IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-006597
[2020] NZDC 5873

WORKSAFE NEW ZEALAND
Prosecutor

V

ESSENTIAL HOMES LIMITED
Defendant

Hearing:	26 February 2020
Appearances:	S Backhouse for the prosecutor S Elliott for the defendant
Judgment:	6 April 2020

SENTENCING REMARKS OF JUDGE J E MACDONALD

Charges

[1] The defendant has pleaded guilty to two charges:

(a) Non-compliance with a prohibition notice – sections 107(1) and 107(2)(b) of the Health and Safety at Work Act, 2015 ("HSWA") which carries a maximum penalty of a fine not exceeding $500,000; and

(b) Carrying out work involving asbestos – regulations 7(1) and 7(6)(b) of the Health and Safety at Work (Asbestos) Regulations 2016 ("Asbestos Regulations") which carries a maximum penalty of a fine not exceeding $50,000.

[2] The two offences overlap in that the asbestos removal work is the work that was undertaken in contravention of the prohibition notice.

Salient Facts

[3] The defendant is a limited liability company and a PCBU. It has two directors, Mr Pope and Mr Naylor. It is a holding company for a residential development at 14 Corrella Road, Belmont, Auckland, which entailed demolishing an existing house and building three new townhouses.

[4] The defendant engaged Naylor Construction Limited (NCL) to supply materials and labour for the job. Mr Naylor is the sole director of NLC, which had five employees, three of whom carried out work at Corrella Road.

[5] Neither the defendant, NLC, nor any of its workers were licensed asbestos removalists.

[6] The defendant engaged other subcontractors to complete work on site, including DKL Projects Limited (DKL) and Dowdell & Associates Limited (Dowdells).

[7] On 26 July 2018, the defendant was issued with a prohibition notice, which prohibited "all work or activity at 14 Corrella Road, Belmont, Auckland (other than licenced asbestos removal work)". The notice also stated, "you must not resume the matter or activity until you have received notice from an inspector that this notice is no longer in effect. Failure to comply with this notice is a serious offence".

[8] Despite the notice, various types of work was carried out from the date the notice was issued through until 12 October 2018. That included unlicensed asbestos removal work, on 10 August 2018 and between 11 to 26 September 2018, in breach of the prohibition notice. In that process Mr Naylor and two workers, Mr Simpson and Mr Brown, were exposed to serious health risks by carrying out work involving asbestos.

[9] The defendant has no previous convictions.

Agreed Facts

[10] It is agreed that the financial position of the defendant as at 4 February 2020, is as described in an affidavit from Mr Pope. The defendant has negative equity and currently no income.

[11] The defendant agrees to pay prosecution costs of $1,455.

Respective Positions on Sentence

[12] The position for the prosecution, as set out in its written submissions, is that the offending falls within the medium culpability band (as later explained). The appropriate global starting point is a fine of $190,000. With discounts for good character and co-operation with the investigation of 5 percent each, and a further discount of 25 percent for guilty pleas, the end fine should be $128,250. Orders for emotional harm reparation of $5,000 to both Mr Simpson and Mr Brown are also sought, along with costs of $1,455.

[13] However, in oral submissions at sentencing, Ms Backhouse modified her stance on the starting point, by reducing it to a fine of $150,000 on the main charge, with an uplift of $15,000 for the other charge. That meant a global starting point of $165,000.

[14] The defence position is that the offending falls within the low culpability band (again as later explained). The appropriate starting point is a fine of $50,000. A discount of 10 percent for each of three factors; the defendant's previous good character, its co-operation with the investigation, and voluntary offer of reparation, together with a discount of 25 percent for guilty pleas would result in a fine of $26,250. That should then be reduced to about $20,000 in recognition of the defendant's poor financial position.

[15] As to orders for reparation to cover emotional harm, Mr Elliott submits there is no evidential basis for such orders as no victim impact statements have been

provided. Nevertheless, there is a willingness to make an ex gratia payment of $1,000 to each worker.

