IN THE DISTRICT COURT
AT PAPAKURA

I TE KŌTI-Ā-ROHE
KI PAPAKURA

CRI-2020-055-001345
[2020] NZDC 25963

Under the Health and Safety at Work Act 2015:

WORKSAFE NEW ZEALAND
Prosecutor

v

ECOLOGICALLY SOUND DEMOLITION LTD
Defendant

Hearing:	27 November 2020
Appearances:	Ms K T Sagaga and Mr Finn for the Prosecutor No Appearance by the Defendant
Judgment:	14 December 2020

DECISION OF JUDGE C S BLACKIE
on Sentence

Background

[1] The defendant company is charged under the Health and Safety at Work Act 2015, s 206(2) and s 206(3)(b) that, being a PCBU, directed or allowed workers, namely Clifford Searle and Shannon Perenara, to carry out work that was required by the Health and Safety at Work (Asbestos) Regulations 2016 to be carried out by or on behalf of a person who is authorised, namely work involving the removal of non-

friable asbestos or ACM and was not authorised in accordance with the Health and Safety at Work (Asbestos) Regulations 2016, to do so.

Particulars

[2] (a) Regulation 56 of the Health and Safety at Work (Asbestos) Regulations 2016 requires a Class B or Class A Asbestos Removal Licence to be held by a PCBU or a person carrying out the removal of more than 10 square metres (cumulatively over the whole course of the removal project for the site) of non-friable asbestos or ACM.

(b) More than 10 square metres of non-friable asbestos or ACM was removed from the site at 23 Butterworth Avenue, Papakura, Auckland.

(c) No Class B or Class A Asbestos Removal Licence was held by Ecologically Sound Demolition Ltd, Clifford Searle or Shannon Perenara, at the relevant time.

[3] The date of the offence was between 7 and 13 September 2019.

[4] The maximum penalty for breach of the Health and Safety at Work (Asbestos) Regulations 2016, Regulation 56(2)(a) is a fine not exceeding $100,000.

[5] The charge was filed on 27 August 2020, with a first appearance hearing date scheduled for 8 October 2020.

[6] On 7 October 2020, the defendant company entered a plea by notice of – guilty. The company indicated that it did not wish to appear before the Court at sentence but filed the following submission:

> "We were led to believe that the proper notice had been filed with Worksafe but it had not. Unfortunately, that left us in the position detailed in the charge. I would also like to add that the staff were trained and certified in the removal of non-friable Class B asbestos. The removal was done properly and safely. The charge and case is a procedural error and we accept we made this mistake. As a result of Covid-19, we have suffered a 90% drop in income and any substantial fine will destroy what is left of this company".

[7] Following receipt of the plea by notice, the hearing was adjourned to 27 November 2017 for the prosecutor to make submissions on sentence. A summary

of facts was filed with the Court when the plea was entered on 8 October 2020. No dispute has been raised in respect of the summary and, accordingly, it was considered that it is an agreed summary of facts for the purposes of sentencing.

[8] The defendant was approached by DDL Homes South Auckland Ltd to undertake demolition work, including removal of asbestos at 23 Butterworth Avenue, Papakura, Auckland. Warren Hurst (Mr Hurst), a director of the defendant company, attended the site and observed the asbestos on the house.

[9] The defendant engaged Licensed Asbestos Assessors NZ Ltd (LAA NZ) to conduct an asbestos survey of the site. LAANZ attended the site on 29 July 2019 to undertake an assessment and completed the Survey Report on 30 July 2019.

[10] The defendant prepared an Asbestos Removal Control Plan in accordance with the Survey. However, there was no input from a licensed asbestos removalist.

[11] The defendant contacted Azzie Specialist Ltd (Azzie), a company in the business of removing asbestos, to remove the asbestos containing material (ACM) from the site. Mike Afoa (Mr Afoa) is the sole director of Azzie and a licensed Class A and Class B asbestos removal supervisor.

[12] The arrangement was for the defendant's workers to undertake the removal of the Class B ACM from the site under the supervision of Azzie. Mr Afoa would supervise or arrange for one of his workers to supervise and run the whole procedure, which included preparing the asbestos removal control plan, making the notification and arranging the clearance report.

[13] Between 8 and 10 September 2019, the workers removed Class B ACM from the site without the supervision of a licensed asbestos removalist from Azzie. On 12 September 2019, Mr Hurst contacted Mr Afoa, confirming that the Class B ACM at the site had been removed.

