowing Mr Chand to be extricated.

[7] Mr Chand suffered fractures to his right lower leg and knee. He was in hospital for six weeks undergoing two surgeries and a skin graft. On 24 July 2024 he was still seeing a physiotherapist twice a week to help with his rehabilitation. Although he can now walk unaided, he has a bad limp. He continues to struggle physically and requires constant pain medication. On 26 July 2024 Mr Chand was due to speak with a specialist about the possibility of a full right knee replacement.

[8] Mr Chand has not been able to work since the incident. In the meantime, he has been receiving financial assistance from ACC and Mr Nitin Patel. Mr Nitin Patel has also supported Mr Chand by driving him to his appointments whenever the pain in his leg has prevented him from driving.

[9] A WorkSafe investigation followed. WorkSafe was notified on the incident on 29 March 2023 and commenced an investigation. That investigation established firstly that the defendant did have a hazard management document which explained how to identify a hazard and how to complete a risk assessment, however the defendant did not complete a risk assessment process in respect of the stone slabs. The defendant did not have any documented system in place for the unloading process. It relied entirely on verbal guidance from Mr Nitin Patel and the instructions in the Aardwolf Slab Lifter 50 owner's manual.

[10] Mr Jackson, an engineer engaged by WorkSafe reviewed the process followed by the defendant and determined that the following steps could have been taken:

(a) Inspecting the container and the wooden framing before beginning the unloading process to identify any broken supports or unstable slabs.

(b) Using open topped containers so that the slabs can be lifted from above without the workers entering the fall shadow of the slabs.

(c) If closed top containers must be used, using a method of work that did not require workers to enter the fall shadow. This could include removing bundles of slabs from the container using a bundle handling attachment or strops.

(d) Alternatively, steps could have been taken to protect the worker while they are attaching the clamp inside the container. This could include using braces or struts to prevent slabs from falling or a safety frame for the worker to stand in.

[11] Mr Chand had never had a health and safety induction from the defendant nor was he provided with any training on unloading the stone slabs. However, the workers did have tailgate meetings at the beginning of each day during which they would discuss the process for unloading the stone slabs. It is recorded that in 2019 another of the defendant's workers was seriously injured when several MDF boards fell on them. The MDF boards were stood up vertically for storage and the metal strapping happened to fail while the worker was working in close proximity. The worker broke both his ankles resulting in a long hospital stay. This incident was notified to WorkSafe, and it was decided that no enforcement action was required.

[12] Looking at the purposes and principles of sentencing, when sentencing an offender under s 48 of the Health and Safety at Work Act, s 151 instructs the Court to apply the Sentencing Act 2002 principles. It also requires the Court to have particular regard to a number of considerations including ss 7 to 10 of the Sentencing Act and the purpose of the Health and Safety at Work Act.

[13] The purpose of the Health and Safety at Work Act relevantly include firstly protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risk arising from work or from prescribed high-risk plant. Secondly securing compliance with the Act through effective and appropriate compliance and enforcement measures and providing a framework for continuous improvement and progressively higher standards of work health and safety.

[14] Notably the Health and Safety at Work Act provides that the health and safety of workers is a person conducting a business or undertakings' primary duty of care. Against that background sentencing under the Act requires significant weight to be given to the sentencing purposes of denunciation, deterrence, and accountability. Regards to the interests of the victim is required including appropriate reparation being awarded. One of the key principles of sentencing is that the Court must take into account the particular circumstances of the offender.

[15] In terms of approach to sentencing under the Act, the decision of *Stumpmaster v WorkSafe New Zealand* (citation 14:28:26) sets out a four-step approach for sentencing offenders under the Act. Firstly, assessing the amount of reparation, secondly fixing the amount of the fine by reference first to the guideline bands and then having regard to the aggravating and mitigating factors, thirdly determining whether further orders under s 152 of the Act are required, and fourthly making an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps.

Step One: Reparation

[16] Emotional Harm. Mr Chand is 64 years old. His life has changed dramatically as a result of the accident. He is yet to fully recover from his injuries, and he suffers ongoing pain. He does not know when he will be able to go back to work or how many surgeries he might need in the future. I record that this is incredibly difficult for him. In fixing a monetary award for emotional harm, the Court must do its best to strike a figure which is just in all these circumstances.