Sentencing Criteria

[16] In its comprehensive submissions the prosecution noted the importance of ss 7 and 8 of the Sentencing Act 2002, which s 151(2) of the HSWA states must be applied to sentencing. Section 151(2)(b) of the HSWA also noted the regard to be given to the purposes of the HSWA as set out in s 3:

> **3 Purpose**
>
> (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—
>
> (a) protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant; and
>
> (b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
>
> (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
>
> (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
>
> (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
>
> (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
>
> (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.
>
> (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

Sentencing Approach

[17] The guideline judgment for sentencing under s 48 of the HSWA is *Stumpmaster v WorkSafe New Zealand* in which the Court confirmed there are four steps in the sentencing process:[1]

1) Assess the amount of reparation;

2) Fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors;

3) Determine whether further orders under ss 152-158 of HSWA are required; and

4) Make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps.

Step One: Assessing Quantum of Reparation

[18] The prosecution submits that reparation for emotional harm should be imposed, even though there are no victim impact statements, as it would acknowledge that the workers were exposed to serious health risks, associated with carrying out work involving asbestos. *WorkSafe v Hutt Construction*[2] and *WorkSafe v DKL Projects*[3] are examples of where reparation for emotional harm has been ordered in the absence of victim impact statements.

[19] As just mentioned, the defence points to the fact that there is no evidential basis for making such orders. Both Mr Simpson and Mr Brown were invited by WorkSafe to provide victim impact statements detailing any emotional harm they had suffered, but both declined to do so.

Conclusion

[20] I acknowledge that reparation for emotional harm can be ordered in the absence of victim impact statements. From time to time it happens in the criminal jurisdiction,

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190 at [3].
[2] *WorkSafe New Zealand v Hutt Construction 2013 Ltd* [2016] NZDC 3652.
[3] *WorkSafe v DKL Projects* [2016] NZDC 25800.

for example, in cases of assault. However, in such cases, the description of what happened and any physical injuries that might have been sustained, will often make it easy to infer not only that emotional harm has been suffered, but as to what extent.

[21] In this case, while I accept there has been an exposure to risk, there is no evidence of any emotional harm and that is not necessarily something that can be inferred.

[22] There may also be a further jurisdictional barrier. In terms of s 32(1) of the Sentencing Act, a sentence of reparation may be imposed if an offender has caused a person to suffer emotional harm. That is qualified, however, by s 32(2) which provides that an order for reparation can only be made if that person comes within the definition of "victim" in s 4 of the Act.

[23] Turning to that section, Mr Simpson and Mr Brown would only come within the definition of "victim" if physical injury was suffered or they were persons against whom an offence was committed. Neither was physically injured, and I doubt, given the nature of the offences, that it could be said that they were offences committed against them.

[24] Ultimately, I resolve the matter on the basis that there is no evidential basis to establish emotional harm and I make no orders.

[25] At the same time, I appreciate that Mr Naylor has offered to pay Mr Simpson and Mr Brown a bonus at the end of the project, to acknowledge the position in which he placed them. There is also the offer to make an ex gratia payment to each of $1,000. would hope that both payments will still be made.

Step Two: Assessing Quantum of Fine

[26] The prosecution acknowledges that there have been no previous prosecutions under either s 107 of the HSWA or regulation 7 of the Asbestos Regulations.

[27] Given that *Stumpmaster* fell under a different section of the Act, with a different maximum penalty, the prosecution has adjusted the culpability bands set out

in that case. While different sections of the Act have different penalties to reflect the seriousness of the charges, there may also be different policy considerations involved, and so simply adjusting the numbers strictly on a percentage basis may not necessarily be appropriate. However, as defence counsel has not expressed any real disagreement with the suggested approach, I will proceed on the bands as adjusted, which are as follows:

(a) Low culpability – starting point of up to $100,000;

(b) Medium culpability – starting point of $100,000 - $200,000;

(c) High culpability – starting point of $200,000 - $350,000;

(d) Very high culpability – starting point of $350,000 +.

[28] In terms of relevant considerations for assessing culpability, the Court in *Stumpmaster* referred to the well-known list of relevant factors from the guideline judgment under the earlier legislation, *Department of Labour v Hanham and Philp Contractors Ltd*:[4]

> The identification of the operative acts or omissions at issue and the "practicable steps" it was reasonable for the offender to have taken in terms of s 22 HSWA.
>
> An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.
>
> Whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred.
>
> The degree of departure from prevailing standards in the industry.
>
> The obviousness of the hazard.
>
> The availability, cost and effectiveness of the means necessary to avoid the hazard.

