SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [18].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT TIMARU

I TE KŌTI-Ā-ROHE
KI TE TIHI-O-MARU

CRI-2018-076-001350
[2019] NZDC 12621

WORK SAFE
Prosecutor

v

ATLAS SCAFFOLDING TIMARU LIMITED
Defendant

Hearing:	20 June 2019
Appearances:	E Jeffs for the Prosecutor T Mackenzie for the Defendant
Judgment:	20 June 2019

NOTES OF JUDGE J E MAZE ON SENTENCING

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[1] Atlas Scaffolding faces sentencing after pleading guilty to two charges under the Health and Safety at Work Act 2015. The first is that between 29 November 2017 and 4 December 2017 the company failed to comply with its duty to ensure as far as practicable the health and safety of workers installing a scaffold, thereby exposing any individual to death or serious injury from electric shock or electrocution. The lapses are particularised as four things: failing to adequately identify risks associated with the overhead powerlines, failing to consult adequately with the line company about

the risks associated with the powerlines and steps to isolate, minimise or eliminate those risks, thirdly, failing to take steps so recommended, and fourthly, failing to ensure all work was undertaken in accordance with the applicable Code of Practice.

[2] The second charge is that on 5 December 2017 the company failed to comply with its duty in relation to the health and safety of those who could reasonably be expected to use the scaffolding in question, and thereby exposed those people to risk of death or serious injury from electric shock or electrocution. The particulars of the failings are the same as before, but also failing to have the scaffolding inspected by a competent person before releasing it to the user.

[3] The summary of facts discloses the scaffolding in question related to building work at a dwelling in Waimate, in particular the roof was to be replaced. Of those men working on the erection of the scaffolding at different times, one had a valid certificate, three had no qualifications, the qualifications of one was unknown, and one was not registered on the defendant's training matrix. The problems were discovered, in a sense by chance, by a diligent inspector. The platform was in close proximity to a powerline. It was not known initially whether there was a permit in place and it seems that it was indicated there was, incorrectly. There was also uncertainty about whether the power was connected. The structure also bore a safe scaffold tag but it seemed to have been issued by someone who lacked the qualifications. The defendant company later looked into this and explains that this arose from an earlier event and was nothing to do in fact with the present arrangements. It had simply not been removed. It then emerged there was no hazard identification and controlled check list for the installation. Fortunately, there was no injury or fatality but of course the legislation is aimed at risk prevention. As a result of what occurred here WorkSafe says the installation was done without abiding by the required duties and as listed in the particulars.

[4] The defendant company has no previous convictions under the health and safety legislation either currently applying or earlier. It has, however, been issued with 10 prohibition notices and two improvement notices between 2011 and 2017.

[5] I think it fair to reflect, however, that the company has made a practice of in effect giving a second chance to many of the young men who come before this Court in the course of their otherwise chaotic and difficult lives. In the past I have myself been aware that some of these young men have been able to obtain employment, which has been a step up to a more structured and responsible lifestyle. That is not to suggest that Atlas Scaffolding is a charitable institution, but it is a point well made that there is some difficulty in managing a workforce where levels of education are not high. It is all part of what must be considered in the mix.

[6] The law requires me to apply the Sentencing Act 2002 and apply the purposes of ss 7 to 10. I accept the submission from Ms Jeffs that the most significant aims of sentencing are accountability, responsibility, denunciation and deterrence. It must also surely include provision for the safety of the community. Under the *Stumpmaster* decision the approved approach is to assess the reparation, fix the fine in accordance with principles, determine applications for any other orders, and then assess proportionality and any need for adjustment.[1] There is no issue of reparation here as fortunately there was no accident. WorkSafe says this falls within medium culpability. It was easy to identify the inadequacies and faults and failings and it was reasonably practicable to address and correct those. The nature and seriousness of the risk was serious and obvious, the departure from industry standards was significant and correction of the failings was inexpensive.

