IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2017-044-003044
[2018] NZDC 22114

WORKSAFE NEW ZEALAND
Prosecutor

v

DONG XING GROUP LTD
Defendant

Hearing:	17 October 2018
Appearances:	E F Jeffs for the Prosecutor J Tian for the Defendant
Judgment:	17 October 2018

NOTES OF JUDGE P J SINCLAIR ON SENTENCING

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[1] Dong Xing Group Limited has pleaded guilty to one charge of failing to comply with a workplace duty, such failure exposing a person to risk of death or serious injury. That charge is laid under s 48 Health and Safety at Work Act 2015.

[2] The facts are as follows. Dong Xing supplies and installs scaffolding to the Auckland construction market. It has been operating since December 2011. Scaffold was installed at 88 Onewa Road by Dong Xing sometime between 14 June 2016 and 30 June 2016. The scaffold had three working platforms and was used by a builder and painter to renovate a two storey residential house. The height of the working platforms varied depending on the slope of the ground. The scaffold was used by the builder Hui Yang and painter Dean Wright. The scaffold was installed in such a way that it created significant risk to the workers who used it. In particular:

(a) The scaffold was in close proximity to or was touching a 230 volt live powerline. Anyone touching the scaffold was therefore at risk of electrocution or serious injury from an electric shock. Those walking on the top working platform were also at risk of touching the live powerline itself and/or its point of entry to the house.

(b) The scaffold was more than 300 millimetres from the wall at the back of the house and there were no inside guardrails or alternative means of edge protection in place to protect persons using the scaffold from falling approximately two metres from the lowest working platform, or four metres from the second working platform. Falls from height are a significant hazard which can result in serious injuries and can be fatal.

(c) The scaffold was at risk of collapsing as a result of excessive corroding and/or pitting on the components, the poorly packed sole boards and/or the distorted base plate. A scaffold collapse has the potential to seriously injure or kill both those working on the scaffold and anyone in the immediate vicinity of the scaffold.

[3] The prosecutor submits no reparation is required as no physical harm or damage to the property resulting from the breaches ensued. The prosecutor submits the defendant's culpability for this offending is high, and that an appropriate starting point for a fine would be in the region of $600,000. From the starting point, the prosecutor submits an uplift in the region of five percent is appropriate to reflect the defendant's poor safety record. The defendant is entitled to a reduction of 10 percent from the starting point for co-operation and remorse and remedial action taken, and a further 25 percent reduction in recognition of its early guilty plea. The prosecutor accepts a fine based on these calculations would pose financial difficulties for the company. It proposes, taking into account the financial circumstances of the company, a fine of $200,000 could be imposed, with an order allowing the company to pay the fine off over a period of time. The prosecutor seeks costs of $2333.40, being half of WorkSafe's recorded legal costs. And finally, the prosecutor seeks an order pursuant to s 158 for the defendant's workers to undertake a specified training course within six months of sentencing.

[4] The defendant submits reparation is not required as no physical injury or harm has resulted. The defendant submits its culpability is in the medium [range] so the appropriate starting point for the fine would be in the range of $250,000 to $600,000. It specifically proposes a starting point of $425,000. The defendant acknowledges an uplift of five percent is appropriate for previous notices served on it by WorkSafe, and a reduction in the region of 20 percent is appropriate to reflect its co-operation, remorse, immediate remedial actions and initiatives and further voluntary remedial actions. The defendant submits a reduction of 25 percent is appropriate to reflect its early guilty plea and, taking into account the company's financial position, submits a total fine of $100,000 would be appropriate. An order pursuant to s 152 for payment of WorkSafe's costs is not opposed by the defendant. The order sought by the prosecutor for further specified training is also not opposed.

[5] In response to the Pike River disaster, which resulted in 29 fatalities as well as a growing concern about the high number of deaths and serious injuries in the New Zealand workplace, a major reassessment of health and safety legislation was conducted. This resulted in the Health and Safety at Work Act 2015 (which I will refer to from now on as "the Act") coming into force in April 2016. The Act substantially increased penalties for significant breaches of workplace health and safety obligations. It aimed to incentivise compliance with these obligations.