[14] On 16 September, Mr Afoa contacted Worksafe advising that the defendant had removed Class B ACM from the site but the persons involved were not licensed asbestos removalists and had failed to notify Worksafe.

[15] As a result of the information received, Worksafe's investigation revealed that the defendant had directed or allowed its workers to remove more than 10 square metres of non-friable asbestos-containing material from the site between 7 and 13 September 2019. The survey outlines 176 square metres of asbestos-containing material on the site. The clearance report confirms that over 100 sq metres of asbestos-containing material was removed. Neither the defendant, nor Mr Hurst, Mr Searle or Mr Perenara are licensed Class B or Class A asbestos removal specialists.

[16] When visiting the site, Worksafe and its officials noted:

(a) A lack of the use of a vacuum;

(b) Fragments of potential asbestos sheet in the garden;

(c) Soffits broken up and not wrapped in plastic sheets in the bin;

(d) Bushes were still intact, showing that sheets were not laid down underneath the soffits because they would have had to be removed and

(e) Sheets were broken up, letting fibres onto the ground.

[17] Worksafe issues a prohibition notice directing the defendant to stop all work until asbestos could be removed from the site by a licensed asbestos removalist.

Sentence-related Issues

[18] Section 151(2) of the HSWA sets out the criteria to be applied in respect of sentence, including:

(a) The purpose of the Act

(b) The risk of, and the potential for, illness, injury or death that could have occurred; and

(c) Whether death, serious injury, or serious illness occurred or could reasonably be expected to occur; and

(d) The safety record of the person (including without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed by the person) to the extent that it shows whether any aggravating feature is present; and

(e) The degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and

(f) The offender's financial capacity or ability to pay any fine, to the extent that it has the effect of increasing the amount of the fine.

[19] The provisions that usually apply at sentencing under s 7 and 8 of the Sentencing Act also apply under the HSWA.

[20] More specifically, as far as the HSWA is concerned, s 151(2)(b) requires the Court to have particular regard to the purpose of the Act – that is:

(a) Protecting workers or other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work or from prescribed high risk plant; and

(b) Provide for fair and effective workplace representation, consultation, co-operation and resolution of issues in relation to work, health and safety; and

(c) Encourage unions and employer organisations to take a constructive role in promoting improvements in work, health and safety practices, and assist PCBUs and workers to achieve a healthy and safety at work environment; and

(d) Promote the provision of advice, information, education and training in relation to work, health and safety; and

(e) Secure compliance with the Act through the effective and appropriate compliance and enforcement measures; and

(f) Ensure appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under the Act; and

(g) Provide a framework for continuous improvement and progressively higher standards of work, health and safety.

[21] In summary, regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practical.

Approach to Sentencing

[22] The guideline judgment for sentencing under the Health and Safety at Work Act 2015 is *Stumpmaster v Worksafe New Zealand*[1]. That decision re-focusses on a number of issues relating to the new Act that previously existed under the previous Act and were fully traversed in the earlier guideline decision of *Department of Labour v Hanham v Philp Contracts Limited*[2]. In *Stumpmaster*; the full Court of the High Court confirmed the four steps in the sentencing process as being:

(a) Assessing the amount of reparation to be paid to the victim;

(b) Fixing the amount of a fine by reference to the guideline bands and then having regard to aggravating and mitigating factors;

(c) Determining whether further orders under ss 152 – 158 of the Health and Safety at Work Act are required; and

(d) Making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Step 1 – Assessing the Amount of Reparation

[23] No reparation is sought.

Step 2 – Fixing the Amount of the Fine

[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020
[2] *Department of Labour v Hanham v Philp Contracts Limited* [2008] 6 NZELR 79 (HC)

[24] The Court of Appeal in *Moses v R*[3] modified the appropriate sentencing approach into two stages:

(a) Calculating the adjusted starting point incorporating aggravating and mitigating features of the offence.

(b) Assessing all aggravating and mitigating factors personal to the offender, together with any guilty plea, discount, as a percentage to the adjusted starting point.

