FINANCIAL DETAILS CONCERNING THE DEFENDANT COMPANY REFERRED TO IN PARAGRAPHS 24 AND 26 ARE PROHIBITED FROM PUBLICATION FOR REASONS OF COMMERCIAL CONFIDENTIALITY.

IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2021-044-001703
[2022] NZDC 15441

IN THE MATTER OF	**The Health and Safety at Work Act 2015**
BETWEEN	**WORKSAFE NEW ZEALAND** Prosecutor
AND	**QRZ PROPERTIES LIMITED** Defendant

Hearing: 10 August 2022

Appearances: A Everett for the Prosecutor
B Harris and C Fraser for the Defendant

Judgment: 19 August 2022

RESERVED DECISION OF JUDGE B A GIBSON

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[1] The defendant company has been charged by Worksafe New Zealand with an offence pursuant to ss 38(1) and 48 of the Health and Safety at Work Act 2015 (the Act). The charge relates to an incident that occurred on or about 25 May 2020 at 15C Wicklam Lane, Greenhithe where the defendant company was undertaking property development work with respect to a residence it was constructing there.

[2] At the relevant time Mr Yingnian (commonly known as Kevin) Xu, an employee of the defendant was working there. Mr Xu was a carpenter but the defendant generally subcontracted its construction work to other construction firms and Mr Xu had a lesser role in the company's developments than his occupation would

suggest. However on this occasion, where wooden flooring to the property needed to be installed, the defendant contracted Mr Xu to carry out installation work of the floorboards of two of the sites at the development, 17 and 15C, on the basis that he would be paid per square metre which was to be separate to his ordinary duties and remuneration as an employee of the company.

[3] Mr Xu, as an experienced carpenter owned his own tools and was using an Ozito brand 100 mm electric angle grinder to carry out the work. He had arranged for the angle grinder to be modified by having a handmade metal plate welded to the lower lip of the safety wheel guard and had attached a 100 mm circular saw blade to it. The design standards and the angle grinder user manual warned against attaching a sawtooth blade it because of the increased risk of "kickback". The angle grinder had a switch enabling the blade rotation function to be "locked on".

[4] On 25 May 2020, in the mid-afternoon, Mr Xu was working at 15C Wicklam Lane. Ms Juan Zhang arrived in the room where he was working. She was employed separately on a previous occasion by the defendant as a plasterer, but was Mr Xu's girlfriend at the time. She sat near him when he was using the angle grinder to make an undercut to a doorframe. While using the angle grinder he lost control of it due to "kickback". The angle grinder flew from his grasp and embedded itself in Ms Zhang's right upper arm and continued to rotate in her arm until it was turned off.

[5] Ms Zhang suffered serious and significant harm. Emergency services were called and she was taken to hospital. Medical records indicate she had "*two extensive right arm lacerations. A proximal laceration, triceps injury and humerus fracture, ulnar nerve sensation and motor function impaired*".

[6] The company acted responsibly in terms of the reporting requirements mandated by the legislation and advised Worksafe on the day of the accident. They also paid $50,000 to Ms Zhang, the victim of the offence. She chose not to file a victim impact statement.

Relevant Legislation and the Guideline Judgment for Sentencing

[7] Section 151(2) of the Act sets out the specific sentencing criteria to be applied when an offender is convicted of an offence under s 48. It directs the Court to apply ss7-10 of the Sentencing Act 2002 as well as a number of other criteria, in particular:

> (b) The purpose of this Act; and
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> (c) The risk of, and the potential for illness, injury or death that could have occurred; and
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> (d) Whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
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> (e) The safety record of the person … to the extent that it shows whether any aggravating factor is present; and
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> (f) The degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
>
> (g) The person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[8] The purpose of the Act set out in s 3 and includes, *inter alia*:

> (a) Protecting workers or other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant.

[9] The decision of Venning and Simon France JJ in *Stumpmaster v Worksafe New Zealand*[1] is recognised as the guideline judgment for sentencing under the legislation and provides for a four-step approach, namely:

> (a) Assess the amount of reparation.
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> (b) Fix the amount of the fine, by reference first to the guideline bands and then having regard to aggravating and mitigating factors.
>
> (c) Determine whether further orders under s 152-158 of the Health and Safety at Work Act 2015 are required.

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[1] [2018] NZHC 2020.

(d) Make an overall assessment of the proportionality and appropriateness of the combined sanctions imposed by the preceding three steps. This involves consideration of the defendant's ability to pay.

