VT
SENT
16/8/19
CLOSED

IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2018-019-003967
[2019] NZDC 26560

WORKSAFE NEW ZEALAND
Prosecutor

v

SCAFFRITE WAIKATO LIMITED
Defendant

Hearing:	16 August 2019
Appearances:	A Longdill for the Prosecutor B Carter for the Defendant
Judgment:	16 August 2019

NOTES OF JUDGE R L B SPEAR ON SENTENCING

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[1] Scaffrite Waikato Limited is for sentence, having pleaded guilty to the following offence:

> Between 1 June 2017 and 29 June 2017 at Hamilton being a PCBU (person conducting a business or undertaking), having a duty to ensure so far as is reasonably practicable that the health and safety of other persons is not put at risk for work carried out as part of the conduct of the business or undertaking, namely installation and maintenance of a scaffold, did fail to comply with that duty and that failure exposed other persons to a risk of death or serious injury.
>
> Particulars:
>
> The risk of death or serious injury arose from a risk of a fall from height, being hit by falling objects and scaffold collapse.
>
> It was reasonably practicable for Scaffrite Waikato Limited to have:

(a) Ensured the scaffold was properly constructed and maintained in accordance with the manufacture's specifications and industry standards.

(b) Implemented an effective system to ensure the scaffold was readily inspected.

[2] This is an offence under ss 36(2) and 48(1) to (c) of the Health and Safety Work Act 2015 attracting a maximum penalty of a fine not exceeding $1.5 million.

[3] The amount of the maximum penalty indicates two things. First, that there is likely to be a significant range in the offending from the lower end of the culpability scale to that of very high culpability. Secondly, that it is a penalty designed to encourage PCBUs to undertake their business in a way that does not expose anyone to the risk of harm.

[4] An agreed summary of facts has been reached between prosecution and defence. That explains that Scaffrite is a limited liability company that was at this time involved in the supply and installation of scaffolding in the greater Waikato area. The scaffolding involved in this case was installed at a building site in Hamilton where a multi-residential set of dwellings was being built by Pragma Designer Homes Limited.

[5] The scaffolding that we are concerned about had a single working platform approximately one metre below roof height of this single level dwelling complex. The scaffolding was installed on 2 June 2017. The scaffolding itself was a proprietary brand of scaffolding under the style, INTAKS.

[6] On 28 June 2017 a complaint was received by WorkSafe about the state of the scaffolding. A WorkSafe inspector attended the site that day. He noticed that there were two builders working on the scaffolding installing roofing framing. There were Scaffrite workers on that site as well installing scaffolding at another part of the building. The inspector determined that the scaffolding concerned with this case posed some risks to the builders working on it. Specifically:

(a) The scaffold at the northern elevation was off plum.

(b) There was ground subsidence adjacent to a scaffold standard at the south elevation.

(c) The work platform of the scaffold was set with the inner plank at a minimum distance of approximately 500 millimetres from the building framing with a scaffold or handrail tube installed at a distance of approximately 250 millimetres in an attempt to reduce the gap between the platform and the workplace.

(d) There were no toe boards or kick boards to prevent material or tools falling from the working platform.

(e) There was no record of in-service inspection on the required scaffold tag since the scaffold was first brought into use.

[7] From 3 June 2017 to 28 June 2017 (just over three weeks), there had been no inspection of the scaffolding although the Safe scaffold tag was proudly displayed on the scaffolding.

[8] The inspector issued a prohibition notice stopping work on the building site. Scaffrite then attended to the areas of complaint in the main to the point that when the inspector returned the next day he was satisfied obviously with the remedial work that had been undertaken as he lifted the prohibition notice.

[9] The hearing today has focused to a large extent on the complaints identified about the state of the scaffolding. First, that one of the vertical standards was off plum. Secondly, that another of the vertical standards was right beside some soft ground material that had subsided. The contention of the prosecution is that this placed at risk the integrity of the scaffolding structure and thus created a risk of harm to anyone working on it. The standards required to be observed for this particular scaffolding structure required each bay to be able to bear a load of at least 450 kilograms.

[10] Mr Carter has provided a report from an engineer in which the engineer opines that the off-plum standard and the standard that was by the ground that was subsiding

would not have caused the scaffolding to collapse. That was the initial concern of WorkSafe and clearly the inspector.

