IN THE DISTRICT COURT
AT WHANGAREI

CRI-2014-088-001912

THE QUEEN

v

KIWI TIMBER PROTECTION LIMITED

Hearing:	8 December 2014
Appearances:	S Woodhead for the Crown J Cairney for the Accused
Judgment:	08 December 2014

NOTES OF JUDGE G DAVIS ON SENTENCING

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[1] Kiwi Timber Protection Limited appear for sentence today having pleaded guilty to one charge laid, pursuant to ss 6 and 50, subs 1(a) Health and Safety and Employment Act 1992, namely that they failed to take all practical steps to ensure the safety of one of its employees and failed to take those steps to ensure that he was not exposed to hazards arising out of the use of a forklift. The maximum penalty for an offence against these sections of the Act is $250,000, those penalties having been increased in 2003 from a maximum penalty of $50,000.

[2] The background to the offending is described in a lengthy summary of facts. I will take the salient points from that summary.

[3] Mr Blincoe was an employee at the company and was employed from 5 November 2012. In January 2014 he was promoted having been promoted further, a month or so beforehand and his January 2014 promotion involved him using forklifts on a regular basis. He had undertaken some internal training with the

employer but it appears as though that employee training was practical and had not, for the moment, had a theoretical component attached to it. Nor does it appear that the appropriate certificates had been obtained from an external source as is commonplace in the industry.

[4] The company is a timber company and it involves the acquisition of timber, primarily, from a subsidiary that it has in the Waipapa area. On 10 February Mr Blincoe was driving a forklift around a dry mill building. At about 10.30 am he (inaudible 16:47:11) to pick up an empty timber-carrying cradle. The forklift that he was driving rolled backwards down a driveway to a dry mill building. It hit a pile of steel on the side of the driveway. It tipped over. Mr Blincoe was thrown from the forklift and the cab of the forklift landed on top of him. He suffered significant injuries as a result of this accident and he died at the scene. A handbrake which was fitted to the forklift was, after investigation, found to be in the "on" position. Those are the facts that I have to proceed on in a general sense.

[5] I have heard a great deal today about Mr Blincoe and it is appropriate to begin in the general sentencing remarks by acknowledging the presence of his family, in particular his mother and father who are present in Court and who I had the benefit of hearing their victim impact statements being read by them. There is no question that that in itself was a difficult task for them and one that leaves the Court feeling wholly inadequate as to anything that it can say in these sentencing remarks that may help to ease the pain that I am sure that you feel and continue to feel.

[6] Equally, however, there were members of the company and the directors of the company present in Court today and those victim impact statements acknowledged the efforts that the company had gone to, to assist the family in their difficult times and it is important to acknowledge those efforts which I will do through the course of these sentencing remarks but also to thank those directors for their attendance in Court also.

[7] I accept that while it is difficult for the family to be here today it is equally difficult for members of the company to be here, to hear submissions about things that the company could have done, ought to have done or did not do as the case may

be, while all in the context of speaking about a workmate and no doubt, I assume a friend. I will come back to more about Mr Blincoe shortly.

[8] Any sentencing exercise that the Court has to embark on in this context is governed by two particular sets of rules and statues. I have made reference to the Health and Safety and Employment Act 1992, but there is also the principles and purposes set out in the Sentencing Act 2002 that I will need to touch on. The other set of rules, if I can describe them in that very general sense, is the case law that this Court is guided by. I will come back to that point also shortly. But that is the general framework that the court has to consider.