[4] Department of Labour v Hanham and Philp Contractors Ltd High Court, Christchurch, 18/12/2008, Randerson J, Panckhurst J CRI-2008-409-2, CRI-2008-409-34, CRI-2008-408-9 (2009) 9 NZELC 93,095(2008) 6 NZELR 79

[29] The prosecution has dealt with each factor in turn and I will do the same, even though it is only in respect of the degree of departure from prevailing standards in the industry, that there is any real disagreement.

The identification of the operative acts or omissions at issue and the "practicable steps" it was reasonable for the defendant to have taken in terms of s 22 HSWA.

[30] The prosecution submits that there were two reasonably practicable steps that should have been taken:

(a) Ensure that no worker activity was carried out at the site – breach of the prohibition notice; and

(b) Ensure that no workers were permitted to carry out work involving asbestos removal.

[31] The defence takes no issue with that.

An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

[32] The prosecution highlighted that breathing in airborne asbestos fibers is a serious risk to health. Fibers can lodge in the lungs and may cause diseases, such as asbestosis, lung cancer and mesothelioma. Asbestosis is the largest cause of work-related disease deaths in New Zealand; and in 2010 around 170 people died of asbestos-related diseases.

[33] The defence takes no issue with that.

Whether death, serious injury or serious illness occurred or could have reasonably been expected to have occurred.

[34] The risks involved in asbestos exposure are significant. The effects and symptoms can have a latency period of around 20 years.

[35] Again, the defence takes no issue with that.

The degree of departure from standards prevailing in the industry.

[36] The prosecution points to the fact that work involving asbestos removal involves such a high level of risk to worker health that Parliament determined that a specific scheme was required to regulate the industry, hence the Asbestos Regulations.

[37] It is submitted that the present offending involved a blatant breach of the regulations, as work involving the removal of asbestos must be carried out by a licensed asbestos removalist. Further, the defendant was on notice of this being licensed work, given that issuing of a prohibition. It is also submitted that the degree of departure from industry standards and guidelines on asbestos removal in this case is particularly severe and serves to increase the defendant's culpability.

[38] On this issue, the defence makes two points:

1) This is not a case of a deliberately ignoring the presence of asbestos and proceeding to carry out demolition work regardless. Instead, as soon as it became aware of the presence of asbestos it engaged licenced professionals to survey and then remove the asbestos containing material; and

2) The steps subsequently taken to remove some of that material only occurred because Mr Naylor honestly believed that Mr Kenealy of DKL (the licensed asbestos removalist engaged by the defendant) had authorised him to do so. This came about at an onsite meeting after DKL had been unable to attend to the work for some time.

[39] Mr Kenealy denies that he authorised Mr Naylor to undertake the work and says that all he did was to explain to Mr Naylor the methodology DKL would use. Nonetheless, Mr Naylor asserts that he honestly believed otherwise that Mr Kenealy had authorised him to undertake the asbestos removal work, and it is submitted that there are surrounding facts which support that:

(a) Having gone to the effort and expense of engaging a licensed asbestos removalist, it seems odd that Mr Naylor would carry out the work himself unless, of course, he believed that he had been authorised to do so;

(b) DKL returned to the site after the asbestos work by Mr Naylor and his workers had been completed, and no issue was raised about them having done the work;

(c) DKL invoiced the defendant for all the asbestos removal for which it quoted, which included that undertaken by Mr Naylor and his workers; and

(d) DKL had previously been prosecuted for doing asbestos removal work in breach of the Asbestos Regulations.

[40] Subsequently, there was a second crucial misunderstanding by Mr Naylor that stems from his belief that a Clearsafe Inspector who visited the site on 10 September 2018, had given a verbal clearance of the site, which allowed them to commence the demolition of the main house. In fact, the correct process was for the Clearsafe certificate to be provided to WorkSafe, and it was WorkSafe's inspector who would then lift the prohibition notice.

[41] The defence acknowledges that ignorance of the law is no excuse and accepts too that Mr Naylor could and should have made himself aware of the specific requirements for lifting the prohibition notice before commencing work on site.

The obviousness of the hazard.

[42] The prosecution submits that the current state of knowledge of the risks relating to asbestos is high, and the means available to avoid that risk are readily available and explained in full in relevant guidelines. Furthermore, the defendant, as a property development company, should have appreciated that the risks involved in working with asbestos were obvious, especially as a prohibition notice had been issued.