[6] The charge Dong Xing is to be sentenced on carries a maximum penalty of $1.5 million. The equivalent charge under the previous legislation carried a maximum penalty of $250,000. The aim of the increase in fines is to increase deterrence and reduce New Zealand's poor workplace health and safety record.

[7] Sections 151 and 22 of the Act set out the criteria I must apply when determining sentences on this charge. I must have particular regard to:

- ss 7 to 10 Sentencing Act 2002;
- the purpose of the Health and Safety at Work Act;

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

- whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred;

- the safety record of a person;

- the degree of departure from prevailing standards in the sector of industry; and

- the financial capacity of the company or ability to pay the fine.

[8] In my view, accountability, deterrence and denunciation are paramount principles for this sentencing. The need to assess the gravity of Dong Xing's culpability and be consistent with other like-sentencing decisions is also important. As mentioned, regard must be made to the purpose of the Act, which is to provide for a balanced framework to secure the health and safety of workers and other persons by protecting against harm and eliminating or minimising risk. Workers and other persons should be given the highest level of protection as is reasonably practicable against harm to their health, safety and welfare from hazards and risks arising from their work.

[9] Under the former Act, the leading case and the approach to sentencing health and safety prosecutions was *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095.[1] Recently in *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, a full High Court bench delivered a guideline judgment on sentencing offending under the Act.[2] The High Court largely retained the former approach to sentencing articulated in *Hanham* but with necessary modifications to recognise changes in the new Act. The former three step approach has therefore been expanded to a four step approach as follows:

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[1] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095.
[2] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

(a) Assess the amount of reparation.

(b) Fix the amount of fine.

(c) Consider orders under ss 152 and 158 of the Act.

(d) Make an overall assessment of the proportionality and appropriateness of penalty.

[10] Fixing the fine is done with reference to four guidelines bands:

(a) Low culpability, $0 to $250,000.

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

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

(d) Very high culpability, $1 million to $1.5 million.

[11] So the first matter, reparation. Reparation is not required in this case as no physical harm or property damage has resulted from Dong Xing's offending.

[12] So I turn to assess the quantum of fine. I must assess Dong Xing's culpability with reference to the relevant factors previously identified in *Hanham* and then place the offending within one of the four bands I have mentioned. In *Stumpmaster*, the Court observed that these factors remain relevant under the Act, and whilst "some of the proposed language may be better, we prefer to leave it to the sentencing courts to express the concepts as they wish".[3]

[13] So I turn to consider the factors relevant to Dong Xing's culpability. **What were the operative acts or omissions?** The defendant was contracted to supply and install scaffold at 88 Onewa Road. Scaffolding is a control measure designed to

[3] *Stumpmaster v Worksafe New Zealand*, above n2, at [37].

manage the risk of a fall from height during construction work. The scaffolding supplied and installed by the defendant was unsafe, in that:

(a) The scaffold was in close proximity or touching a 230 volt live powerline.

(b) The scaffold was more than 300 millimetres from the wall at the back of the house and there was no inside guardrail or alternative means of edge protection in place. The onus was on the defendant to obtain written approval from the electrical company. In my view, it was not entitled to rely on the project manager to undertake this task.

(c) There was heavy corrosion and pitting on the scaffold components.

(d) The sole boards were poorly packed.

(e) The base plates were distorted.

(f) The scaffold geometry was not vertical or horizontal.

(g) The rakers were not installed in accordance with the SAR and New Zealand guidelines.

(h) The defendants did not have any scaffold design drawings, site specific health and safety plans or site audit records for the scaffold. Dong Xing told WorkSafe it was waiting for the client to provide these documents. However, the SAR guidelines clearly state this is Dong Xing's responsibility as a specialist scaffolding erection company.

(i) Dong Xing's training and competency register was of poor quality and did not identify the holder of certificates and competence for scaffolding.

(j) The scaffold was installed by workers who were under the supervision of a worker for whom there was no record of his training or competency and this worker did not hold a certificate of competence in scaffolding.