[9] There was a case that you would have heard being spoken about by each of the counsel that have assisted the Court today, D*epartment of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC) and it is considered to be the leading authority in respect of the cases where there have been breaches of the Health and Safety and Employment Act 1992. And that requires this Court to undertake a three-step exercise. Firstly, is to assess the amount of reparation that may be paid by the company. Secondly, is to fix a fine and thirdly, is to consider looking at those two features together, the appropriate proportionality and the appropriateness of the reparation and the fines that are involved. It is important to note that the fine and the reparation that you would have heard spoken about in Court today served two very distinct statutory purposes. The reparation is designed to restore the victims of this offending as much as money is able to do to a position they would have been in had this offending not taken place. And it is important to note that of course nothing can bring back Mr Blincoe today. So as inadequate as it may seem the reparation is simply some step towards assisting the victims of the offending moving forward in the days and the weeks and the month ahead.

[10] In contrast any fine that the Court imposes or chooses to impose is entirely punitive in its function. It is designed, amongst other things, to send messages out to those involved in industries where there are risks that are either obvious, on the one hand or may not be obvious on the other, that all employers have an obligation to ensure that a safe workplace is provided for their employees. So, while we have

spoken about reparation on the one hand and fines on the other it is important to just make the point for everybody present here today that they serve two entirely separate functions.

[11] Overarching all of that, as I have said, also the provisions of the Sentencing Act 2002 and they are important because they require the Court to arrive at a sentence that holds any offender accountable for what they have done and one that will ensure that there is acknowledgement of the harm that has been done. There is also an important function of ensuring that there is denunciation of this type of behaviour and that there is also a deterrent message sent out. Equally there is an important need to protect the public, in this case employees from this sort of behaviour. So I hope by touching on these points in a general sense one will appreciate the complexity of the sentencing task that we have to undertake today.

[12] I spoke earlier of the D*epartment of Labour v Hanham & Philp Contractors Ltd.* It said that the function of the Court is to look at setting the reparation and then the fine. There are two separate enquiries that the Court has to undertake and they take us back inevitably to the summary of facts that I have touched on.

[13] What has emerged from the summary of facts is that the forklift that Mr Blincoe was driving today was a forklift that was not factory-fitted with a seatbelt or any form of harness mechanism. It is, in my view, a critical aspect of this accident because, as will become apparent, the fitting of a seatbelt and the wearing of the seatbelt by all the employees would not have been an expensive exercise for the company to undertake both in terms of the actual fitting of the seatbelt and the training that could have been provided to the employees.

[14] The second aspect here is that Mr Blincoe was an employee who had had some training in the use of forklifts. But it appears from the material that I have seen his training was limited to using a forklift on flat surfaces and this accident appears to have started when the forklift has been parked on or adjacent to a ramp. One wonders whether that in itself was something that was beyond the approval that Mr Blincoe had and I do not say that in any way to cast any dispersions on

Mr Blincoe, but it appears that part of the training that could have been undertaken was not only some practical training, which I accept occurred over a three week period, but also some theoretical training. Often one overlooks the importance of the theory because it is the practical skills that are seen to be most significant. Theoretical training though, as I understand it, would have involved some training in identifying hazards that were likely to appear in the workplace. Hazards that may not necessarily seem obvious but nonetheless present themselves to those who are working in the workplace.

[15] The other factor that appears to be a contributor, and it is to be acknowledged that the company acknowledges this to be the principal contributing factor, is that the handbrake on the forklift was not in its proper working condition. About a week prior to this incident there had been a concern raised by one of the employees in a handover log that described the forklift as taking ages to get into gear. He describes in colourful language that the brakes of the forklift were not working at their optimum capacity. Although let me assure you that was not the words that this particular employee used. It appears that the company's response to that handover log was to repair the gears and the brakes on the forklift but they do not appear to have either checked, or if they did check did not take any steps to repair the handbrake on the forklift.

[16] Further to that it appears that there was a maintenance programme in place with the company but that maintenance programme does not appear to have been regularly documented and one does not appear to have been available for inspection by members of the company to ensure that the portable equipment, as it has been described today, was in optimum and proper working order.