[25] In *Stumpmaster*, the High Court re-set the guidelines bands for culpability as an adjustment to *Department of Labour v Hanham and Philp Contractors Ltd.* *Stumpmaster* was concerned with setting culpability bands where the maximum penalty to be imposed was up to $1.5m. However, that is not the position here. The maximum penalty under the Health and Safety at Work (Asbestos) Regulations 2016 is $100,000. Using the same criteria as set out in *Stumpmaster* but taking into account the maximum penalty that applies in this case, the prosecutor submits that adjusted and appropriate bands are:

(a) Low culpability – starting point up to $17,000;

(b) Medium culpability – starting point $17,000 to $40,000;

(c) High culpability starting point - $40,000 to $67,000; and

(d) Very high culpability $67,000 upwards.

[26] These bands have been assessed having regard to a number of recent District Court cases involving owners, contractors and other removalists working on sites where the removal and disposal of asbestos was a primary concern. In some of those cases the maximum penalty in relation to the particular charge was up to a fine of $250,000 – that is, two-and-a-half times the maximum penalty that applies. In this case, however, the criteria relating to the proportionate calculation of a starting point is the same. The cases referred to include:

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[3] *Moses v R* [2020] NZCA 296

(a) *Worksafe New Zealand v Peter John Page*[4].

(b) *Worksafe New Zealand v Hutt Construction*[5] *2013 Ltd and Philip John Delaney.*

(c) *Worksafe New Zealand v John Carstairs Robertson*[6] [2018] NZDC 9940.

(d) *Worksafe New Zealand v Vase Boating Ltd*[7] [2020] NZDC 4815.

(e) *Worksafe New Zealand v Knight*[8] [2018] NZDC 24613.

(f) *Worksafe New Zealand v Sibley*[9].

[27] Of the cases, the last mentioned, *Worksafe New Zealand v Sibley*, has the closest resemblance to the current situation. In that case, the defendant was engaged by a home owner to remove ceiling tiles containing asbestos at a residential property in Queenstown. The defendant, along with two workers, removed the tiles. The defendant did not conduct a risk assessment for the work and failed to ~~inform~~ further testing to confirm the presence of asbestos before removal. The defendant was not licenced to remove asbestos, nor did he notify Worksafe prior to commencing his work.

[28] Against a maximum fine of $100,000, the District Court Judge considered an appropriate starting point to be a fine of $25,000. This is proportionate to the starting points referred to in the other cases when adjusted down, having regard to the maximum penalty. In assessing the appropriate penalty, the same considerations apply as were noted as relevant factors in the earlier guideline decision of *Department of Labour v Hanham and Philp.* Those factors now need to be addressed.

Identification of the operative of acts or omissions at issue and the "practicable steps" it was reasonable for the offender to have taken in terms of s 22 of the Health and Safety at Work Act 2015.

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[4] *Worksafe New Zealand v Peter John Page* – District Court, Auckland, CRI-2014-004-004462 12 December 2014 -Judge McDonald.
[5] *Worksafe New Zealand v Hutt Construction 2013 Ltd and Philip John Delaney* [2016], NZDC 3652.
[6] *Worksafe New Zealand v John Carstairs Robertson* [2018] NZDC 9940.
[7] *Worksafe New Zealand v Vase Boating Ltd* [2020] NZDC 4815.
[8] *Worksafe New Zealand v Knight* [2018] NZDC 24613.
[9] *Worksafe New Zealand v Sibley* Decision Christchurch DC 11 November 2020 – Judge Keller

[29] It is contended by the prosecution that the defendant failed to take the following reasonably practical actions to ensure the safety of its workers:

(a) Ensure no work was carried out at the site until a licensed asbestos removalist was present.

(b) Ensure no workers were allowed to carry out work involving asbestos at the site, including removing, handling, disposing of, or disturbing asbestos or asbestos-containing materials unless supervised by licensed asbestos removalist.

An Assessment of the Nature and Seriousness of the Risk of Harm Occurring as Well as the Realised Risk

[30] The product involved in this case was Chrysotile asbestos (white asbestos). That form of asbestos has long curly fibres which are flexible after spinning and weaving into a fabric. It is common in home building and household products.

[31] Breathing in airborne asbestos fibres has a serious risk to health. It can cause lung disease, such as asbestosis, lung cancer and mesothelioma. It is a large cause of work-related deaths.

Whether Death, Serious Injury or Serious Illness Occurred or Could Reasonably Have Been Expected to Have Occurred

[32] Exposure to asbestos can result in fibres being inhaled and bedded into the lungs, which may cause diseases, such as lung cancer. There is, therefore, a significant risk.

