

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2024-004-003691
[2024] NZDC 31547**

WORKSAFE NEW ZEALAND
Prosecutor

v

**CHURCH BAY SERVICES LIMITED
JOAN CARPENTERS LIMITED**
Defendants

Hearing: 12 December 2024

Appearances: A Simpson for the Prosecutor
N Dhaliwal for the Defendant Church Bay Services Limited
H Birch for the Defendant Joan Carpenters Limited

Judgment: 12 December 2024

NOTES OF JUDGE K J GLUBB ON SENTENCING

[1] Joan Carpenters Limited (JCL), represented in court by Mr Anderson, and Church Bay Services Limited (CBS), represented in court today by Mr Ford, are each charged with one charge of being a PCBU, failed to comply with their statutory duty, which exposed workers to the risk of death or serious injury.

[2] Both have pleaded guilty to the respective charges, and they are for sentence.

The Facts

[3] JCL is a construction company engaged in residential building work. It was undertaking extensive renovation work on a property on Coromandel Road, Oneroa.

CBS is a scaffolding company which subcontracted to JCL and installed an as-built scaffolding on the property to enable the reconstruction.

[4] Work began onsite on 15 October 2022 and proceeded without incident. Over the course of the work, at various times, Auckland City Council inspectors, Northpower, as representative for Vector, and the architect had all visited the site without raising any concerns as to non-compliance.

[5] Close to the property and within the MAD, or minimum approach distance, from the second-story scaffolding, were 11,000-kilowatt overhead powerlines. It transpired that the raising of the scaffolding on 14 February 2023 was in breach of the SAD, or safe approach distance, to the overhead lines. This requirement was regulated by the NZECP 34 and required a close approach consent. None was sought.

[6] At one point, Mr Ford pointed out the conductors on the line to Mr Anderson, and he acknowledged them, but no further research was done. Mr Ford in turn assessed the distance by eye – inaccurately, it would seem – and mistakenly believed they were four metres from the scaffolding. Neither sought further input from Vector.

[7] Additionally, Mr Ford made weekly inspections of the scaffolding and had in place a requirement that only qualified personnel were to make alterations to the scaffolding. Over time, he had noticed JCL were making unauthorised scaffolding adjustments despite requests not to do so.

[8] As the renovation continued, new metal cladding was installed. It measured about 5.7 metres in length. Prior, a safe system of work was discussed which included appropriate PPE, cutting stations, and handling by JCL and its staff. The presence of the overhead powerlines was not discussed.

[9] At about 8 am on 5 May 2023, the victim – who joins us today via AVL from the United Kingdom, and I thank him for being here – arrived on site and, with a colleague, Ms Hall, recommenced installation of the cladding. Given a change in the site, they began passing the lengths of cladding through a top-level open-sliding window. Before doing so, JCL had made a change to the scaffolding platform so that

a single plank was placed outside the window, and it spanned a void of about a metre width and over a 3.7-metre fall. That change was contrary to the express as-built scaffolding construction and would not have been approved.

[10] The victim went out onto the single plank and manoeuvred a length of cladding to get it into position. In doing so, he inadvertently touched the overhead powerlines. He received an electric shock. He passed out and fell backwards off the unauthorised modified scaffolding and through the open void. He landed on his back on a pile of stacked wooden decking boards and bounced off onto the ground from that height of 3.7 metres.

[11] An ambulance was called, and the victim was flown to the North Shore Hospital before being transported to Auckland Hospital for emergency medical treatment.

[12] The victim suffered significant injuries. He was diagnosed with fractured thoracic vertebrae T-7 and T-8 level, left; multiple rib fractures involving two ribs, left; full thickness burn of wrist and hand, left; full thickness burn of ankle and foot, right; and effects of electric current.

[13] The victim was discharged from hospital on 7 May 2023. On 17 May 2023, the victim was admitted to the burns unit at Middlemore Hospital and underwent surgical procedures including debridement, which is the removal of dead or infected skin tissue, and skin grafts to the left fifth digit and right foot.

[14] On 22 May 2023, he was discharged and spent two weeks recovering at home.

[15] The victim also had concussion-related symptoms and was referred to a concussion team, who provided support and a recovery plan and resting schedule.

[16] The victim advised that he is making good recovery. He is currently working in the United Kingdom, or at least he was at the time that the summary of facts was prepared.

[17] In terms of the aggravating factors of that offending, there was a complete failure to properly assess and make provision for the overhead wires, both by JCL and CBS. Each had an obligation to know what was required and properly remediate that risk. There was a lack of express briefing to address that risk. In my assessment, the risk was eminently foreseeable, particularly when handling almost six-metre lengths of metal cladding atop a high scaffolding. Some suggestion was made by JCL that it was not known to be conductive; I simply do not accept that.