[17] WorkSafe seeks an emotional harm payment of reparation of $45,000. To the defendant's credit there is no dispute over that figure and is consistent with the sum awarded in several broadly similar WorkSafe prosecutions and I am particularly referencing WorkSafe v Lanyan and Le Comte, *WorkSafe v JTK Trustee Limited*, *WorkSafe v Cottonsoft Limited* and *WorkSafe v Expol Limited*.[1] In these circumstances I agree that $45,000 is a just amount in the circumstances.

[1] (Citation missing Lanyan); *WorkSafe v JTK Trustee Limited* [2022] NZDC 16895; *WorkSafe v Cottonsoft Limited* [2019] NZDC 1851 and *WorkSafe v Expol Limited* [2018] NZDC 25368.

[18] Consequential Loss. The standard approach to consequential loss in the Health and Safety at Work Act prosecutions is to compensate for the statutory shortfall in the victim's ACC entitlements. Under the ACC scheme Mr Chand has been receiving payments amounting to 80 per cent of his pre-accident income. Mr John Shaw a chartered accountant has given evidence that Mr Chand will have received $97,681 by the time of sentencing. Twenty per cent shortfall on that figure is $24,420.

[19] The parties agree that this is the appropriate sum to account for Mr Chand's consequential loss less any proven payments made by Mr Patel to Mr Chand. Looking through it, I record that the figure calculated by WorkSafe tops up Mr Chand's ACC payments until the date of sentencing. It does not account for consequential loss Mr Chand is likely to incur after sentencing and it is acknowledged that Mr Chand may not be capable of returning to work for some time.

[20] I discussed this with counsel before I embarked on articulating the sentence because I wish to gauge views from them in regard to any projection forward of consequential loss. The reality is that for every week the consequential loss for Mr Chand is $334.52. That is worked out by $24,420 figure divided by 73 weeks which is up to the date of sentencing. I had projected forward a possible further six months although I accept that that is speculative and conjecture and is not precise. I would have seen that amount to a further sum adding that to the $24,420 as bringing it up to a level of around $33,117.

[21] In any event, I accept now that the parties have reconciled to the notion that there should be no prediction forward as to the period of time that Mr Chand would be out of work and the recognition is that there should be no consequential loss figure awarded acknowledging that the $24,420 being the consequential loss to date is well and truly matched by payments made by Mr Patel to Mr Chand in the sum of $26,400. So based on that the reality is that there is a credit to Mr Patel, and I suspect and I have not heard but I acknowledge that the incidental running around that Mr Patel has done to assist Mr Chand also has a cost. In recognition of all of that the parties agree, and I accept that there should be no consequential loss sum awarded. That being the case we are looking at a bare $45,000 emotional reparation.

Step Two: Fine

[22] The next step is to determine the fine. When fixing a start point for the fine at step 2 of the *Stumpmaster v WorkSafe* determination the following guideline bands are to be used:

(a) For low culpability offending it is $0 to $250,000.

(b) Medium culpability band is $250,000 to $600,000.

(c) High culpability $600,000 to $1,000,000.

(d) Very high culpability $1,000,000 to $1,500,000.

[23] The culpability assessment is guided by the factors identified in the Department of Labour v Hannam & Philp Contractors Limited (citation 14:36:24). They are firstly an identification of the operative acts or omissions at issue. This requires a 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 Act. In this case the defendant could have taken steps to firstly complete an adequate risk assessment to identify the risk of the stone slabs falling, secondly develop and implement a safe system of work for the unloading of stone slabs, and thirdly ensure workers were trained in the safe system of work or supervised by a trained person when unloading the stone slabs.

[24] Secondly, an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk. The stone slabs posed a risk of death or serious injury to workers and in this instance, Mr Chand was seriously injured.

[25] Thirdly the degree of departure from standards prevailing in the relevant industry. WorkSafe has pointed out that there was readily available guidance online from the US, under OSHA, the British OSE and WorkSafe Victoria about the safe handling of slabs. These materials would not have been difficult for the defendant to find if it had thought to look for them. It does not strike me as an unreasonable expectation, especially since the unloading on stone slabs was an unfamiliar activity

for the defendant. In saying that I acknowledge the defence point though however that there does not appear to be New Zealand guidance on the handling of stone slabs. A New Zealand based guidance document would have removed any uncertainty for business in the defendant's position.