Reparation

[10] As already mentioned the defendant company paid the victim $50,000. Worksafe, in its submissions, accepted that in the absence of a victim impact statement, the exact impact of the injuries are unknown making it difficult to assess what would be an appropriate reward for reparation and also notes that amount is more than has been paid in comparable cases such as *Worksafe New Zealand v Mainland Poultry Limited*[2] where a worker's thumb was severed from her hand by a rotation Auger blade and where $30,000 was allowed as emotional harm reparation and *Worksafe New Zealand v Atlas Concrete Limited*[3] where a worker's glove was caught in a conveyer leading to a broken left arm as well as extensive soft tissue damage to his tendons and muscles. He was awarded $40,000 emotional harm reparation.

[11] In those circumstances the prosecutor did not seek a further award for emotional harm, a position supported, understandably, by counsel for the defendant.

The Appropriate Fine

[12] The guideline judgment of *Stumpmaster* set out a series of culpability guidelines for fines replacing those in the earlier guideline judgment in the former legislation, namely *Department of Labour v Hanham and Philip Contractors Limited.*[4] The new culpability bands provide for fines of up to $250,000 for low culpability cases, $250,000 to $600,000 for medium culpability and fines of $600,000 to $1,000,000 for high culpability cases and for those cases which fall under the heading very high culpability, fines in excess of $1,000,000 up to the statutory maximum of $1,500,000. While the culpability bands are now different from the earlier guideline judgment in *Hanham* the culpability factors referred to in that decision remain relevant and include a requirement for the Court to assess the nature and seriousness of the risk

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[2] [2022] NZDC 9562.
[3] [2017] NZDC 27233.
[4] (2008) 6 NZELR 79.

of harm occurring as well as the realised risk, the degree of departure from standards prevailing in the relevant injury, the obviousness of the hazard and the availability, cost and effectiveness of the means necessary to avoid the hazard.

[13] Here the addition of the circular blade to the angle grinder increased the risk of injury through "kickback". There was no shutdown function meaning that if the user of the grinder lost control the grinder shut itself off thereby reducing the hazard to the operator or anyone nearby and further, the manual and design standards specifically warned against attaching the type of blade that was attached to the grinder and also specifically warned of the risk of "kickback". This hazard should have been known to Mr Xu. The defendant company should have been aware that an angle grinder would be used for work on its sites and it had an obligation to ensure that both the employees and contractors used safe equipment. Mr Xu was a foreign national, as the prosecutor submitted, who used English as his second language which in itself enhanced the obligation on the employer to ensure that workers and contractors on site, including Mr Xu and others of similar background, were aware of the standards that applied in New Zealand in relation to the tools being used. Having said that I nevertheless accept the defendant company was a property development company with limited expertise as far as building, tools and equipment were concerned and that Mr Xu was using his own tools, not those of the company. Mr Xu had purchased the angle grinder from Bunnings in the course of his previous employment and had undertaken his own modification to the equipment, in all likelihood without the knowledge of the defendant.

[14] The prosecutor contends for a starting point of $400,000 within the medium band. For the defendant Mr Harris submits the offending is not as serious as made out by the prosecution and, while accepting that the offending fell within the medium culpability guideline, proposed a starting point of a fine of $300,000, together with the reparation payment of $50,000 already made, as being appropriate notwithstanding that the harm done to Ms Zhang was clearly serious.

[15] The essential difference between the factual situation here and those in the cases referred to by the prosecutor such as *Worksafe NZ v 4 Hippos Farm Limited*[5] and *Worksafe v Smoke Control NZ Limited*[6] were that the employer owned the tools and equipment being used. Similarly, *Worksafe v N E Parkes and Sons Limited*[7] was another such case where the employer failed to ensure that its vehicles were safe for use and that safe operating procedures such as pre-start checks were undertaken. *Parkes* was a case involving a vehicle purchased as farm machinery which was being driven by an itinerant worker known as a "woofer". The worker drove the vehicle on a track and while undertaking a reversing manoeuvre it toppled over the edge killing her passenger. The vehicle did not have a full roll cage and its warning system was defective. The *4 Hippos Farm* case involved a worker operating a wood splitter owned by the defendant company. The worker who was injured while operating the wood splitter had not being provided with safety instructions or proper training. The *Smoke Control* case involved a worker altering four smoke curtains using a sabre saw. The company did not have enough steel tabs in stock to enable the job to be completed and so the worker attempted to improvise using a handheld angle grinder, a piece of equipment owned by the defendant in that case. A wheel on the angle grinder disintegrated with one of the shards hitting the worker in the neck. Death ensued. There was no safety guard fitted to the angle grinder and nothing to prevent the shard from hitting the worker.