[11] This case was proceeding to a sentencing hearing in December 2018 when Scaffrite received an engineer's opinion that these deficiencies in the structure would not have caused the scaffolding to collapse. There was to be a disputed facts hearing in June 2019 to resolve that conflict but agreement was eventually reached on the concession of WorkSafe that the engineer's opinion would not be disputed. Ms Longdill has assisted me with the record of the consensus reached between prosecution and defence in this respect is as explained in paragraph 11(c) of the agreed summary of facts. That:

> Two 3.6 metre bays of the scaffold (those adjacent to the out of plum standard and under the support next to the soil subsidence, if further ground gave way) may sag if subject to extreme loadings which may put workers on those bays at risk of falling.

[12] That agreement as to facts obviated the need for a disputed facts hearing. The matter was then scheduled for a sentencing hearing which we have now reached. I accept the position as is outlined in paragraph 11(c) in the summary of facts as amended and which I have just recorded.

[13] However, there was another requirement on this company and that was to carry out regular inspections, preferably weekly. There were no inspections from 3 June 2017 through to 28 June 2017. Mr Carter has explained that there were problems with the roof. It required some further work and rather than return in a week's time from time of erection of the scaffolding that work was delayed for just over three weeks and regrettably no-one carried out an inspection in that interim period. Mr Carter accepts that that was a deficiency in the Scaffrite performance in relation to its observance of the guidelines.

[14] It follows accordingly that Scaffrite cannot ignore the possibility that, if there had been further ground subsidence, or one of the other standards gone out of plum, that the structure may have become quite unsafe and caused harm. Mr Carter's concession here is appropriate to the effect that the major fault on the part of Scaffrite was its failure to carry out regular inspections. The integrity of the structure could

well have deteriorated with a consequential increased risk to those on the building site. Fortunately, that did not occur.

[15] Another feature to this case and complaint was that the gap between the edge of the platform and the working face was about 500 millimetres and accordingly, by the guidelines, required full edge protection. What this edge protection is designed to prevent is people, material and tools falling from the working platform. Guideline 8.5 in the *Scaffolding in New Zealand Good Practice Guidelines* (November 2016) states:

> Edge protection must be provided at the open sides and ends of all platforms and landings. Toe boards should be fitted to all platforms.
>
> Full edge protection must be installed when the gap between the working platform and the working face exceeds 300 millimetres.

[16] What we have here, and as depicted in the photos, is a gap of about 500 millimetres and accordingly, by the guidelines, there needed to be edge protection. There was not full edge protection. What can be seen in the photo is a lateral pipe (want of a better word) located in the middle of the gap reducing the gap to under 250 millimetres both before and after, between working platform and working face of the building. That would have no doubt prevented a person falling through that gap, but it would not have prevented materials or tools falling from the working platform. One photo indeed shows two men up on the working platform and another man directly below. I am told that the man below is indeed the project manager for the building company, but he is obviously at risk of something falling on top of him, dropping from the working platform.

[17] When I come now to assess the seriousness of the offending, it is necessary to recognise the factual position as has been clarified in the course of this hearing. It is necessary that I make an assessment having regard to the various bands or categories for culpability set out in *Stumpmaster v WorkSafe New Zealand.*[1]. That is a decision of the full Court of the High Court and it clarifies the approach to be taken when dealing with cases of this nature under the 2015 Act. *Stumpmaster v WorkSafe New Zealand* sets out four guideline bands for culpability.

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190.

(a) Low culpability with a starting point of up to $250,000.

(b) Medium culpability with a starting point of $250,000 to $600,000.

(c) High culpability with a starting point of around $650,000 to $1 million.

(d) Very high culpability with a starting point of $1 million plus.

[18] There are of course a number of factors that need to be considered when assessing culpability and as found not only in the decision of the High Court *Department of Labour v Hanham and Philp Contractors Ltd* but also in s 151 of the 2015 Act.[2] The first consideration is the identification of the operative acts or omissions and the practicable steps that it would be reasonable for the defendant to have taken in terms of s 22 of the 2015 Act.

[19] In this respect, the primary issue is of course the fact that the defendant erected the scaffolding and left it for over three weeks without carrying out an inspection. In my view, that identifies the culpability of the defendant and it is just fortunate indeed that there was no deterioration in the integrity of the scaffolding structure that developed over that period while of course it was being used by the builders. In this respect, there was of course a departure from the industry standards that required regular inspections and as I have been informed today there should have been at least a weekly inspection.

