IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-002540
[2019] NZDC 18190

WORKSAFE NEW ZEALAND
Prosecutor

v

QUICK EARTH MOVING LIMITED
Defendant

Hearing:	10 September 2019
Appearances:	C O'Brien for the Prosecutor E Boshier for the Defendant
Judgment:	10 September 2019

NOTES OF JUDGE E M THOMAS ON SENTENCING

A. The defendant is fined $150,000 and ordered to pay reparation of $30,000.

B. Two project orders and one adverse publicity order are made.

REASONS

The offending

[1] Quick Earth Moving Limited has been described by WorkSafe as a civil works, earthmoving, and demolition company. WorkSafe accepts that it is not a demolition company as such, demolition is not part of its core business. However, it was engaged by project managers Dong SH Limited to demolish a residential single home in Pt Chevalier. There was no written agreement governing the terms of that engagement.

[2] On 20 December 2017 demolition was well underway. Two workers were on site. One operated a digger, the other acted primarily as a spotter. The demolition was occurring without incident until both workers observed cracks in a wall. They stopped work immediately. They sourced a second digger which they used as a brace. They continued demolition the structure itself posed a hazard.

[3] The wall happened to border a property that was occupied at the time by the Paterson family. That day they were at home hosting a children's music party. There were around 35 guests. Adults were watching the demolition next door with interest and concern. Their concern was for the wall, and for the risk that it may fall onto the property or otherwise affect the Paterson's property.

[4] As the digger operator removed the final part of the roof the wall collapsed onto the Paterson's property. It hit the side of their house. It caused damage to the exterior. It also hit a gas terminal which caused a gas leak. That leak in turn required the immediate evacuation of everybody on the property. Everybody was able to evacuate except Mrs Paterson. She is wheelchair bound. She could not get past the debris that was on the driveway. That would have caused considerable distress to her, and to those who could not remain with her, particularly her son. Eventually Ms Paterson was evacuated after the fire service constructed a ramp over the debris.

[5] The Patersons had nowhere to go. They could not stay at friends who did not have the infrastructure necessary to accommodate Ms Paterson. They were forced to

pay for accommodation at a city hotel. They were out of their home for the four days before Christmas, probably the busiest and most stressful four days of the year. They lost work because of the great disruption of their lives, and the distress that they had suffered.

[6] Testing would ultimately show that asbestos was present on the demolition site next door to the Paterson's property.

[7] Quick Earthmoving Limited is charged with failing to ensure the health and safety of its workers. That is in relation to the exposure to asbestos, it is also in relation to the falling wall. It is also charged with failing to ensure the health and safety of others, namely the Paterson family and their guests in relation to the falling wall. Each of those charges carries a maximum penalty of a fine of $1,500,000. That gives the company some indication of how seriously Parliament treats this type of offending.

[8] Penalties were increased markedly in recent years, with the increase in those penalties has come renewed judicial interpretation, or discussion of how sentencing should be carried out in these sorts of cases. The lead decision in that respect is *Stumpmaster v WorkSafe New Zealand*.[1] That case identified the relevant steps that I must go through.

What is the appropriate reparation that should be paid to the Patersons?

[9] Thankfully they have not suffered physical harm. They have suffered damage to their home, and that has been repaired, it was insured. I should record formally that the defendant has reimbursed the insurer for that cost. They have suffered financial harm. They have suffered emotional harm. WorkSafe has attempted to break down the costs of that harm as best it can, but I prefer the approach that has been taken by the defendant company. It suggests a higher figure in fact of $25,000. I agree that a figure in that vicinity is appropriate.

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

What is an appropriate fine?

[10] Culpability, in other words the defendant company's blameworthiness, falls to be measured against different factors.

[11] The most significant failure of the company is its failure in clearly identifying the practicable steps that it did not take. This would not have taken much. In relation to asbestos it failed to engage a competent person to check and if necessary remove the asbestos prior to demolition. In relation to the demolition risk it failed to adequately assess the risk prior to work commencing.

[12] It failed to develop and implement a demolition management plan, which is required by the best practice guidelines for demolition in New Zealand, issued by the Department of Labour.

[13] It failed to provide workers with adequate training and procedures, also a requirement of the same guidelines. Although demolition is not part of its core work it was aware of the guidelines after it had been issued an improvement notice in early 2016 for demolition work. Because demolition was not its core work it was under perhaps even more of a responsibility to ensure that it properly and fully understood, and that all of its workers properly and fully understood, the necessary obligations in relation to demolition if that was work it was going to undertake.

[14] In relation to its neighbours the company failed to properly assess the risk to that property and to people on it. It failed to properly identify and implement controls.

[15] The potential risks were obvious. The potential risks could have been serious. They were risks not only to the defendant's two workers on site but also to the Patersons and all their guests. Thankfully, very little of the risk was realised.