[26] Fourthly, the obviousness of the hazard. A 400-kilogram stone slab standing on its end is an obvious hazard. It is common sense that a heavy, delicately balanced object might cause injury. It was to be expected the defendant would have appreciated this, especially after the incident in 2019 when a different worker was injured by falling MDF boards. The defendant's lack of experience in unloading stone slabs is not an excuse. If anything, it should have prompted it to exercise greater caution and seek guidance. In saying that I also accept that this was not a regular activity for the defendant.

[27] Fifthly, the availability costs and effectiveness of the means necessary to avoid the hazard. I recognise that some of the specialised equipment suggested by Mr Jackson was not readily available to the defendant such as specialised fork hoists for instance. Other simpler steps were available, however. For instance, the cost of implementing braces to prevent the slabs from falling would have been minimal. It would also not have taken much for the defendant to train worker about the risk of standing within the fall shadow.

[28] Sixthly, the current state of knowledge of the risks, potential harm, and the means available to avoid the hazard or mitigate the risks. Recognising this was an obvious hazard I conclude that there were numerous safety measures which the defendant could have adopted. I also accept this was not a deliberate case of avoidance of compliance for the purpose of minimising costs.

[29] Assessing the fine start point, various authorities have been submitted to assist me in determining the start point. Drawing comparisons is vexed because of the distinguishing factors in each case. I do determine this case falls within the medium band of culpability. The defence have submitted a $400,000 start point. Prosecution submits a $500,000 start point. I determine the start point sits within the range of authorities cited, that is $400,000 to $500,000. In this case, having regard to my

assessment of the *Department of Labour v Hannam and Philp Contractors Limited* factors a start point of $450,000 is set.

[30] I am then obliged to look at the aggravating and mitigating features for the defendant and the next step is to adjust the starting point for the fine having regard to any aggravating or mitigating features relevant to the defendant. There are no aggravating factors. The parties agree the following discounts should be awarded:

(a) Co-operation with the WorkSafe investigation, 5 per cent.

(b) Good character and lack of previous convictions, 5 per cent.

(c) Remorse, 5 per cent.

(d) A guilty plea discount of 25 per cent.

[31] With that I agree. The prosecution submits an appropriate discount for reparation and ongoing support to Mr Chand should be in the vicinity of 10 per cent. Defence submits 15 per cent in recognition in what is described as the prudent foresight of being suitably insured thus assuring a reparation sum can be made to Mr Chand and also recognising the significant pro-active financial and practical support provided for him. I determine a 10 per cent discount for reparation and ongoing support. I also remind myself that awarding large discounts may undermine the statutory purposes underlying the Health and Safety at Work Act. Applying all the discounts it totals 50 per cent leaving the end point fine $225,000.

Step Three: The Ancillary Orders

[32] Section 151(2) (inaudible 14:44:10 I think this should be s 152(1)) of the Health and Safety at Work Act provides that the Court may order an offender to pay to the regulator a sum that it thinks just and reasonable towards the cost of the prosecution including the costs of investigating the offending and any associated costs. WorkSafe have sought an order amounting to half of the prosecutor's legal costs being $2,311.58. The defence takes no issue with that figure and an order in that sum is made.

[33] The final matter for determination is an assessment of proportionality and appropriateness. The penalty must be a proportionate penalty for the defendant's offending however on issues arising it has to be determined with respect to the defendant's ability to pay the penalty. Section 40 of the Sentencing Act 2002 allows the Court to consider the financial capacity of a defendant when setting a fine. That should only be applied when there is "clear evidence" of strained financial circumstances, and I reference the decision of *Department of Labour v EziForm Roofing Products*.[2]

[34] For WorkSafe, Mr Shaw a chartered accountant has provided two affidavits. His second affidavit is the most relevant, recognising it is a response to the first affidavit of the defendant's accountant Mr Patel. Mr Patel a chartered accountant for the defendant has also provided two affidavits. In his first affidavit he records the following: "For the year ended March 2024 All Smart Kitchens' net taxable profit was $489,549. For the three months ending 30 June 2024, All Smart's net taxable deficit was $277,154."