(k) The equipment procedure the defendant had in place was basic with little information on what the inspection process was for staff. As a result, the scaffold was installed using damaged equipment which had not been identified prior to it being taken to site, during scaffold erection or scaffold checks.

(l) A scaffold handover certificate was not completed until 10 August 2016, between six to eight weeks after the scaffold had been installed. The certificate was not completed correctly and the scaffolding representative not printed.

[14] **What was the degree of departure from prevailing standards and obviousness of the hazard?** Dong Xing submits that this was not a case of major or significant departure from prevailing industry standards or any gross disregard for safety. It submits its only failure was *thinking that relying on the head PCBU to cover or disconnect the powerline constituted sufficient control of the risk.* The defendant submits that it had health and safety systems in place even prior to the incident: *It is merely that these systems proved inadequate in this instance*. The defendant submits all scaffold equipment stored at the company yard was labelled, "To use" or "To be maintained", and that new staff mistakenly took components which were rusted. The scaffold had an "Unsafe" tag attached to it to mark that it was unsafe due to the proximity of the live powerline and this was mentioned to the project manager, who agreed to fix the issue by arranging for the powerlines to be covered. The defendant submits that it was under the impression that no one would be allowed onto the scaffold until the issue was addressed.

[15] I consider the degree of departure from the prevailing standards was significant and the hazards were obvious. In order to be effective, the scaffold must address the specific risks associated with build or renovation in accordance with standards set out in the Scaffolding, Access and Rigging New Zealand's Best Practice Guidelines for

Scaffolding in New Zealand. The supply and installation of scaffolding is part of the defendant's business. I concur with WorkSafe that others were entitled to rely on the defendant to ensure the scaffolding was installed adequately for the needs of the build and installed correctly and safely.

[16] I consider the deficiencies in the scaffold were obvious and significant. I do not consider the existence of a sign or tag on the scaffolding reduced the defendant's culpability to any great degree. Access to the site and the scaffolding was still possible. While the defendant appeared to recognise a risk created by the live powerline, it did not place sufficient or appropriate controls to manage that risk. Mentioning to the project manager was not sufficient.

[17] I also consider the defendant should have known about the risk of a fall from height or scaffold collapse and the ways to minimise it. I consider it failed in a significant way to comply with:

(a) The SAR NZ guidelines, which are recognised as the benchmark for scaffolding, and provide the best practice guidelines for working at height in New Zealand.

(b) The MBI guidelines which provide further guidance in relation to who should erect, alter or dismantle scaffold and what information a scaffold supplier should provide to a user.

(c) New Zealand electrical codes of practice for electrical safe distances.

(d) Industry standards addressing prevention of falls from heights.

[18] The next issue I consider is: **Could death, serious injury or serious illness have occurred or reasonably have been expected to have occurred?** Dong Xing acknowledges that it is well recognised that falls from heights and exposure to live powerlines are significant risks and have the potential to result in serious injury. However, Dong Xing submits that, *Certain risks arise out of the inherent nature of certain industries. While those in the industries with greater risks should be held to a*

higher standard to ensure safety, the full extent of the inherent risks should not be entirely attributed directly to the acts or omissions of the defendant. While it is the responsibility of the defendant to minimise these inherent industry risks, the Court is invited to not view the potential for serious injury associated with the scaffolding industry itself as a direct result of the defendant's conduct or aggravate their culpability.

[19] Dong Xing further submits that attention must also be given as to whether harm associated with a risk actually materialised or was reasonably expected to have materialised in the circumstances and adds, *The Court is respectfully invited to consider whether these risks, in light of the surrounding circumstances, could reasonably be expected to be realised. The existence of risks does not automatically lead to the manifestation of its consequences, as other causal factors may be required for the risk to be realised.*

[20] I do not agree. I consider it fortuitous and pure luck that one of the workers on site was not seriously injured as a result of the three failings mentioned. A risk is a risk, and in my view it was a case of good luck rather than good management that a serious injury or fatality did not occur.