[43] The defence accepts that but says it comes back to the mistakes or misunderstandings on Mr Naylor's part, as just outlined.

The availability, cost and effectiveness of the means necessary to avoid the hazard.

[44] It is submitted that the means to control the risk were available and are used as a matter of course by those in the construction/demolition industry. The costs involved would not have been onerous or prohibitive.

[45] The defence takes no issue with that.

Starting Point

Prosecution Position

[46] The prosecution has referred to several cases for the purposes of comparison. I will deal first with the two viewed by the prosecution to be of most relevance. Both involve a breach of a prohibition notice.

[47] *WorkSafe v L & L Marriott Holdings Ltd* involved a breach of a prohibition notice under s 43 of the Health and Safety in Employment Act 1992 ("HSE").[5] The defendant operated a panel beating and spray painting business as a one person company. A WorkSafe inspector visited the premises and saw a worker spray painting with fumes clearly visible. There was no method of removing the fumes and unsafe electrical sources were also present causing the risk of fire. The painter was also not using an appropriate mask respiration system and another worker was seen walking in the area of the fumes with no protective clothing. The defendant was issued a prohibition notice on preventing further spray painting, but an inspector returned on four separate occasions to find that spray painting was still taking place in breach of the prohibition notice. On the last occasion the defendant lied about whether spray painting had taken place.

[5] *WorkSafe New Zealand v L&L Marriott Holdings Ltd* [2015] NZDC 12413.

[48] The Court found that the departure from prevailing standards was deliberate and persistent. A starting point of $50,000 was adopted, being within the middle and lower levels of the medium culpability band in the *Hanham and Philp* bands. That was reduced to $15,000, because of the defendant's poor financial situation, and a fine of $5,000 was imposed on each of three charges. That was against a total maximum penalty of fines totalling $750,000.

[49] The case of *WorkSafe v Salters Cartage and Ronald Thomas Salter* involved an explosion of a 96,000 litre holding tank containing flammable fuel vapours, that was ignited by welding work being carried out on the tank.[6] The welder was killed. A prohibition notice was issued and directed at the hazard of ignition of flammable vapour substances. It also prohibited the distillation process or operation of the distillation plant. There was subsequent e-mail communication advising Mr Salter of what was required before the notice could be lifted. Despite that, and for financial reasons, he contravened the notice (between 4 February and 4 March 2016) by resuming operation of the distillation plant.

[50] At sentencing the offending was described as "egregious" because it occurred in the context of a fatal accident, reminders from WorkSafe and an apparent willingness to put profit ahead of safety. A starting point of $100,000, against a maximum penalty of $500,000, was adopted, being at the bottom end of the high culpability band from *Hanham and Philp*.

[51] The prosecution also referred to three cases involving breaches relating to work involving asbestos: *WorkSafe v Hutt Construction 2013 Ltd*[7]*, WorkSafe v Crafer Crouch Construction Ltd*[8] and *WorkSafe v Peter John Page*[9].

[52] Those cases, however, involved charges under the primary duty/offence provisions of the HSEA/HWSA, for which the maximum penalties were very much higher than the $50,000 maximum penalty the defendant faces on the charge of breaching the Asbestos Regulations.

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[6] *WorkSafe v Salters Cartage and Ronald Thomas Salter* [2017] NZDC 26277.
[7] *WorkSafe v Hutt Construction 2013 Ltd* [2016] NZDC 3652.
[8] *WorkSafe v Crafer Crouch Construction Ltd* [2018] NZDC 26800.
[9] *WorkSafe v Peter John Page* DC Auckland, CRI-2014-004-004462 12 December 2014.

[53] The prosecution submits that the culpability in the present case, is greater than *L & L Marriott Holdings,* given that the work involved asbestos.

[54] As to *Salters,* while it related to the breach of a prohibition notice in the context of a fatality, it is submitted that a similar starting point can be adopted to reflect, not only that the prohibition notice was breached, but that the breach involved unlicensed persons carrying out licensed asbestos work. It was also mentioned that the defendant had failed to undertake any preliminary checks in determining whether asbestos was present prior to demolishing the shed, and testing was only undertaken when required by WorkSafe.