[35] He records the total liabilities of All Smart Kitchens as per the attached financial statement for the year ending 31 March 2024 was $1,782,265. He references the assets as at the year ending 31 March of $3,319,108 including the matters identified at paragraph [9] of his report. He records:

> After enjoying the strong recovery from the pandemic in the initial years, recently the business growth has slowed down substantially with higher interest rates and slower economy with struggling construction and building industry. The majority of customers the All Smart Kitchens serves are also from the building and construction industry and they are also experiencing the similar financial difficulties.

[36] He records the All-Smart Kitchens is currently working at around 30 per cent capacity due to the lack of work and currently employees are working at reduced hours. He references that sales for the quarter ended 30 June 2024 were $99,820 representing 4.31 per cent of annual turnover for the year ended 31 March 2024. He records that accounts receivable as of 30 June of $2,146,165 includes receivables of

[2] *Department of Labour v EziForm Roofing Products* [2013] NZHC 1526.

$690,490 which is more than five months old and overdue. He also records that five customers represent approximately 65 per cent of the accounts receivable.

[37] He records historically the company has traded profitably without any liquidity issues however he says the company is going through an uncertain phase. The industry in general and shareholders in particular have no indication about the future and how long that situation will last. He concludes: "On that basis we are of the view that the company is not in the position to pay a fine exceeding $50,000." Mr Shaw's affidavit in response records as follows: "I consider an entity's financial capacity to pay reparation and/or fine can be evaluated by consideration of it's current financial position and/or, if the fine is to be paid by instalment, it's expected future financial performance. Consideration of an entity's current financial position can have regard to whether it has the following:

(a) Any liquid assets such as cash.

(b) Any assets surplus to operations which could be realised.

(c) Any available resources of external funding including from owners, third party funders or insurers.

(d) Sufficient financial strength including overall net asset position and its expected financial operating performance for a fine to be paid from one or more of those sources.

[38] He records at paragraph [14]: "As at 30 June 2024 All Smart Kitchens owned net assets of $1,200,000 comprising total assets of $3,000,000 less total liabilities of $1,800,000 excluding shareholder current accounts and net asset balance increases to $1,900,000." He then identifies the company's assets mainly comprising of firstly accounts receivable of $2,100,000 and then he identifies the other assets. He records, as he must, the company's largest asset by book value is accounts receivable of $2,100,000. He says the balance as represented is significantly higher than the level of receivables he would expect to see for a business of this size and activity. He said: "All Smart Kitchens held a working capital balance of $1,700,000."

[39] In regard to accounts receivable, he said: "Mr Patel's evidence that amounts due from the defendants largest five customers which he says represent 65 per cent of the total balance and should not be considered recoverable." He says: "Further, the remaining balance will only be sufficient to last to five or six months absent further sales." He then records that: "Other than Rising Sun New Zealand Homes Limited, no other of the defendant's largest five customers are in liquidation."

[40] He records also: "The defendant does not explain why it continues to invoice its five largest customers and potentially still carry out work for them including $575,000 of current billing when it considers all amounts from these parties unrecoverable." He says: "In my view, this billing in the absence of other explanations suggests some of the outstanding balance may be recoverable." He does record: "Though it is not possible on the available information to determine the likely level of any recoverability." He further records:

> In summary, without more detailed and consistent explanations regarding the collectability of the company's large accounts receivable balances it is difficult to consider whether the defendant's conclusion on financial capacity or a fine of up to $50,000 is reasonable.

[41] As indicated above Mr Shaw says: "Based on assumptions I consider reasonable, the defendant may have up to $741,000 of surplus working capital from which a fine might be paid contingent on the recoverability of receivables." He then concludes:

> "On that basis and assuming a fine cannot be paid from the proceeds of receivables, I would expect an annual fine of more than $20,000k (inaudible 14:54:36) may not be difficult for the business to sustain until more favourable market conditions return."

[42] But Mr Patel's supplementary affidavit in relation to Mr Shaw's affidavit replies as follows: "With the gross margins generated in the first quarter for the company were in negative $125,355." As explained throughout the earlier affidavit and as known to all of us, he says: "The current market is in a dire situation, and it is almost impossible to predict or forecast the future." He said: "The directors are estimating between $75,000 and $90,000 exclusive of GST per month over the coming 12 months period anticipating no major changes in economic conditions."