[17] As is always the case with these types of investigations they are conducted with the benefit or the clarity of hindsight. What I have seen of this company, however, is that there appears to be no suggestion that they do anything other than take their responsibilities as an employer seriously. I have seen today a number of health and safety meeting reports that were attached to the submissions filed by counsel which records regular quarterly meetings and attended by senior

management and by North Safe. North Safe is a company that does the health and safety checks in worksites around the Northland area.

[18] On 24 October 2013, there was a note that all forklift training had been done. That new employees that had started would need forklift training. And there was an example of an incident and I use that phrase in the least culpable terms about an employee using a forklift and having difficulty picking up a container primarily because what was seen as being uneven ground in the area involved.

[19] On 16 January 2014, a further health and safety meeting was held. Again in attendance was North Safe and it was again noted that all employees had been put through forklift training and that it was an ongoing process as new employees came and old employees went. There was a reference to the yard being regroomed to it being smoothed out. That is one example that counsel has highlighted to me of the seriousness with which they take their health and safety responsibilities. So it is against that backdrop that I am required now to turn to the three-step process of considering whether reparation should be paid and if so how much. But equally in this instance to determine if reparation is to be paid, who it should be paid to.

[20] To that extent it is acknowledged that a sum just over $34,000 has already been paid by the company to Mr Blincoe and his family. That sum was paid very early on in the piece and was designed to assist in getting them through an initial traumatic period following Mr Blincoe's passing in the work site. It appears from the victim impact statements that were read today that the company attended to and paid for his funeral and there were some travelling costs for members for Mr Blincoe's family who came back from Australia to attend the funeral or the tangi and those travelling costs or the funds that have been provided also went some way to assist those travelling costs.

[21] A further sum of $60,000 has been offered by way of reparation today over and above the $34,000 that has been paid and I am told that is available to be paid. It would be available for immediate dispersing amongst members of the family. I accept that that is a generous offer by the company and it is one that while it was not indicated by the informant today that it should be accepted there was no great issue

or umbrage taken by the informant with the total amount of reparation that has been offered and paid and is proposed to be paid.

[22] I make, therefore, an order that reparation in the sum of $94,040.00 is to be paid. That is to be paid as follows:

(a) The sum of $34,040 has already been paid and received by the wider Blincoe family and I simply record that that sum has been paid and it is to form part of the $94,000.

(b) The remaining $60,000 is to be paid within seven days to the following persons. The division I have made is somewhat arbitrary. I accept that. But it, in my view, needs to be done this way to provide some certainty for all of those involved.

(i) A payment of $25,000 is to be paid to May Leonard, Mr Blincoe's mother. I heard from Ms Leonard the effect on her of losing her son cannot, in my view, be expressed in a more honest way than she has, perhaps save for Mr Blincoe's victim impact statement.

(ii) Equally a second sum of $25,000 is to be paid to Michael Blincoe. He too has provided a significant victim impact statement which expresses in very clear terms the pain and the grief that he feels.

(iii) A third sum of $5000 is to be paid to Mr Blincoe, that is Mark Blincoe's girlfriend as she was described, Nicola.

(iv) And the remaining $5000 is to be paid to the estate of Mr Blincoe. That is to be dispersed amongst Mr Blincoe's brothers and sisters in equal shares.

(v) All of those sums, as I say, are to be paid within seven days.

[23] the second task that the Court has is to assess the quantum of the fine. The D*epartment of Labour v Hanham & Philp Contractors Ltd* case is again of benefit to the Court because it sets out three particular stages of phases that the Court is required to look at. As I have said D*epartment of Labour v Hanham & Philp Contractors Ltd* case was important because it was the first occasion that there had been a detailed analysis or a detailed look at the regime as it was after the 2003 amendments. And what the Court in that case did was set out three separate regimes for the Court to look at. It assessed low culpability as being a fine up to $50,000. Medium range culpability, a fine of between $50 and $100,000 and high culpability of being a fine between $100,000 and $175,000 but the Court reserved or did not set a ceiling saying that when there are cases of extremely high culpability fines at the upper end of the $250,000 limit could be imposed. So that is why in assessing the culpability the Court has to take cognisance of the facts as I have described them and the omissions that I have also made reference to.

