

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF VICTIM AND SUMMARY OF FACTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>

**IN THE DISTRICT COURT
AT NORTH SHORE**

**I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA**

**CRI-2022-044-001954
[2022] NZDC 4626**

WORKSAFE NEW ZEALAND
Prosecutor

v

**CHUNDA LIMITED
JMK HOMES LIMITED**
Defendant Companies

Hearing: 9 March 2023

Appearances: A Simpson and E Dallas for the Prosecutor
M Hutcheson and C Sargison for the Defendant Company
Chunda Limited
D Wang for the Defendant Company JMK Homes Limited

Judgment: 9 March 2023

**NOTES OF JUDGE S J MAUDE ON SENTENCING
[Recalled and reissued on 3 May 2023]**

[1] Chunda Limited and JMK Homes Limited appear today to be sentenced each charged that between 24 July 2020 and 22 September 2020 at Auckland being a business conducting a business or undertaking having a duty to ensure so far as reasonably practicable the health and safety of workers who work for it while the workers are at work in the business or undertaking, including while undertaking

construction work at in this case Lot 74, 2182 East Coast Road, Silverdale, Auckland, did fail to comply with that duty and that failure exposing their workers, including ██████, to a risk of death or serious injury caused by falling from a height.

[2] At the outset I suppress publication of the victim ██████ name and publication of the summary of facts that is consented to by Worksafe and the two companies.

[3] I also record that there was absent today the directed Mandarin interpreter and that while ██████ is present with his wife, the latter speaking Mandarin and able to interpret, I direct that if they request these sentencing notes are at the Ministry of Justice cost to be translated and typed back in Mandarin and released to them.

[4] On 21 September 2020, ██████, an employee of construction company Chunda Limited fell through a void on the second floor of a construction site at 2182 East Coast Road, Silverdale leading to serious injury, he left with a with broken spine and confined now to a wheelchair.

[5] Today I am asked to sentence the two companies.

[6] The process I adopt is to:

- (a) Summarise the relevant facts.
- (b) Assess the amount of reparation to be paid by each company.
- (c) Assess the quantum of fines to be paid by each company.
- (d) Determine what regulatory costs should be paid.
- (e) Consider the overall appropriateness looking in totality at the combination of the above outcomes.

[7] I turn firstly to what are the agreed facts, noting that I have deliberately summarised them for the sake of brevity but that they of course are available to the parties for consideration in detail but not publication.

[8] Chunda Limited is a residential construction company building new homes with employees. Mr Lin is its sole director. Mr J Lin is the foreman.

[9] JMK Homes Limited is a property development company. Mr Tian is its sole director. That company prior to the incident on 10 September 2020 had employed Mr Yang as project manager for the 2182 East Coast Road site.

[10] Mr Yang prior to the incident had moved to China working remotely from that country. Primarily he would communicate with Chunda's Mr Lin about the project.

[11] ██████ the victim began working for Chunda in March 2020. He started work on the East Coast Road property on I believe 10 September 2020.

[12] He was messaged at 8.21 on 20 September by WeChat by Mr Lin's son to go to work the following day at the East Coast Road site.

[13] On arrival the ground floor framing was complete with joists installed upon which the second floor was to be constructed. He was instructed by Mr Lin to work on the second floor. Sheets of flooring had been earlier delivered to the site and placed on the second storey.

[14] At 9 am while carrying a sheet of flooring with Mr Lin, ██████ fell through a second floor void to the ground floor three metres below. He was helicoptered to Middlemore Hospital receiving immediate emergency treatment and surgery. He was released on 30 September to Auckland's spinal rehabilitation unit. He returned home on 2 December.

[15] As a consequence of the incident he suffered significant ongoing disabling and lifechanging injuries, including a broken spine causing paralysis, leaving him without leg movement. He is unable to walk and is confined to a wheelchair.

[16] On inspection of the site investigators observed that the lot worked on had closed fencing. It had hazard board signage on the fencing but no details marked on it. The building framing was completed to the second level floor with joists installed. Large wooden flooring boards were stacked in two piles on the top of the joists near the front of the building. Scaffolding was installed providing access to a second level working area. Some floorboards had been fixed in position and others were scattered around the first level floor on top of the joists.

[17] Inspectors observed that edge protection that is wooden guardrails and fall bags had been installed on the second level floor and fall bags had been positioned on the ground floor but were not adequately set up for use. In JMK's interview with WorkSafe Mr Yang confirmed that he had these safety measures installed after the incident.

[18] On 3 November 2020, Chunda sent WorkSafe an email providing its health and safety procedures outlined above and saying that on the morning of the incident Mr J Lin as foreman/team leader had done a site safety check and would meet regularly with Mr H Lin to review potential health and safety issues.