[43] He identified the five top debtors as at 30 June 2024. He then recorded that considering the current market conditions the company is not expecting to get any major realisation in the time to come. He also records that the letter from Inland Revenue detailing the outstanding debt and ongoing monthly instalment is attached. He said that you can see that a monthly instalment of $12,282.10 is payable until 27 April 2027. In addition to this All-Smart Kitchens have additional tax liability of $136,754 towards their 2024 tax return and that they have not made any payments so far and the entire amount is outstanding and payable by 7 April 2025.

[44] He also records that Mr Patel, and his wife are both working owners. He records that Mr Patel's role is comparable to that of a CEO. He also records that Mr Patel and his wife have decided to reduce their wages to about 50 per cent effective from 1 August 2024 to support the business cashflow. He said they both require money to live on, but they have reduced their spending to the minimum amount possible. Finally, Mr Patel records the company does not have any overdraft facility and All Smart Kitchens does not have any other external funding available including second tier funding in the current extreme economic conditions.

[45] In conclusion, acknowledging the respective views as to the company's ability to pay a fine, with the prosecution a fine of $20,000 per annum or more may not be difficult. Defence submits the company is not able to pay a fine exceeding $50,000. In *Mobile Refrigeration Specialists Ltd v Department of Labour* (citation14:58:23), Justice Heath (inaudible 14:58:22) conducted an analysis of the law applying to reductions due to a defendant's financial circumstances.[3] In that case, Justice Heath noted:

> "A fine is punitive in nature designed to serve the sentencing goals of denunciation, deterrence, and accountability. Accordingly in order for there to be some reduction there must be clear and unequivocal material as to what level of fine cannot be paid.

[46] In the case of the company, he said:

> The Court should require clear evidence of financial incapacity supported by appropriate disclosure of all material facts, most of which will be in the

[3] Citation needed

> exclusive possession of the offender before imposing a sentence below that appropriate to mark the offending.

[47] In *Department of Labour v Street Smart Limited* Justice Duffy observed the following policy requiring fines to be punitive.[4] She said:

> There are good policy reasons which accord with the purpose and scheme of the Health and Safety in Employment Act for ensuring that where employers infringe, penalties must bite and not be at a licence fee level.

[48] In *WorkSafe New Zealand v Blackadder* Judge Crosbie commented: "A fine ought not to place a company at risk but should be large enough to bring home the message to directors and shareholders of corporates."[5] In this case I acknowledge that a fine is not meant to be easily absorbed by an offender. It is meant to bite. However neither should it imperil the financial viability of the defendant. I take the position here that the focus needs to be on insuring that the defendant remains viable economically while still requiring to pay a fine. I bear in mind the company is trying to trade in very difficult financial and trading circumstances.

[49] Having reviewed the financial position of the defendant I reduce the indicated fine to $75,000 to be paid in monthly instalments of $1,250. That is a five-year payment schedule which is at the outer level of extending liability into the future. The account of the fine sits roughly mid-point between the defendant's position and the prosecution position. The fine I have determined is appropriate, recognising the prosecution submits $20,000k (inaudible 15:01:35) per annum or more and the defendant's position of $50,000 total. I record that an accounts receivable recovery improvement and an ability to adjust director's salaries is also factored into this level of fine.

[50] The end point hear is emotional harm reparation for the sum of $45,000. No consequential loss is ordered. A fine in the sum of $75,000 payable by monthly instalments of $1,250, and an ancillary order of prosecutor's costs in the sum of $2,311.58.

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[4] Citation needed.
[5] *WorkSafe New Zealand v Blackadder* [2022] NZDC 2048.

[51] There is also an order made that the summary of facts is to be released.

[52] Thank you Mr Patel and I just want to add that you have acted incredibly responsibly post the event. What you have offered and supplied to Mr Chand, I think is almost exceptional and I commend you for that, but I also hope that you get your business back up and running, perhaps to the level that it was but I guess the rider to that is that no one knows where we are heading in this current climate, but good luck.

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Judge GA Fraser
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 18/12/2024