[55] The prosecution submits that the present offending is in the middle of the medium culpability band, with the appropriate global starting point (as adjusted) being in the order of $165,000.

[56] The prosecution accepts that there are no aggravating features that would warrant an uplift to that starting point.

Defence Position

[57] The defence referred to two cases for comparison purposes. Both are prohibition notice cases that occurred under the former HSEA, where the maximum penalty was $250,000 as compared to the maximum fine of $500,000 under HSWA.

[58] In *WorkSafe v Collings* the defendant, a builder, was replacing the roof of a building but had failed to place any guard rails on the roof. When approached by Labour Department officials the defendant was quite belligerent and stated he was going to continue to work, which resulted in a prohibition notice being issued.[10] The defendant did put up a guard rail only to be told it was woefully insufficient and he was reminded that the prohibition notice had not been lifted. The defendant remained "belligerent" and stated he was going to continue regardless. The breaches were viewed by the Court as "serious and deliberate" resulting in a starting point of a $45,000 fine.

[10] *WorkSafe v Collings* DC Christchurch, CRI-2014-009-4683.

[59] In *WorkSafe v Inter Pro Groups Limited* the defendant was building a house where unsafe scaffolding was observed by WorkSafe, resulting in the issue of a prohibition notice which prohibited any further work.[11] The defendant responded by engaging a scaffolding company to rectify the defects in the scaffolding. When inspectors subsequently visited the property, they found that brickwork and cladding on the house had been completed, and the scaffolding removed. It transpired that when the scaffolding company had failed to complete the work because of financial difficulties, the defendant decided to use the existing scaffolding to complete work on the house as there was an impending Council inspection. That contravened the prohibition notice. At sentencing the Court, in adopting a starting point of a fine of $25,000, considered that the breach did not reflect a belligerent, deliberate or serious breach, as was the position in *Collings*.

[60] In the present case the defence concedes there had been multiple breaches of the prohibition notice, but it is submitted that this was part of a continuing course of conduct that flowed from the two mistakes or misunderstandings on Mr Naylor's part, as previously discussed.

[61] Defence counsel submits that the fact that the breach of the prohibition notice included work involving asbestos, should not be treated as a specific aggravating factor, because inherent in the breach of any prohibition notice will be exposure to the risk in respect of which it was issued – in this case, asbestos.

[62] The defence submits that the most analogous case is *Inter Pro*. There, as in the present case, the defendant responded to a prohibition notice by engaging professional experts to deal with the risk identified. For *Inter Pro* it was a specialist scaffolding company. For the defendant, it was a licensed asbestos surveyor (Dowdells) and removalist (DKL). Both defendants returned to work before the prohibition notice was removed. In *Inter Pro* it was for financial reasons. In the present case it was because of Mr Naylor's mistaken belief that he had been authorised to carry out the demolition work.

[11] *WorkSafe v Inter Pro Groups Limited* [2015] NZDC 8468.

[63] Given those similarities with *Inter Pro* the defence submits that in practical terms the same starting point should be adopted. That means a starting point of $50,000. That equates to double the starting point adopted in Inter Pro to account for the doubling of the maximum penalty under the HSWA. That would place the offending within the low culpability range, as previously outlined.

[64] As to the discounts available, it is submitted after comparison with other cases, including *Salters*, *Crafer Construction*, *Page* and *Collings*, that a 10 percent discount for each of the factors of previous good character, co-operation and reparation, is appropriate.

[65] As to the charge in relation to the breach of the Asbestos Regulations, it is submitted that no uplift is required as the actus reus for each charge is effectively the same. The focus is on the contravention of the prohibition notice.

Conclusion

[66] To avoid a disputed facts' hearing the parties agreed on a resolution that is reflected in paragraphs 21 and 22 of the summary of facts, which read as follows:

> 21. Mr Kenealy advised WorkSafe he was not aware a prohibition notice was in place.
>
> 22. DKL was not able to attend to the asbestos removal work at the site for some time. At a subsequent meeting at the site Mr Kenealy explained to Mr Naylor various aspects of the work that was required to be undertaken. Based on the discussions at that meeting, Mr Naylor took the impression that Mr Kenealy had authorised Mr Naylor to undertake the preliminary outside work himself.