[19] In a subsequent interview with WorkSafe on 28 June 2021, Mr H Lin denied Mr J Lin was a foreman/team leader and said that Chunda had not implemented its usual procedures at Lot 74 because Chunda did not own the site and considered it was not in charge of the site.

[20] WorkSafe publish resources that are available for free download from their website providing practical guidance for employers, contractors, employees and all other engaged in work associated with working at height including notably: *“Best Practice Guideline: Safe use of safety nets 2014, Good Practice Guideline: Scaffolding in New Zealand 2016 and Best Practice Guidelines for Working at Height in New Zealand 2019”*, the guidelines setting out the steps for planning safe working at height and hierarchy of controls for managing risk in situations where it cannot be eliminated entirely.

[21] The Health and Safety at Work Act 2015 imposes a number of duties relating to health and safety work. Chunda and JMK failed to comply with their duties as set out below.

[22] In respect of Chunda it had a duty to ensure so far as was reasonably practicable the health and safety of workers who work for it while the workers were at work in their business or undertaking.

[23] The Health and Safety at Work Regulations contain more specific duties imposed on such entities. Regulation 10 creates a duty for such an entity to ensure as far as is reasonably practicable that:

- (a) The layout of the workplace allows persons to enter and exit the workplace and to move within it without risk to health and safety under normal working conditions and an emergency.
- (b) Work areas have sufficient space for work to be carried out without risks to health and safety.
- (c) Floors and other surfaces are designed, installed and maintained to allow work to be carried out without risks to health and safety.

[24] If a risk cannot be eliminated it must be minimised so far as reasonably practicable to ensure workers are given the highest form of protection against harm to their health, safety and welfare as it reasonably practicable.

[25] More than one person may have that same duty at the same time as it provided for in s 34 of the Act.

[26] In respect of Chunda, the company did not take reasonable steps to ensure the health and safety of workers.

[27] The company was aware that the JMK project manager was in China and was unable to conduct site inspections. The company did not discuss with JMK how to compensate for this. It did not undertake its own risk assessment.

[28] Reasonable measures such as installation of safety barriers and netting were not undertaken.

[29] It failed to implement its own procedures adopted after extensive prior engagement with WorkSafe as to working from heights.

[30] A site hazard board was in place on site but not used.

[31] ████████ had received no risk avoidance training.

[32] In respect of JMK it failed to ensure the health and safety of its workers.

[33] It did not initiate a discussion with Chunda as to the meeting to its duties.

[34] It did not make its own risk assessment or take steps to ensure that Chunda did.

[35] In short, JMK assumed Chunda would undertake risk assessments and implement safety measures even though its project manager was in China.

[36] Today I have considered the facts that I have referred to and counsel's submission.

[37] WorkSafe in summary has submitted the following outcomes should flow:

- (a) That there should be reparation ordered in the sum of \$90,000 to \$100,000.
- (b) That a start point fine in respect of Chunda of \$550,000 would be appropriate subject to consideration of aggravating and mitigating factors; they urging a resultant fine of \$330,000.
- (c) A start point fine for JMK of \$400,000 with resultant fine after discounts of \$220,000.

- (d) Costs from Chunda in the sum of \$3,148.88 and from JMK in the sum of \$3,265.80.
- (e) Consequential damage reparation in total in the sum of \$17,851.

[38] For JMK counsel submits:

- (a) That his client company and its manager Mr Yang had not instructed that work be done on the second floor in question.
- (b) That the company had not been consulted by Chunda as to the commencement.
- (c) That Chunda had instructed ██████ to do the work.
- (d) That non-instruction was because safety measures had not been put in place, and that is to say JMK's non-instruction of ██████ was for that reason.
- (e) JMK accepts responsibility nevertheless as set out in the facts. There was an absence of its project manager on site.
- (f) Mr Yang was out of New Zealand due to the COVID-19 Pandemic. His responsibilities were managed remotely. That was a unique and unprecedented situation that should impact fine outcome.
- (g) In the circumstances JMK was significantly less culpably than Chunda.
- (h) The procedure was that Mr Yang would instruct Chunda. The next step due, Mr Lim then implementing it.
- (i) No safety preparation was completed by JMK and no instruction given to Chunda to proceed as the company had directed ██████ to proceed.

- (j) There was for JMK no prior offending or need for intervention from WorkSafe unlike with Chunda. He seeks a discount of 15 per cent.
- (k) His client company accepts the suggested reparation as being appropriate in the range of \$90,000 to \$100,000 he urging however that it be met on an 80/20 basis, that is 80 per cent by Chunda and 20 per cent by JMK.
- (l) The company accepts WorkSafe's calculations of consequential reparation due to ██████ in respect of the differential between ACC payments and actual loss of \$17,851.
- (m) As to the fine to be imposed upon JMK, he urged that culpability was at the low end of moderate culpability with a start point of \$250,000 urged.
- (n) That there were no aggravating features.
- (o) Counsel urged discounts for mitigating factors of:
 - (i) Prior good record, 15 per cent.
 - (ii) Co-operation, five per cent.
 - (iii) Remorse, five per cent.
 - (iv) The fact that a reparation offer had been made and that his client company had intended to assist ██████, such assistance to be offered through a restorative justice process, not accepted by ██████ discount of 15 per cent sought.
 - (v) A 25 per cent discount for plea.