[21] In *Jones v Worksafe New Zealand*, the Court held that the degree of harm that has occurred has to be taken into account, however commented that in determining the level of culpability it would really be justified to treat the lack of actual harm as transforming the band of culpability into which a particular case would otherwise fit.[4] In *Stumpmaster*, the Court held that although necessarily the risk under s 48 prosecutions will always at least be of causing serious harm or illness, it is still important to have regard to exactly what the risk was. How many people did it involve for example, and might a worker have been killed? Also, the realised risk component of this enquiry, the actual harm caused, similarly remains an important aspect in setting the placement within the bands. The Court noted:[5]

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[4] *Jones v Worksafe New Zealand* [2015] NZHC 781.
[5] *Stumpmaster v Worksafe New Zealand*, above n2, at [40].

> We remain of the view that what actual harm occurred is a relevant and important feature in fixing placement within the bands. That a defendant is "lucky" no-one was hurt does not absolve it of liability under s 48, but the actual harm caused is still a relevant sentencing factor in determining how serious the offence was.

[22] In my view, Dong Xing ought to have been aware of the extent of the risk the exposure to the powerline and fall from height posed, in addition to the state of the scaffolding. As a result of Dong Xing's failings, workers who used the scaffold were exposed to three potential serious and obvious risks; an electric shock, a fall from height, and the scaffolding collapsing. Although no injury or actual harm ensued, that has to be balanced against the fact that there were three separate and serious failings, each one of which could have resulted in serious harm or death.

[23] **What were the practical steps the defendant should have taken to ensure the health and safety of the people who used the scaffold?** The defendant acknowledges that it had the capacity and sound components to minimise the relevant risks. It could have used sound components to erect the scaffold and could have installed guardrails and midrails to address the risk of a fall from height. Those items should have formed part of its inventory and additional costs of installing. [The cost of] those items would have been negligible. It was not prohibitive for the defendant to have arranged for the powerline to have been made safe before the scaffold was installed and used. I concur with WorkSafe that Dong Xing:

(a) Should have adequately designed and planned the scaffold and installation process to ensure safety during the construction and use, including ensuring that the workers were wholly protected from contact with the live powerline and that the scaffold was erected without the gap between it and the building.

(b) Ensured that the scaffold was properly constructed in accordance with industry standards and from sound material.

(c) Ensured the workers installing the scaffold were competent or were supervised by someone who was competent.

(d) Inspected and certified that the scaffold was safe for use before handing it over to the scaffold user.

[24] Given the guideline decision of *Stumpmaster*, in my view it is appropriate to refer only to the cases subject to that appeal. In *Tasman Tanning Company Ltd*, the High Court was of the view that the starting point should have been towards the top of the second band at $550,000 after a forklift driver suffered gas poisoning and a head injury from blacking out after being exposed to hydrogen sulphide in a tanning operation[6]. Tasman Tanning was held to have breached several duties, including providing inadequate rules to prevent departures from procedures, inadequate communication protocols, inadequate training and warning about hydrogen sulphide and failing to provide workers with appropriate protection equipment. The High Court commented that the harm was significant and that the known risk of gas and its propensity to accumulate at a lower level with a lack of personal monitoring equipment was a significant breach of duty.

[25] In *Niagara Sawmilling Co Ltd*, the Court upheld the starting point of $500,000 after the victim working on a grader trimmer machine had two of his fingers partially amputated when his hand dislodged in the machine and his glove caught.[7] The Court held the breach was a "fundamental one, long recognised – the need to adequately guard machinery". [8] In *Stumpmaster*, the High Court held the starting point should have been around $550,000 after the company failed to provide a safe, obvious barrier preventing persons walking into danger whilst it was felling a tree.

[26] I have reviewed the decisions of *Hanham* and *Department of Labour v Eziform Roofing Products Ltd* which involved workers falling from a temporary scaffold and a roof respectively and suffering injury. In both instances the Court adopted starting points at the lower end of the original high culpability band and medium to high bands respectively.[9] In a more recent decision under the new legislation, *WorkSafe New Zealand v Dimac Contractors Ltd*, the Court set a starting point of $650,000 involving a number of workers being exposed to live electricity while undertaking

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[6] *Tasman Tanning Company Ltd v Worksafe New Zealand* [2018] NZHC 2020.
[7] *Niagara Sawmilling Co Ltd v Worksafe New Zealand* [2018] NZHC 2020.
[8] At [94].
[9] *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526, (2013) 11 NZELR 1.

earthworks.[10] However, I have not overlooked that *Hanham* and *Eziform* were decided prior to the new legislative increases in fines and *Dimac* is a District Court decision which was not part of the analysis undertaken by the full High Court in *Stumpmaster*.