[67] I understand that this reflects an acknowledgment by the prosecution, that rightly or wrongly Mr Naylor honestly believed that Mr Kenealy had authorised him to carry out the demolition work, which involved working with asbestos, and, in

relation to Clear Safe, there was a genuine misunderstanding on his part about the lifting of the prohibition notice.

[68] Having said that, Ms Backhouse in oral submissions at sentencing, presented a compelling argument that the defendant must have been aware of its obligations, but simply ignored them. At the very least it was cavalier. She also submitted that even if it was an honest mistake it is not a mitigating factor.

[69] I can say that had I approached sentencing on that basis, then I would have placed the offending within the medium culpability band, and a starting point at the level advocated by the prosecution might well have been appropriate.

[70] However, I consider that I am obliged to proceed in accordance with the resolution reached between the parties, which is that Mr Naylor honestly believed that he was permitted to proceed in the way that he did on both occasions. In other words, the contravention of the prohibition notice and the breach of the Asbestos Regulations was unintentional.

[71] That being the case, I view the offending as less serious, than if it had occurred deliberately or intentionally.

[72] Consequently, I view the offending in the present case to be less serious than the offending in *Marriott Holdings.* While that case is analogous, in the sense that it involved the latent risk of exposure to toxic paint fumes, the distinctive feature is that it involved repeated and deliberate breaches of a prohibition notice, in the face of ongoing visits and warnings from an inspector. The defendant had also lied about whether painting was continuing.

[73] I regard the offending in *Salters* to be far more serious, and therefore not overly helpful. The offending occurred in the context of a fatality, with flagrant breaches of the prohibition notice for financial reasons.

[74] I consider that *Collings* provides a useful comparison. As previously outlined, the offending involved a serious and deliberate breach, where the defendant effectively

ignored a prohibition notice and kept on working. His attitude was described as "belligerent". The starting point was a fine of $45,000. As the maximum penalty has now doubled a basic doubling of the fine would mean a starting point of $90,000. If that is the appropriate starting point for a serious and deliberate breach, then in my view a breach made in good faith must be less culpable.

[75] I appreciate that the prosecution argues that the present case is more serious than *Inter Pro*, given the repeated reminders from WorkSafe about the prohibition notice and the risks associated with asbestos. However, of the cases involving a breach of a prohibition notice, I thought *Inter Pro* was the most analogous for the reasons advanced by defence counsel and summarised above in paragraph [62]. The starting point in that case was a fine of $25,000, which now equates to $50,000 given the doubling of the maximum penalty. At first sight a starting point in that range for the present case seems reasonable.

[76] I need to assess, however, whether special weight should be attached to the fact that we are dealing here with the risks associated with asbestos. The prosecution placed special emphasis on that aspect, while the defence submitted it should not be treated as a specific aggravating factor.

[77] So, is an exposure to asbestos, (and with it the ongoing risk over many years of serious harm or death), to be regarded as more serious than an exposure to other risks, such as a fall from height (*Inter Pro* and *Collings*), or an explosion from welding near flammable vapours (*Salters*), each of which contains the same risks of serious harm or death? Viewed strictly in the context of those potential outcomes there is no difference.

[78] There is a difference though between a risk that passes, such a risk of a fall from height, and the risks associated with an exposure to asbestos, which are ongoing for a very long time. But how that is best accommodated at sentencing, in the absence of statistical data establishing the percentage of those who are exposed to asbestos do go on to suffer serious health consequences or death, is difficult to know. In the present case the exposure to asbestos was for a relatively short period, which presumably would limit the risk.

[79] In my assessment, the cases to which counsel have referred, support a conclusion that the starting point should be a fine of less than $100,000, which places it in the low culpability band. Furthermore, my acceptance that the offending flowed from two honest mistakes or misunderstandings also supports a categorisation in the low culpability band.

[80] That said, it is difficult to ignore the fact that the defendant, as a property developer, should have known better and more care should have been taken in terms of familiarisation with the procedures and precautions that needed to be taken. There was also no urgency to carry out the work on either occasion. It would have been easy to ascertain the correct position, either by making a phone call to Worksafe or taking the time to read the prohibition notice. Those factors, along with the ongoing risk to the health of Mr Simpson and Mr Brown (even if they may or may not have any concerns), persuade me that the starting point should be higher than was adopted in *Inter Pro*.