[39] If accepted the result would be in totality a 65 per cent discount on the \$250,000 fine with an end result fine of \$87,500.

[40] For Chunda Mr Hutcheson urged:

- (a) That Chunda should pay 50 per cent of the emotional harm reparation.
- (b) That the end fine after aggravating and mitigating factors should be \$330,000 concurring with WorkSafe.
- (c) Costs of \$3,141.88 were agreed.
- (d) Taking account of proportionality and totality, and his client company's responsibility and ability to meet fines, the sum should reduce to in the order of \$323,523 paid over five years.

[41] In support of his submissions, Mr Hutcheson urged:

- (a) Chunda was contracted by JMK Homes Limited to construct a home.
- (b) As to reparation Mr Hutcheson referenced cases in which reparation had been ordered in the range of \$75,000 to \$100,000. He referenced *WorkSafe New Zealand v Cardinal Logistics* where \$75,000 was ordered in respect of injuries short of a broken spine and loss of leg movement.¹ He referenced *WorkSafe New Zealand v Champion Flour Milling* where a victim was left without a prognosis of not being able to walk again.² [REDACTED], Mr Hutcheson submitted, has not been advised that he will never walk again.
- (c) He referenced *WorkSafe v Ask Metro Fire Ltd* where a victim was paralysed from the shoulders down and where reparation of \$100,000 was ordered and *WorkSafe v Supermac Group Resources Ltd* where a paraplegic victim received reparation of \$100,000.³

¹ *WorkSafe New Zealand v Cardinal Logistics* [2018] NZDC 19696.

² *WorkSafe New Zealand v Champion Flour Milling* [2020] NZDC 10240.

³ *WorkSafe v Ask Metro Fire Ltd* [2017] NZDC 13314 and *WorkSafe v Supermac Group Resources Ltd* [2019] NZDC 15023.

- (d) Mr Hutcheson submitted \$90,000 as being an appropriate reparation figure.

[42] Given that in his submission JMK assumed responsibility, Mr Hutcheson urged that reparation be apportioned on a 50/50 basis. As to the fine to be imposed Mr Hutcheson accepted \$550,000 as an appropriate start point.

[43] In respect of aggravating and mitigating factors, WorkSafe's submissions were not entirely accepted:

- (a) Chunda did have a health and safety system, he urged, albeit it informal.
- (b) The procedure was not implemented due to crucial and avoidable miscommunication as to the commencement, timing of the second floor work.
- (c) He accepted that Chunda's own systems represented a departure from industry standards.
- (d) He accepted that it would not have been onerous or expensive to upgrade to industry standards.
- (e) He did not accept that it was appropriate for there to be a five per cent uplift for prior offending. His client he urged should not be doubly punished.
- (f) Discounts of five per cent for remorse and cooperation and reparation were agreed as was a discount of 25 per cent for plea.

[44] At the end of the day an outcome of \$330,000 after discounts was accepted subject to ability to pay and totality which I will refer to later.

[45] Mr Hutcheson's primary submission was as to the financial capacity of his company. Financial Capacity Limited Mr Hutcheon argued Chunda's ability to meet the overall outcome.

[46] He urged that his client company as informed by its accountant could only meet a lump sum of \$80,000 with the remaining \$150,000 paid in monthly instalments; however, after taking into account the WorkSafe accountant, Mr Shaw's, calculations and opinions, Mr Hutcheon on behalf of his client reviewed his position resulting in a submission accepted by WorkSafe that the total that could be paid by his client company was \$323,532 payable for the first two years at \$6,250 per month, and that is \$75,000 per year and for the remaining three years at \$4,820.33 per months, and that is \$57,844 per year.

[47] I turn then to consider the Court's approach.

[48] It is not for the Court to reach resolutions by agreement but to reach conclusions based on its interpretation of the facts and the law as they merge.

[49] In terms of reparation, I have reference counsel's submissions as to emotional harm reparation and the similar case outcomes that I have been referred to. It is clear to me that the appropriate band for this case lies in the \$80,000 to \$100,000 range for reparation and I fix it at \$90,000.

[50] As to the issue of apportionment, I note that JMK engaged Chunda to undertake the construction of the house. Further, I note that Chunda did without consultation with JMK proceed with the second floor works that led to [REDACTED] injury.