[27] It has also not escaped my attention that fortunately no one was harmed in this instance and therefore Dong Xing's culpability could not be construed as grave as instances where workers have actually suffered harm. However, as I have already mentioned, there were effectively three risks identified and three departures from industry standards.

[28] Taking all of these matters into account, I consider Dong Xing's culpability falls at the top end of the medium band and I set a starting point of $580,000. In my view, that figure represents a significant deterrent reflecting the statutory purposes and the degree of departure from industry standards, acknowledging there was a potential risk but no actual harm was caused.

[29] I turn to aggravating features. Dong Xing has no previous convictions. However, it has received one infringement notice, eight prohibition notices and nine improvement notices since its incorporation in December 2011. WorkSafe seeks an uplift of five percent for this factor. Dong Xing acknowledges that that is an appropriate uplift, however submits that the prohibition notices and infringement notices must be put into perspective taking into account the number of sites that the defendant has undertaken work at since its incorporation.

[30] Section 151(e) of the Act requires the Court to have particular regard to the safety record of the person (including, without limitation, any warning, infringement notices, or improvement notices issued to the person or company or enforceable undertaking agreed to by the person). Although Dong Xing does not have any previous convictions, in my view the combination of the infringement notice, prohibition notices and improvement notice are concerning. I consider they reflect a continuing lack of compliance and adherence to industry standards. I impose an uplift of five percent.

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[10] *WorkSafe New Zealand v Dimac Contractors Ltd* [2017] NZDC 26648, [2018] DCR 447.

[31] Finally, I turn to the mitigating factors to fix the final fine. Dong Xing seeks a20 percent discount for mitigatory factors, including immediately and fully remedying the deficiencies of the scaffolding after the prohibition notice was issued on 12 August. It seeks further discount for co-operation, remorse and *voluntarily undertaking a number of other remedial and preventative actions at a systematic level to prevent future reoccurrences, including organising a community seminar in collaboration with WorkSafe to promote public awareness of health and safety.* WorkSafe acknowledge that Dong Xing is entitled to a discount of 10 percent.

[32] The Court in *Stumpmaster* discussed the issue of mitigating factors in some detail, commenting that such routine standard discounts give cause for concern and have distorted the sentencing process by so reducing the starting points that outcomes have become too low.[11] The Court commented that some correction is necessary to ensure that a balance is maintained to honour the new legislative changes and increase penalties. The Court added that proper analysis of the basis for the credit is required and that it is contrary to sentencing principles that those with previous convictions receive the same global discount as those without when a component of that discount is a previous good record. The Court commented that a further discount of a size such as 30 percent is only to be expected in cases that exhibit all the mitigating factors to a moderate degree, or one or more to a high degree.

[33] In my view, Dong Xing is not entitled to a credit for rectifying and correcting significant and woeful deficits that should not have existed in the first place. The steps Mr Liu, scaffolder and shareholder of Dong Xing Group Limited, states that have been taken since this prosecution are, I consider, steps which should have been in place prior to the prosecution and are simply compliance with industry standards. Steps and processes such as effective inspection systems to regularly check on site work, requiring all staff to complete up to date safety training, providing a dedicated worker in charge of separating equipment, requiring maintenance, teaching workers to identify defective or inadequate equipment, and subcontracting other scaffolding companies to erect scaffolds when the company is in short supply of workers, are standard and appropriate steps which should be employed during the course of its

[11] *Stumpmaster v Worksafe New Zealand*, above n2, at [64].

operations. However, it does appear Dong Xing has engaged an independent contractor to assist it in becoming compliant with all industry standards and manufacturers' instructions, which could be seen as an additional measure above simply adhering to the standard industry guidelines.