[16] These cases are all factually dissimilar to the matter the subject of the present charge. They all involve the use of the companies own equipment. They all involve equipment that ought to have been maintained properly by the company and which was defective and the *Smoke Control* and *4 Hippos Farm* case had the additional overlay of the company failing to ensure either that the correct equipment was available or the worker was properly trained in its use. Here the worker provided his own equipment. The company could not be expected to have any knowledge so as to be able to supervise the worker in its use. The worker, Mr Xu, was far more experienced in that respect than the directors and officers of the company itself who were operating a property development company, not a construction company. He

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[5] [2019] NZDC 15462.
[6] [2021] NZDC 17446.
[7] [2020] NZDC 25449.

was an experienced carpenter and responsible for his own tools and had been responsible for the modification angle grinder that failed. Consequently, while I accept the matter falls within the medium culpability band set out in *Stumpmaster* I consider it to be, as the defendant submits, at the lower end of that band and accept the defendants submission that the starting point for the fine ought to be $300,000.

Mitigating Factors

[17] The appropriate discount for the guilty plea in this instance, as both the prosecutor and defendant agree, is 25 per cent and the defendant is entitled to a further discount of 10 per cent for the level of reparation paid before a plea was entered together with discounts for cooperation at 5 per cent, remorse at 5 per cent and its previous good record in respect of the legislation, also 5 percent, meaning that the total discounts available from the starting point is 50 per cent leading to a fine of $150,000 before ability to pay is considered.

[18] The prosecutor also seeks a contribution to its costs of 50 per cent, the amount being $1,818.23 which is accepted by the defendant. No further order under ss 152-158 of the Act is sought or required.

The Defendants Ability to Pay Proportionality and Appropriateness of the Sanctions

[19] Other than the level of fine the essential issue between the parties is the defendant's ability to pay the fine levied. It has already paid the $50,000 reparation and does not object to the contribution to the prosecutor's costs but submits that it does not have the ability to pay the usual swingeing fine for this type of offence, certainly not as a lump sum.

[20] Ability to pay is one of the factors that needs to be considered.

[21] The defendant is a residential property investor and developer. It has one director and shareholder, Mrs J Zhou, although her husband, Mr D Qian is heavily involved in the business. He was a shareholder until July 2018.

[22] The company was incorporated in 2013. According to the affidavit of Mr C Wang, a chartered accountant, its primary business up until 2018 was the subdivision and development of a property at 19 Wicklam Lane, Greenhithe, Auckland which was divided into 10 lots over two stages. Mr Xu was working on a property on one of the lots when the accident happened. The properties were listed for sale after new titles issued in May 2017.

[23] In 2018 Mr Qian and the owner of 38 Wicklam Lane, Mr J Dong agreed to jointly purchase and develop 44 Wicklam Lane and later 39 Wicklam Lane. QRZ NZ has undertaken development work for the properties but a dispute has arisen between Mr Qian and Mr Dong together with an allegation made by Mr Dong that QRZ has not undertaken work for the benefit of the development of 39 Wicklam Lane. The position Mr Dong takes is that Mr Qian and QRZ were simply lenders to the 39 Wicklam Lane development and they have subsequently been repaid. The property was sold without the knowledge of the defendant or Mr Qian in November 2020 and that has led to civil proceedings which are scheduled for trial in the High Court in March 2023.

[24] [redacted]

[25] QRZ's main assets, other than the work in progress for 39 Wicklam Lane, is an interest in a joint venture in Henderson for the development of land there. The other asset is a contingent asset being the outcome of the civil proceeding involving the Wicklam Lane dispute. The claim for damages involving both Mr Qian and the defendant company is in excess of $4,600,000 but the portion the defendant is entitled to in the event the claim succeeds is presently uncertain.

[26] The hopeful outcome of litigation is not recognised in the financial statements for obvious reasons. [redacted] Its most recent financial position is at the end of March 2022 and [redacted]

[27] Consequently, given the state of the company at present, it is not in a position to pay a fine or reparations without a further injection of capital from its shareholder.

[28] The prosecutor relies on an affidavit from a Wellington accountant, Mr T S A Taylor who notes that historically the ongoing viability of the defendant company has been based on support from the shareholder and also temporary loans. He opines "there is nothing presented to suggest that the support wouldn't continue". His proposition is that if the defendant is successful in the High Court litigation then it will be able to pay a fine and there is nothing to suggest that it cannot pay a fine, at present, by lump sum.

[29] I disagree. The only way a fine could be paid on the accounts I have seen and having regard to the matters raised by Mr Wang would be for an injection of shareholder capital.

[30] It is the company that is liable for the fine, not the shareholder. However I accept there are good reasons why the shareholder would want the company to continue in existence for the foreseeable future, not the least being the High Court litigation and the possible development of the Henderson property so it is not unrealistic to expect shareholder support. Mr Harris submits that a total fine of $100,000 could be paid by instalment with 50 per cent payable by April 2023 and the remainder by the end of 2023 which would enable the shareholder to realise some capital.

[31] I accept that and accordingly reduce the fine to $100,000. $50,000 is to be paid by 30 April 2023 with the balance paid by 30 December 2023. The payment of the contribution of $1,818.23 towards the prosecutor's legal costs is to be paid forthwith.

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Gibson DCJ