[18] The ongoing unauthorised adjustments made to the scaffolding was also an aggravating factor. In the face of that, CBS should have closed the site to ensure compliance. It did not, and the situation continued.

[19] There is the impact on the victim. I have read the victim impact statement and heard from Mr Holmes-O'Connor. In his victim impact statement, he refers to the constant battle to stay sane and keep functioning in the world. He says his nervous system was completely shot after the accident. He just could not handle anything, and he did not feel like the person he was before the accident:

I was completely terrified of the world, terrified of my body. Anything I did to distract myself from it just made it worse. The only thing that would bring me down was to lie down and close my eyes and breathe.

[20] He notes that he was getting therapy from a therapist as to burns and found that really beneficial. He says that he is still practising those therapies today. He says:

It is hard to put into words what has happened, but me and my partner and my family have suffered from PTSD. My brother had recently passed, so we were in a state of shock from that as well.

[21] I acknowledge that today. This all made it very difficult.

[22] He was already planning to move to the United Kingdom and had committed to that, so this added huge stress to their lives. He says:

Not being able to work overseas also meant it was a financial burden on us going away. The accident threw all our plans out the window, and I wasn't really in a state to communicate with my partner, so our relationship was put under a lot of stress, too. It has taken a lot of work to find a good place again. It wasn't really until a year after the accident that I felt I had a handle on my mental health and what I needed as a person.

[23] I thank you for that victim impact statement, Mr Holmes-O'Connor.

[24] What I simply note is that it has had a significant and ongoing impact on him, as the victim impact statement makes very clear. He is very fortunate to have survived this accident; many in his circumstances would not have. It is a blessing he is with us today.

[25] In my assessment, the recovery is far from complete, and he continues to be impacted by the effects daily and in his life significantly.

[26] In terms of aggravating factors personal to the companies JCL and CBS, there are none. There were no prior instances of unsafe work practice. They come before the Court with clean hands.

[27] In terms of mitigation, I consider the unauthorised interference with the as-built scaffolding to be a mitigating factor to an extent for CBS. But the remedy was simple. CBS should have closed the site to ensure ongoing compliance. They did not.

Purposes

[28] In this sentencing I refer to the purpose of the legislation, that being to protect workers from harm and also to encourage engagement and secure compliance. To that end, workers and others need the highest level of protection.

Approach to Sentencing

[29] The approach I adopt in this sentencing, and the way I structure it, is as mandated in *Stumpmaster v WorkSafe New Zealand*:¹

- (a) I assess the amount of reparations.
- (b) I fix the amount of fine by reference to the guideline bands, having regard to the aggravating and mitigating factors.

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

- (c) I make further orders in relation to the regulator's costs, which were identified to the Court as \$14,510 – so, if it was shared, it would be \$7,255 each.
- (d) I make a proportionality assessment. In fact, that has really been the major thrust of the submissions, although Ms Dhaliwal, through previous counsel, had made a significant point about what the starting point should be.

[30] In terms of the submissions I have received, WorkSafe submit that \$40,000 in reparations would be appropriate. They submit a fine in the sum of \$550,000. They acknowledge discounts, which total 50 per cent – five for co-operation, five for reparations, five for remorse, five for good conduct, and five for remedial steps, both companies having made significant changes, and 25 per cent for plea. I then look to consequential loss.

[31] For JCL, the submission was \$20,000 reparations (\$10,000 each), an overall fine of \$300,00, and a discount of 55 per cent – as with Worksafe, except they submitted an additional five per cent for the extra efforts in terms of remedial action that was taken and also for the trade educational efforts made. They dispute the full consequential loss, also noting that ACC had made some payments as well. They question the regulator's costs to that end and whether or not the amount needed to have been spent.

[32] For CBS, counsel submit a \$30,000 reparations figure split 60/40. They agree with the consequential loss figure but also apply the 60/40 split. They submit a fine in the sum of \$275,000 to \$300,00 would be appropriate, and the 50 per cent discounts as detailed by the regulator are not contested. The end sentence they submit is \$134,700 to \$150,000.

[33] The proportionality issue was the fundamental question for the Court. Both CBS and JCL note that a lump sum fine that exceeds \$20,000 would risk putting each company out of business.

[34] I called for further information as to the regulator's submission on that point. I have received the material from Mr Shaw, and I have read the additional information that has been provided. Mr Shaw maintains his position to an extent, although, as has been pointed out, he is somewhat tentative in that analysis, and it is questionable whether he is necessarily looking at the prevailing economic circumstances which confront the companies.

[35] I note there is now an agreed position between JCL and the regulator in the memorandum that has been filed. The position for CBS remains as articulated through the various documents that have been helpfully received. It is not my intention to review that in any detail. I have read it all, and I have found it very helpful.