[20] Ms Longdill for the prosecution argues that the culpability of the defendant is such that the offending should be placed in the medium culpability band and that the Court should adopt a starting point of $320,000. In this respect, she referred to two decisions where there had been no harm done as a result of the offending (in other words no one was injured or killed) and where starting points of in one case $580,000 and in another $475,000 were adopted. Those cases are far more serious than the one before me and indeed I am inclined to Mr Carter's argument here that this case should be placed not in the second band but in the first band of low culpability.

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[2] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79.

[21] It is, of course, always necessary that the Court, when dealing with regulatory offences such as this, recognise the deterrent nature of a penalty for offending of this nature. That is to ensure that those PCBUs who are under this duty to ensure that the work they carry out is not putting others at risk recognise that there will be severe consequences for those who depart from that duty.

[22] I consider that the level of culpability in this case warrants the Court to adopt a starting point of $70,000. I appreciate that that is substantially less than that sought by WorkSafe but it is important to recognise that this was first and foremost a single level structure, that the structure would not have collapsed as it presented to the inspector, although that may not have been obvious to him, and that the dereliction of duty here is more to do with erecting a scaffolding system and allowing it to sit and be worked on without regular inspection for over three weeks.

[23] The question then is whether there should be an uplift because of the safety record of the defendant. In that respect, it is of some significance that over a two-year period the defendant received three prohibition notices stopping work because of unsafe scaffolding. None of those cases resulted in prosecution but Ms Longdill quite correctly refers me to s 151(2)(e) of the 2015 Act that the safety record of the defendant needs to be taken into account and that is specifically identified as including "without limitation" any prior warning, infringement notice or improvement notice. Ms Longdill seeks a five percent uplift to reflect that questionable safety record and I consider that she is on sound ground there.

[24] The question is whether the company is remorseful and that is a difficult matter to assess in a case such as this. Certainly, the company corrected the scaffolding deficiencies to the point where the reinspection on 29 June 2017 by the WorkSafe inspector resulted in the prohibition notice being lifted. So that was prompt attention to the deficiencies. I consider that this however can be considered within that five percent uplift, a modest uplift of $3,500, which could have been more but for the remedial action taken quite quickly by the defendant.

[25] It is accepted that allowance of 5% ($3,675) should then be made for the cooperation of the defendant with the prosecution.

[26] There is then the plea of guilty that was entered and I am told by Ms Longdill that the prosecution does not quibble at full credit of 25 percent against the sentence otherwise calculated ($17,457).

[27] The defendant has ceased trading having sold the business and one question is whether it will be able to meet any fine imposed by this Court. The financial ability to meet a fine is a factor that needs to be taken into account. There has been some accounting advice provided as well as the books of account which have two particular features that need to be mentioned. The first is that over a 12-month period, over $500,000 was taken by the two shareholders of the defendant; both of whom worked in the company and certainly a good part of that will have been their salaries. The second is that the company now has no assets other than a current account of those two shareholders that, if pursued, would require them to repay the sum of $47,000.

[28] These are matters that cannot be factored in with great precision. I have set the starting point, I have made an allowance by uplift for the safety record, I have made an allowance for the defendant's cooperation with the prosecution and I have made an allowance for the guilty pleas with a sentencing calculation outcome of a fine of $52,368. In my view, that is entirely appropriate to meet the seriousness of the offending here. I have not engineered this outcome to bring it close to what the current account position of the shareholders is. It is just the way it has turned out. Exactly what happens from this point is a matter that I need not be concerned with.

[29] The final matter is whether there should be a contribution made to WorkSafe's costs. In this respect, Ms Longdill seeks costs of just over $5,000 which is not suggested as being full reimbursement of the costs of WorkSafe but which reflects a modest contribution to those costs. Mr Carter contends that a far more modest figure of around $2500 to $3000 would be more than sufficient but I am inclined towards Ms Longdill's submissions in this respect as the true cost of a prosecution of this nature would be substantially more than $5000. A cost order in this respect is not designed to provide full reimbursement for the costs involved in the prosecution but to be a contribution towards those costs that reflects the time it has taken here. In this respect, it is of some significance that it was the defendant who engaged an engineer and was able to settle the dispute as to whether the structure was unsound as presented

on

28 June 2017. In the end I consider that an order of costs in the sum of $5,000 is all that is required.

[30] The defendant is fined $52,368 with costs to WorkSafe of $5,000.

Judge RLB Spear
District Court Judge

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