The Degree of Departure from Prevailing Standards of the Industry

[33] The risk of associated exposure of asbestos-containing fibres are well-known and there is extensive industry guidance available on how to manage these risks. In this regard, the defendant failed to:

(a) Comply with industry guidance in accordance with Health and Safety at Work (Asbestos) Regulations 2016.

(b) The approved code of practice - Management and Removal of Asbestos (November 2016).

(c) Worksafe's Quick Guide on Working With or Near Asbestos – for Builders (April 2018).

The Obviousness of the Hazard

[34] The prosecutor contends that the current state of knowledge of the risk relating to asbestos is high and the means available to avoid a risk are readily available and explain in full in the relevant guides material.

[35] The defendant is a demolition company, in the business of demolishing buildings and other structures. The risk involved in working with asbestos would, therefore, have been particularly obvious. Dealing with asbestos is a key risk in this type of business.

[36] The survey provided by LAANZ identified the areas where asbestos was present on site and the defendant was given a copy. This was confirmation to the defendant that asbestos was, in fact, present.

The Availability, Cost and Effectiveness of the Means Necessary to Avoid Hazard

[37] The means to control the risk were available and are used as a matter of course by those engaged in the construction and demolition industries. Any costs would be part of the operating costs. That said, the defendant did take steps to engage a licensed asbestos removalist specialist to supervise the workers but neglected to ensure that this degree of supervision actually occurred.

[38] The prosecution submit that, in this case, the starting point should be set at $25,000. This is 25% of the maximum that could be imposed under the regulations. The prosecutor submits, having regard to the cases relied upon and referred to earlier, that the following aspects apply:

(a) That the removal of the asbestos was not being managed appropriately.

(b) Having regard to the potential for serious illness, the appropriate controls were not in place.

(c) There was no evidence of dishonesty. Although the defendant knew that asbestos was present, there was no evidence that he was being deceptive.

(d) No other person besides the workers at the time were at risk.

(e) The defendant had obtained a survey and contacted a licensed asbestos removalist to supervise the workers.

(f) Later it became apparent that the workers involved were not being supervised and were not licensed to undertake the work.

[39] Having considered the previous cases referred to by the prosecutor and taking into account the overall circumstances of this case, I agree that the starting point of $25,000 is appropriate.

[40] There are no aggravating factors which would justify an uplift from the starting point. The defendant does not have previous convictions. There are, however, a number of mitigating factors which, in this case, include discounts for:

(a) Co-operation with the investigation - 5%

(b) Previous safety record – 5%

(c) Plea of guilty – 25%

[41] Accordingly, the prosecutor submits that a reduction of 35% from the starting point should be available to reflect the defendant's co-operation, previous safety record and guilty plea. Mathematically, this would result in a discount of $8,750 which I round down to an end figure of $16,000.

Proportionality Assessment

[42] In respect of proportionality, the Court has to take into account the circumstances of the offender. In this case, the defendant has not provided the usual information, such as balance sheets and a statement of financial capacity. He says,

however, that he has suffered a 90% drop in income on account of Covid-19 and that any substantial fine would destroy what is left of the company.

[43] In assessing a fine, the Court has to bear in mind that the fine, or any penalty imposed, must be seen to have some "bite", particularly in cases where the public welfare and safety is concerned. Penalties should not be regarded by defendants as part of a business expense. I am not persuaded that the fine should be reduced below my finishing point of $16,000. The defendant should be made aware that the Court does have power under s 81(1)(a)(ii) of the Summary Proceedings Act 1957 to direct that a fine be paid by way of instalments. As the defendant did not appear at the sentencing hearing, it was not possible to enquire as to whether payment by instalments would, in fact, be sought and, if so, at what level. It is open to the defendant to make application to the Court under s 81 should it so wish. The prosecution would have the right to respond.

[44] Costs may be awarded in the case of a successful prosecution, in accordance with s 152(1) of the Health and Safety at Work Act. The prosecutor seeks $2,304.30. I consider this amount to be relatively modest having regard to the nature of the prosecution and an order for costs in favour of the prosecutor is made accordingly. The Court has been greatly assisted by the prosecutor's comprehensive submissions.

Conclusion

[45] The defendant company is convicted and fined the sum of $16,000.

[46] It is ordered to pay costs to the prosecution of $2,304.30.

[47] Court costs $130.

[48] Leave is reserved to the defendant to apply under s 81(1)(a)(ii) of the Summary Proceedings Act 1957 for an order for payment by instalments.

C S Blackie
District Court Judge