IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2019-004-006378
[2020] NZDC 8722

WORKSAFE NEW ZEALAND
Prosecutor

v

DOMINION CONSTRUCTORS LIMITED
Defendant

Hearing:	19 May 2020
Appearances:	A Longdill for the Prosecutor (by telephone) B Harris for the Defendant
Judgment:	19 May 2020

NOTES OF JUDGE E M THOMAS ON SENTENCING

The defendant is fined $15,000 and ordered to pay prosecution costs of $4,500.

REASONS

The offending

[1] Dominion Constructors Ltd has pleaded guilty to, being a PCBU, it failed to consult, co-operate and coordinate with other PCBUs. That is an offence that carries a maximum penalty of a $100,000 fine.

[2] Dominion is a commercial construction company. Sharpeye Ltd is a company which produces and installs glass fittings. On 18 May 2017 Dominion engaged Sharpeye to install glass on an atrium atop one of its projects. Mr Ji Yu worked for Sharpeye and was the site manager/foreman for the work. Prior to the work beginning, Dominion and Sharpeye worked together to identify and properly prepare for any hazards.

[3] Dominion also engaged On Site Solutions Ltd to install the necessary safety netting. That installation was done. However, on 1 March Dominion instructed On Site Solutions to remove the netting to allow for other work that needed to be done on the site. It did not direct On Site Solutions to reinstall the netting. At that time there was one more glass panel that Sharpeye needed to install.

[4] On 6 March 2018 Mr Yu and others working for Sharpeye turned up for work. He noticed that the netting had been removed. One of the functions of the netting is to protect those below from falling debris. It is also to protect anyone who might fall. Mr Yu taped off the areas below the void previously protected by the netting, essentially to warn workers below of the danger above. That helped to take care of one of the risks, but not the risk to a falling person.

[5] That afternoon Mr Yu himself was working in the area near the missing panel. He was wearing the necessary safety harness but he had not clipped it to the safety rope. He fell 14 metres through the void where the missing panel and missing netting were. He suffered serious injury. He had multiple rib, pelvic, leg, collarbone, back and skull fractures. He had lacerations to his head and lungs. He underwent multiple surgeries. He is still unable to work.

[6] Both Dominion and Sharpeye had safety duties in respect of Mr Yu. Both were charged. Where multiple entities owe a duty, they also have a duty to properly consult, coordinate and co-operate to ensure that workers are safe. Dominion has pleaded guilty to failing to do that. It accepts that it failed to do so in relation to the removal of the safety netting. It did not communicate that removal to Sharpeye prior to Sharpeye's workers arriving on 6 March, although it discussed the risk of items falling through the void and steps were taken to reduce the risk of harm for that. It did not

address the specific risk of a person falling through. It accepts that it was reasonably practicable to have done that and that it should have done that.

[7] Mr Yu's fall was not caused by the lack of safety netting. His chances of avoiding injury would have been far greater had the safety netting been present. That risk would have been probably completely eliminated if he had clipped his safety harness to the safety rope. His fall was caused by a fall, whether it was a slip or a trip, a commonplace enough occurrence on a building site.

[8] The approach to sentencing is settled.[1]

What should the reparation be?

[9] I have discussed the extent of Mr Yu's injuries. Two years later he still cannot work. He has suffered understandably deep emotional and psychological effects.

[10] Sharpeye was prosecuted under s 36 and ordered to pay $45,000 in reparation plus additional consequential financial loss. Dominion, in consultation with WorkSafe representing the interests of Mr Yu, has settled upon and paid reparation of $10,000. The prosecution accepts that it has discharged its reparation responsibilities sufficiently and it seeks no further order. I do not take a different view.

What is the appropriate fine?

[11] Several factors come into play:

(a) the defendant was ultimately in control of the worksite;

(b) the potential harm was significant;

(c) although there were other safety procedures that should have been applied and which were not applied, the potential harm was significant;

(d) it was known and obvious harm; and

[1] *Stumpmaster v WorkSafe NZ* [2018] NZHC 2020

(e) there was ample opportunity to do the necessary consultation, co-operation and coordination. There had been some but there needed to be more.

[12] There are countervailing factors, the most obvious of which is that the safety harness was not attached to the safety line. There are also factors such as the uniqueness of each building site, the dynamic nature of these sorts of sites, that every day presents essentially a different site and different hazards and different challenges and different steps that need to be taken to protect workers. They are a moving feast. But then so are the risks to workers and that is exactly why the obligation is onerous and continuing. This case demonstrates, sadly and graphically, how important covering off every safety detail is.

[13] The actual harm suffered by Mr Yu was significant. The appropriate action could have prevented much of that harm.

[14] Both sides accept that Dominion's culpability is medium and falls within the bands identified. The prosecution argues that it is towards the upper end. Adapting the *Stumpmaster* bands to the lower level of fine, I agree. I take a starting point of $25,000. I do not include in that assessment previous failure to comply with notices as none were specific to this particular site.

[15] Dominion otherwise has no previous convictions. There have been notices issued in the past of different kinds, of different levels. But for the reasons I have already spoken about I do not consider that those affect a discount for no previous convictions. Each site is different, each site presents with different challenges. There needs to be open and ongoing consultation between WorkSafe and sites to protect the safety of workers. Occasionally, that will mean the issuing of notices. The issuing of notices does not necessarily mean that an employer is not willing or trying to meet their obligations. It can often reflect the day-to-day difficulties of managing all the changing and varying obligations that employers such as Dominion has in this type of work environment.

[16] It is material that it has no previous convictions, given the extent of its operations and its history in the industry. It has accepted responsibility and paid reparation. For those elements it is worthy of a discount of 20%. It has pleaded guilty and done so early. That warrants a further discount of 25%. That gets us to an end fine of $15,000.

Are any ancillary orders appropriate?

The prosecution seeks a contribution towards its costs. Dominion does not argue with that. The prosecution seeks $4500 being half of the external costs suffered by WorkSafe. I see no reason to order any differently.

Does there need to be any proportionality adjustment?

[17] Neither side says so. Again, I see no need for any adjustment, recognising that $10,000 in reparation has already been paid.

Result

[18] Dominion is fined $15,000 and I order it to pay $4500 towards WorkSafe's prosecution costs.

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Judge EM Thomas
District Court Judge

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In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.