[81] I adopt a starting point of $65,000 on the lead charge of failing to comply with the prohibition notice.

[82] On the charge of breaching the Asbestos Regulations, I accept that there is an overlap with the main charge and, inherent in any non-compliance with a prohibition notice, there will be exposure to the risk in respect of which the notice was issued. However, I doubt that every case of non-compliance would involve a breach of some regulations, as it does here. On a totality basis, and for the purposes of fixing a global starting point, I therefore apply an uplift of $5,000 for the second charge, which means a global starting point of $70,000.

[83] In respect of mitigating factors, there are three to consider. I am satisfied that a 10 percent deduction for co-operation with WorkSafe is appropriate. When it comes to previous good character based on a lack of prior convictions, that would usually bear some relationship to the number of years the defendant had been in business. Mr Elliott indicated that the defendant was a new company with Corrella Road being its first development. A deduction of 10 percent therefore seems too high. In respect of reparation, as I am not making any orders and no deduction is made. That is not to

forget the voluntary offer of an ex gratia payment of $2,000, but even if that had been accepted as reparation it would have only attracted a very small deduction.

[84] I am prepared to deduct 15 percent for the above factors to reach a point of $59,500. With a further deduction of 25 percent for the guilty pleas it means a fine of $44,625.

Step 3: Ancillary Orders and Costs to the Regulator

[85] It is accepted by defence counsel that it is appropriate to order costs of $1,455 to WorkSafe.

Step 4: Proportionality Assessment

[86] The prosecution accepts that the defendant's current financial position is poor but suggests that the defendant might be in a position to pay fines once the units currently on the market have been sold. There is the ability to arrange with the Court to pay fines by way of instalments and also to seek remission of fines. That being the case, the prosecution submits that no adjustment is required in terms of proportionality.

[87] The defence submits that, as it is accepted that the defendant's financial position is poor, some downward adjustment of the fines should properly be made. It is also submitted that the fines imposed should be at a level where the defendant would have a realistic chance of paying them, even if by instalments over time.

Conclusion

[88] The inescapable conclusion is that the defendant's ability to meet fines is very limited. It has no income and is in a negative equity position. The chances of that changing in any appreciable way appear slim and, as Mr Pope has said, if all the units are sold, at best they might still only break even.

[89] An affidavit from Mr Do, an accountant employed by WorkSafe, reflects that he shares a similar view as to the defendant's financial state, and while the sale of the

units would inject some cashflow into the company, he could not comment on what the level of that might be.

[90] As made clear in *Mobile Refrigeration Specialists v Department of Labour*, fines should only be reduced where there was "clear and unequivocal evidence" that a fine at an appropriate level could not be paid.[12]

[91] In the present case, I am satisfied that I have such evidence. The prospects of the defendant paying fines at the level just indicated are remote, and even if all the units are sold it appears unlikely that it will the alter the defendant's ability to pay in any appreciable way.

[92] In *WorkSafe v Benchmark Homes Canterbury & Bowness Built Limited*, Judge O'Driscoll commented that it is open to the Court to impose a fine beyond the company's apparent means to pay, if the company's conduct is so serious that it should no longer be in business.[13] From my assessment of culpability above, this is not one of those cases.

[93] I acknowledge that the defendant may be able to arrange to pay the fines by instalments and there is also an ability to seek remission of the fines. However, that does not alter the fact that s 40 of the Sentencing Act requires me to have regard to the defendant's financial capacity when imposing a fine. That is not something that can be ignored, and I believe it is something that I should address now.

[94] I am satisfied that it is appropriate to reduce the level of the fines to take account of the defendant's current financial capacity. With that in mind I reduce the fines to a total of $30,000.

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[12] *Mobile Refrigeration Specialists v Department of Labour* (2010) 7 NZELR 243.
[13] *WorkSafe v Benchmark Homes Canterbury & Bowness Built Limited* [2016] NZDC 7093 at [188].

Sentence

[95] On the charge of contravening a prohibition order, the defendant is convicted and fined $30,000. It is also ordered to pay court costs of $130 and costs to the prosecution of $1,455.

[96] On the charge of breaching the Asbestos Regulations, the defendant is convicted and discharged.

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Judge JE Macdonald
District Court Judge

Date of authentication: 06/04/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.