[34] I consider the engagement of an independent contractor to assist and ensure that industry standards are maintained, contributing to a community seminar with WorkSafe, and co-operation with WorkSafe during its investigation does warrant a discount. However, in light of the comments in *Stumpmaster* and the general statutory purposes of sentencing, the discount needs to be modest. I allow a discount of 15 percent.

[35] Finally, I address Dong Xing's guilty plea. The plea was entered at the earliest opportunity. Bearing in mind the *Hessell* factors, a full 25 percent reduction is allowed.[12] At this point I reach a fine of $388,237.

[36] I turn to the third step, orders sought under s 152 to s 158 of the Act. WorkSafe is seeking an order for costs of $2333.40, which is 50 percent of WorkSafe's legal costs. That is granted.

[37] WorkSafe is seeking a training order against the defendant, requiring the defendant to undertake or to arrange workers to undertake a course of training. Specifically, WorkSafe seeks an order that the defendant arrange and organise its workers to complete a low level scaffolding course covering NZQA's unit standards within six months from the date of sentence. The purpose of a training order is to make an offender take action to develop skills that are necessary to manage work, health and safety effectively. The defendant states it arranged subsequent to the incident for its workers to complete a passport building construction course with Site Safe which focuses on understanding health and safety responsibilities on construction sites. This is encouraging. However, the defendant acknowledges that a special training programme in relation to scaffolding is appropriate and does not oppose the making of the order. I make a special training order. That special training order is to be complied with within a period of six months.

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[12] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[38] Finally, I turn to the overall assessment of the reparation, other orders and fine and consider whether it is appropriate and proportionate. In *Mobile Refrigeration Specialists Ltd v Department of Labour*, Heath J emphasised the need for a defendant to provide clear evidence of financial incapacity where that is claimed.[13] He directed that full disclosure of all material facts is required.

[39] Annie Chen, a director of E-Counting Partners Limited, attests that she has been providing accounting services to the defendants since March 2015. She attests that based on the information provided by the defendant and compilation report up to 31 December 2017, the report shows a net profit from the first nine months operation of the business of just over $73,000 of net profit. She submits the free cash calculated on a 12 month basis would be just over $65,000. Dong Xing submits that based on the financial information provided, the company should be in a position to pay a fine in the region of $100,000.

[40] I am satisfied that a fine of $388,237 could be difficult for Dong Xing and that [if imposed] it may no longer be able to trade. A fine of that amount would not, in my view, satisfy the purposes and principles of sentencing, including imposing the least restrictive sentence in all the circumstances. I concur with His Honour Judge Gilbert's sentiments in *WorkSafe New Zealand v Rangiora Carpets Ltd*, where he stated it would only be in quite exceptional circumstances involving repeat offending and/or the most egregious of breaches that the Court would impose a sentence with the knowledge that it would force a business to cease its operations.[14] However, I consider Dong Xing is in a position to pay a fine of more than $100,000.

[41] WorkSafe has responded to financial information provided by Dong Xing with an affidavit filed by Mark Keenan, employed as a financial controller by WorkSafe.

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[13] *Mobile Refrigeration Specialists Ltd v Department of Labour* (2010) 7 NZELR 243 at [55].
[14] *WorkSafe New Zealand v Rangiora Carpets Ltd* [2018] DCR 276.

His view is that a fine of up to $200,000 could be met if the company pay that over a period of three or so years.

[42] In *Stumpmaster*, the Court commented that it will not be uncommon for a fine imposed at a level which would result in that company failing, to be significantly reduced in light of the recent increase in sentencing levels. However, having considered the comments made by Mr Keenan on the company's profitability balance sheet, particularly in relation to assets and cashflow, I consider a fine of $180,000 is appropriate. While I am mindful of the Court's comments in *Stumpmaster* cautioning against extending liability of fines too far in the future, I consider a fine of $180,000 paid over a period of 2.5 years will address the purposes and principles of sentencing. So I make the following orders:

(a) A fine of $180,000 is imposed, to be paid within a period of two and a half years.

(b) Costs of $2333.40 to be paid forthwith.

(c) Five workers to undertake special scaffolding training. That course to be complied with within a period of six months.

P J Sinclair
District Court Judge