[7] The WorkSafe submissions pitch the starting point in the range for the fines at $550,000. That is the first point of difference between counsel's approaches. The aggravating factor is said to be the previous poor safety record and a 5 percent uplift is sought to reflect that, but on the other hand a mitigating factor of 10 percent for co-operation and remorse is recognised. WorkSafe says after adjusting for those the answer is $484,000 as a fine with a quarter discount for plea, bringing the final figure to $363,000. WorkSafe seeks an additional order with an award of costs at $1453.28.

[8] Mr Mackenzie, really, makes his first point as a reminder against double-counting and he relates this particularly to both the starting point and the risk

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

of inflation of culpability. He refers me to the *Dong Xing Group Limited* decision and says that in reality there were three dangerous omissions there and a starting point was adopted and approved at $580,000 for the fine.[2] He submits that while it is an aggravating factor of the elements of the offending, that the inspector was led to believe at first that a permit had been issued when it had not, nevertheless, the middle of the medium band (which allows for a starting point at $250,000 and an end point of $600,000) would be up to $450,000 as a starting point. He does not take issue with the 5 percent uplift, a 10 percent discount, and a quarter discount for plea. He does not take issue with the costs order, leaving whether I am satisfied as to financial capacity and the ability to adjust it down as he seeks in effect a one-sixth end result. He referred me in particular, at para [16] of his submissions, to the *Stumpmaster* decision in which the Court said on this issue of ability or inability to pay all of the following provisions in the Sentencing Act apply to a sentencing, ss 8H, 14(1), 40(1) and s 41; I am not attempting to quote directly. The Court said at para [9]:

> With smaller entities the level of fine, if imposed in full, would result in the company failing, and so it is not uncommon to see an otherwise appropriate fine significantly reduced. This is likely to be more common with the recent legislative change and the need to revise sentencing levels upwards.

[9] Mr Mackenzie has referred me to a number of recent decisions under the new legislation and then said:

> It is clear that realistic reductions occur commonly even where that might numerically be a large change from the nominal end point.

He relies upon the evidence from Mr Brand, the chartered accountant and Mr Loveday, the director. He says:

> The limited means to pay are clear. Ultimately a fairly robust and common-sense assessment must occur that balances the purposes and principles of sentencing but does not crush the company out of business.

He proposes $50,000 be the fine to be paid over two years.

[10]

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[2] *Dong Xing Group Limited*

[11] When I asked both counsel to explain the different starting point I was told that it really amounts to how the two charges are treated. WorkSafe says really there are two distinct and separate failures here, a failure to provide safe scaffolding and a failure to provide a safe environment for it. However, Mr Mackenzie says, and I accept, they are inevitably intertwined and there is a degree of forcing a construction to see it in the way urged by Ms Jeffs. I do, however, see that the additional aspect of misleading, whether intentionally or not is of no consequence, about the permit is a relevant factor. So I adopt a more or less mid-level of the medium range as a starting point at $475,000. That has been fixed having some regard to the *Dong Xing* decision and the factors emphasised in submissions. The uplift at 5 percent is, broadly speaking, $24,000 taking me to $499,000. A 10 percent discount is more or less $50,000, taking me to $449,000. A quarter discount for plea is $112,250, taking me to an end indicated fine of $337,750.

[12] I am entirely satisfied as to the precarious position this company is in and I am aware that, while it may be true, a company that cannot afford to meet its obligations cannot afford to trade, nevertheless, this is a situation where there is justification in reduction and the impact otherwise on the workforce would be significant. So, I am satisfied that an adjustment is proper, and I will fix the actual fine at $50,000 payable over two years as urged by Mr Mackenzie.

[13] The end result is that on CRN 0260, the defendant company is convicted and fined $50,000 payable over two years; on the other charge, 0261, the company is convicted and ordered to pay costs of $1453.28.

[14] I order suppression of publication of the financial details of the defendant company, but not of my reasoning.

Judge JE Maze
District Court Judge

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