[36] In terms of the assessment of where to place this, I place this in the low- to mid-band range, noting the comparable decisions. I am nonetheless satisfied it is less serious than what was proven in *WorkSafe New Zealand v Fall Stop Scaffold Ltd* and also *WorkSafe New Zealand v Dong Xing Group Ltd*, where \$550,000 and \$580,000 fines were accepted as appropriate.²

[37] For the reparations figure, I adopt a \$40,000 figure in total.

[38] Noting what I say is some contributory negligence on the part of JCL, I adopt a split of 55/45 per cent. Noting that split, the split would be \$22,000 in reparations for JCL and \$18,000 for CBS.

[39] I look to consequential loss, and I apply the same 55/45 split to that: \$2,818 would be \$1,550 and \$1,268 respectively.

[40] Looking to the regulator's costs, the regulator sought \$14,510.80, which I propose would be \$7,255.40 each, split equally. But I propose to reduce that slightly to a figure of \$5,000 each.

² *WorkSafe New Zealand v Fall Stop Scaffold Ltd* [2020] NZDC 3629; and *WorkSafe New Zealand v Dong Xing Group Ltd* [2018] NZDC 22114.

[41] The starting point I adopt is a figure of \$450,000. The end figure split 55:45% results in a nominal fine of \$247,500 for JCL and \$202,050 for CBS. From that starting point I would make the adjustments for guilty plea and mitigating factors as detailed. 50% is the adjustment for each, leaving fines of \$123,500 and \$101,025 respectively. Ordinarily, that would be the sentence of the Court.

[42] However, I have been provided with significant material regarding the state of both the building industry on Waiheke on a micro and a macro level, and equally, the financial position that each defendant company faces.

[43] It is fair to characterise these as small businesses, both struggling to keep their heads above water in challenging economic times. Both have subsisting financial commitments. Both are operated by a family, with all the ancillary issues that arise. For CBS, that is heightened in some ways because Mr Ford's brother-in-law works full-time, and is here on a work visa, and if the business is unable to continue, his ability to remain in New Zealand is jeopardised.

[44] [REDACTED]

[45] [REDACTED]

[46] Both, but particularly JCL, highlight the challenges faced by others coming from Auckland proper to Waiheke and competing for that work.

[47] Both have limited projected work and income for 2025. While CBS has a reasonable value in its plant and equipment, it is what sustains the business. Without it, there is no business.

[48] [REDACTED]

[49] [REDACTED]

[50] What, then, is the proportionality adjustment, factoring in capacity to pay, also taking account of the provisions of the Sentencing Act 2002, ss 13, 35, 40, 41 and 42 as to declaration (and I have received declarations as required for that purpose), and also prioritising reparations and consequential loss? That is really where the bite needs to be, because it is putting the victim in a position not back to where he was, but at least a recognition of the harm that has been done and helping him to move forward in a positive way.

[51] I am also satisfied that there is little merit in the imposition of a fine, even on an extended payment regime, if the inevitable outcome will be the end of both businesses. Responsibly, the regulator has acknowledged that in the joint memorandum that was filed on behalf of the regulator and JCL.

[52] While noting the fine as I have articulated it and the 55/45 share, I make a significant adjustment – not to zero, but close to it. I set an overall fine of \$30,000, and I apply the split to it. In taking that \$30,000 figure in totality, I effectively accept and apply what was said by Heath J in *Mobile Refrigeration Specialists v Department of Labour*.³ In doing so, I have noted the guilty pleas, clean records of each business, the significant remedial work that has been done, the willingness for restorative justice

³ *Mobile Refrigeration Specialists v Department of Labour* HC Hamilton 2009-419-94, 4 June 2010.

but not significantly, the acknowledgement of the harm, and the preparedness to meet both reparations and consequential loss, and also the work that has been done in the background, such that I conclude that it meets the purposes of the Act.

[53] The end sentence that I impose adopting that 55/45 split is as follows:

[54] JCL, I convict and sentence you to pay reparations in the sum of \$22,000.

[55] I order you to pay consequential losses in the sum of \$1,550.

[56] I order you to pay regulator's costs of \$5,000. I have reduced that by a third; I make no distinction in terms of split.

[57] I fine you the sum of \$16,500 by way of lump sum.

[58] CBS, I convict and sentence you to pay reparations in the sum of \$18,000.

[59] I order you to pay consequential losses of \$1,268.

[60] I order you to pay regulator's costs of \$5,000. I have reduced that by a third; I make no distinction in terms of split.

[61] I fine you the sum of \$13,500 by way of lump sum.

[62] I have not set the fines as a payment over time because the indication is that a lump sum is the preference. But counsel can come back to me if that is an issue.

[63] This was a sorry set of circumstances. We are very fortunate to have Mr Holmes-O'Connor with us today. We must make sure that we adopt practices that ensure this does not happen again. I am sure that this has all been a significant lesson for you all.

Judge KJ Glubb

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 17/01/2025