[16] There was a significant degree of departure from standards that prevail in the industry. The hazards were obvious. The means necessary to avoid the hazards were all available, inexpensive, and would have been sufficient to remove the risk had they been implemented. All of this was easily available to the defendant company with a

minimum of investigation. The current state of knowledge about the risks of these hazards and about asbestos for example are all quite advanced.

[17] Both sides accept that that combination of factors places the defendant's culpability in the medium range described in the *Stumpmaster v WorkSafe New Zealand* case. I agree. Two sides diverge over where in that category they come.

[18] WorkSafe argues that there is a high level culpability, and there is in the sense that in all but one of the factors the defendant company has badly failed. In the one area where its culpability is low it has nothing to do with its own actions but with good luck perhaps. No one was harmed seriously, and that in the end always has to be the saving grace in these sorts of situations.

[19] That means that we must step back a little from the high end fine that WorkSafe is looking for. There is guidance which I have found useful that comes from *WorkSafe v P&M Demolition Specialists Limited*.[2] That case involved circumstances that were broadly similar, culpability that was similar, and a similar combination of factors that exist here. That case was decided against the lower sentences that were available at that time. However, what is clear from that decision is that the starting point for the fine was placed by the learned Judge as being about a third of the way into the medium category.

[20] Sentencing for this type of offending, for any type of offending, is not about numbers. A lot of the analysis that tends to happen in these sorts of cases is about numbers. Life does not work like that. We are dealing with human failures, and human consequences, and human situations. Part of the role of a sentencing Judge is to come to a fair and just response based on those sorts of circumstances.

[21] I assess the starting point as being a fine of $400,000.

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[2] *WorkSafe v P&M Demolition Specialists Limited* [2017] NZDC 8515.

Discounts

[22] The company is genuinely remorseful. It has no prior convictions. It cooperated with WorkSafe. It has paid some reparation already to the insurance company, and it will be paying more. All of that is worthy of a discount of 20 percent. It has pleaded guilty early enough to get the maximum discount of 25 percent.

Are further orders required?

[23] In my view they are. The circumstances of this case have shown an abject failure in the necessary procedures and training of workers in work that they plainly might be engaged in. Counsel have conferred by way of joint memorandum they propose two project orders and one adverse publicity order. Those are all appropriate and they will form part of the decision.

Is the overall result proportionate and appropriate?

[24] This turns on the ability of the company to pay. It is a small company. It is reasonably profitable. Turnover has been increasing steadily for the last few years. The evidence is that it also expects expenses over the next few years to increase. The building and construction industry, of course, generally can be quite fickle, albeit there is a reasonably buoyant market at present in Auckland. The evidence suggests that the company may be forecast to continue to operate at current levels at least for the short term. Those levels indicate an average net annual profit of $70,000. Based on that assessment the sworn evidence has been that the company can afford to pay $5000 a month.

[25] That is an overly simplistic conclusion. It fails to recognise the ups and downs of the market over time, and we will be looking over time here. It also fails to recognise that the long-term future of a company making no profit looks rather different than the long-term future of a company making $70,000 a year in profit. If the company were required to pay $60,000 a year towards any fine that gives it very little breathing space. It may quickly find itself in a position where it must cut costs quickly and that might mean jobs. Parliament's intention would not have been for these sorts of cases to cost workers their livelihoods.

[26] I assess the company's ability to pay at being more like $3000 a month, which will still be reasonably onerous. By the time argument had concluded on this issue WorkSafe took no issue with that figure. WorkSafe argues for reparation to be paid over a period of five years as opposed to four. There is no statement of principle that identifies how long reparation should be paid over. There are statements of principle to the effect that a reparation should not go too far into the future. That it should not be a burden that people must carry for years. That it should not be for a period that is so long that we cannot predict a defendant's ability to keep meeting that payment. Reparation orders extending over a five-year term have become routine. I see no reason to depart from that here. There is no reason based on the evidence before me that I should depart from that here. It is in the public interest that as much as it can the company should pay the fine that it otherwise would be expected to pay.

[27] I work then on the basis that the company can pay $3000 a month over the next five years. That what it is expected to pay out of that $5000 will include giving effect to the various orders including reparation.

Result

[28] The company then is fined a total of $150,000. That will be $75,000 on each charge. It will also pay a total of $30,000 in reparation to the Patersons. That is $15,000 on each charge.

[29] I make the three orders that are contained in the joint memorandum of counsel dated 30 September 2019.

[30] I wish to extend my thanks to both counsel for the quality of their submissions, and particularly for the way each of them responded to the difficult argument that we had today. Thank you to everybody else for the patience and dignity that you have shown throughout this hearing.

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Judge EM Thomas
District Court Judge

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