[24] Looking at those omissions I agree with Mr Cairney that this is one of those situations that sits on the boundary, if you like, between the medium high culpability and the high culpability. Mr Cairney has provided a number of cases each of which deal with forklifts or other moveable machinery and I take the view that each of those cases are distinguishable. I would set the fine here at a starting point of being $100,000. The reason that I distinguish the cases that have been put forward is because in each of the other cases invariably, there were more culpable features including notice provisions having been served on companies requiring them to remedy hazards and often that not taking place. Secondly, that the cases that were relied on by the prosecution while helpful, invariably did not involve necessarily the use of the portable machinery that has been made reference to here. The difficulty with this type of sentencing is that often one looks to the consequences of what has occurred and works back from there. What the cases have made very clear is that the task of the sentencing Court is to look at the acts or the omissions that were either done or failed to be done by the company in assessing their culpability and I set it, as I say, at the top end of the medium range or the bottom end of the high range if one wants to look at it from that point of view.

[25] There are four factors that I think warranted that fine being reduced. Firstly, it has to be said that the company has an impeccable safety record and is of good character. It has not previously appeared before the Court and nor, as far as I can see from the material that has been presented to me, has it come to the attention of WorkSafe New Zealand in the past.

[26] Secondly, there is remorse which is very clear from the acts of the company and its directors here today, both in terms of the manner in which they have assisted Mr Blincoe's whānau in the period surrounding his death.

[27] Thirdly, they have been cooperative with the authorities in the investigation that has taken place and that is also, in my view, a sign of their remorse.

[28] And lastly, there is a credit for a guilty plea that is required to be given and there is no question in my mind, that can only be the maximum credit that can be given for a guilty plea.

[29] The Courts have said this is not to be an arithmetic exercise save and I am prepared to deal with it in the following way.

(a) A $15,000 reduction should be given to indicate as evidence of the remorse and the reparation that has been paid by the company today which would take the fine down to $85,000.

(b) In addition to that there is a further deduction of $5000 to be taken from that fine to take into account the good character and the impeccable safety record.

(c) Next, in my view, there is to be a further discount to take into account the co-operation with the authorities of $20,000 off the fine.

(d) And finally, a credit of 25 percent off the fine to take into account a guilty plea which would result in an end fine of $45,000.

(e) The company has indicated that they are in a position to pay any fine. When one looks at that fine of $45,000 plus the significant reparation that has been paid and looks, therefore, at the totality of the offending, in my view that is the point where the fine should be fixed.

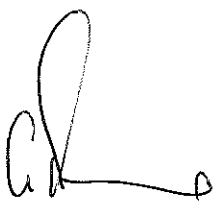
[30] Accordingly, today the company is to be convicted and is ordered to pay a fine of $45,000 plus Court costs of $130 and in addition to that they are ordered to pay reparation in the amounts and the proportions that I have made reference to earlier in these sentencing notes.

[31] Before we conclude the sentencing remarks I will check with each of the informant whether there are any issues that arise from that. [No Your Honour.] And equally with the defence? [Nothing arising Your Honour.]

[32] Thank you. May I also again take the opportunity to thank each counsel for their assistance today, their helpful submissions, to thank the company for its attendance today and also to thank Mr Blincoe and his family for their assistance today as well.

[33] I have heard a little bit about your son. I did not know him at all but I asked the question as to where his middle name Tirarau came from. Te Tirarau as you will know, or are likely to know, was a well-known and high ranking rangatira in the north area around Ngāti Kahu, Torongare, Ngāti Hau and elsewhere and it appears that everything everybody has said about Mr Blincoe would indicate to me that he has done indeed justice to that name.

[34] I thank you all for your attendance today and the company can, metaphorically speaking, step down.



G Davis
District Court Judge