[51] The situation was however complicated by the reality that Mr Yang who would have overseen progression on site was in China overseeing it remotely due to the COVID-19 Pandemic.

[52] Mr Hutcheson for Chunda noted that his client's position was that the accident occurred as a result of broken down communication and that Mr Yang being remote cannot be Chunda's fault.

[53] I prefer the view that Chunda breached its standards to a degree that impacted by Mr Yang's absence.

[54] Primary responsibility however did lie with Chunda as the building company notwithstanding that s 34 of the Act envisages mutual responsibility and imposes a duty to consult.

[55] JMK could have and should have engaged an onsite replacement for Mr Yang.

[56] I fix responsibility that on a 60/40 basis Chunda 60 per cent, that is \$54,000 and JMK 40 per cent, that is \$36,000.

[57] Turning to the consequential reparation for the differential between ACC and actual earnings, \$17,851 is accepted by all as the appropriate sum.

[58] Mr Hutcheson urged credit for his client's reduction of the total sum assessed by Mr Shaw of \$25,967 to \$17,851 first. On that basis Chunda would pay \$15,580.20 being 60 per cent of \$25,967 and JMK, \$10,386.80. Chunda having reduced the \$25,967 should he urged end up paying \$7,464.20 now. I accept that.

[59] I turn then to the position of fines. In respect of Chunda there was as between WorkSafe and Chunda concurrence as to the start point of \$550,000. There was concurrence as to the end point following discounts of approximately \$330,000. I accept the start point of \$550,000 is appropriate.

[60] There must be however an uplift for prior WorkSafe intervention such in my view contrary to the submission of Mr Hutcheson being an aggravating factor and must be an aggravating factor with respect to each offence committed. I fix the aggravating elevation at five per cent or \$27,500.

[61] In respect of co-operation with the investigation I allow a discount of \$27,500 or five per cent.

[62] In respect of reparation I allow a discount of five per cent or \$27,500.

[63] In respect of remorse, five per cent, \$27,500.

[64] In respect of an early guilty plea entered, 25 per cent or \$137,500.

[65] The net result would be \$357,500.

[66] Costs of \$3,148.88 are agreed and ordered.

[67] As indicated consequential damage in terms of Chunda's responsibility is fixed at \$7,464.20.

[68] The issue becomes as assessment of Chunda's financial position and ability to pay the resultant \$439,813.08 that it would otherwise have to pay but for its financial circumstances and whether there should be an adjustment to that sum and periodic payments.

[69] I have reviewed the financial position of the company.

[70] It is clear from the assessment of Mr Shaw alone for WorkSafe that an upfront payment is not possible; WorkSafe proposing payment over five years.

[71] WorkSafe and Chunda are in agreement with the workings of Mr Shaw and I cannot find fault with them.

[72] The maximum payable, Mr Shaw concluded, would be \$323,532. I have indicated payable over two years and then a second period of three years totalling payments over five years as I have already recorded.

[73] Reparation is accepted by all as to be prioritised. The result is viewed in totality is the following:

- (a) Chunda is to pay reparation of \$54,000.
- (b) Chunda is to pay the consequential reparation of \$7,464.20.
- (c) Chunda is to pay costs of \$3,148.88.
- (d) Chunda is fined \$258,918.92.

- (e) The payment is to be made periodically on the basis that I have already set out in this decision.

[74] I turn to JMK Homes Limited.

[75] JMK was an offsite property developer that contracted Chunda. That does not absolve it from responsibility. Section 38 of the Act makes that clear.

[76] The need for oversight is acknowledged by the fact that Mr Yang was overseeing the project remotely.

[77] I accept however that there is for JMK lesser culpability. The Pandemic was an unprecedented event but replacement on site of oversight should have been implemented.

[78] I fix the start point fine as \$350,000.

[79] I accept that the discounts proposed by both counsel are appropriate, adjusted however taking into account Mr Wang's submissions today. The discounts I allow are:

- (a) Five per cent in respect of prior good record, \$17,500.
- (b) Five per cent in respect of reparation, \$17,500.
- (c) Ten per cent in respect of remorse and the interest indicated in providing ongoing support for ██████ including a job offer not possible to be made because of ██████ deciding that he did not wish to participate in a restorative justice conference, \$35,000.
- (d) Five per cent in respect of cooperation with WorkSafe, \$17,500.
- (e) Twenty-five per cent in respect of an early plea, \$87,500.

[80] The resultant end fine is \$175,000. The company is fined accordingly.

[81] Costs are awarded, uncontested, in the sum of \$3,265.80.

[82] Reparation is to be paid to ██████ in the sum of \$36,000 and in respect of consequential reparation, \$10,386.86.

[83] The total payable becomes \$224,652.60.

Judge SJ Maude

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 24/03/2023