IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2023-409-34
[2023] NZHC 1539

BETWEEN		INSPIRED ENTERPRISES LIMITED Appellant
AND		WORKSAFE NEW ZEALAND Respondent

Hearing: 14 June 2023

Counsel: G N Gallaway and J B Lill for Appellant
T H C Braden for Respondent

Judgment: 20 June 2023

JUDGMENT OF RADICH J

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[1] Inspired Enterprises Limited (IEL), operated by its director and 50 per cent shareholder Jonathan Cole, provides in-home flooring services.[1] It gives quotations and arranges product but engages contractors to carry out installation work.

[2] In June 2021, IEL engaged a contractor, Lawrence Gannaway (Mr Gannaway), to remove and replace flooring in a Christchurch house. When lifting the carpet, Mr Gannaway encountered an old vinyl floor covering beneath it. In removing loose pieces of the vinyl, Mr Gannaway found that they were likely to contain asbestos. Asbestos fibres could, at that point, have been released into the air.

[3] Mr Gannaway did not tell IEL at the time. When IEL learned of it, two days later, it arranged for another contractor to seal the area and to make it safe.

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1 The other shareholder in IEL is Mr Cole's wife.

[4] Testing arranged by the homeowner indicated that the vinyl contained chrysotile asbestos and subsequent monitoring tests showed airborne fibre levels to be acceptable.

[5] IEL was charged, under ss 36(2), 49(1) and 49(2)(c) of the Health and Safety at Work Act 2015 (the Act), for failing to comply with a duty to ensure, so far as reasonably practicable, that the health and safety of other persons, including the occupier of the Christchurch property, were not put at risk from the work carried out at the property.

[6] Mr Gannaway was charged separately under the Health and Safety at Work (Asbestos) Regulations 2016 (the Regulations) for failing to ensure that asbestos that was likely to be distributed was identified and removed.[2]

[7] IEL and Mr Gannaway, having pleaded guilty to the charges, were sentenced by Judge Couch in the District Court on 16 February 2023. The Judge ordered IEL to pay a fine of $52,500, to pay $1,235.84 to WorkSafe as a contribution to its costs and to pay court costs of $130.[3] The maximum penalty for the charge it faced was $500,000. Mr Gannaway was fined $1,100 and ordered to pay court costs of $130[4] – the maximum penalty for the charges he faced was $10,000.

[8] The appeal is brought on the following grounds:

(a) that the Judge erred in his assessment of the facts and of points made in the submissions for IEL; in particular:

(i) the Judge said that IEL received positive test results for the asbestos-containing material but failed to inform a third party contractor who then carried out work at the property.[5] In fact, IEL had not received any test results but had it notified the contractor that testing was being carried out; and

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2 Health and Safety at Work (Asbestos) Regulations 2016, reg 26.
3 *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway* [2023] NZDC 2844 at [45].
4 At [56].
5 At [5](f) and (g)].

(ii) the Judge said that counsel for IEL had sought a discharge without conviction when the submission for IEL was that a conviction and discharge was appropriate; [6]

(b) that the Judge failed to make provision for several relevant mitigating factors;

(c) that the impact of the conviction and the least restrictive outcome – in the form of conviction and discharge – were not assessed; and

(d) that the fine of $52,000 was excessive and a different sentence should have been imposed.

[9] WorkSafe New Zealand, the respondent (WorkSafe) admits the factual errors made by the District Court Judge but submits that the Judge assessed appropriately the starting point, the mitigating factors and the proportionality of the fine in all of the circumstances. It says that the Judge's errors were minor and that there was no demonstrable error in the sentence.

Summary of facts

[10] IEL was engaged by the owner of a Christchurch property (the homeowner) on 10 April 2021 to remove and replace her existing floor coverings. IEL, in turn, engaged Mr Gannaway to undertake the floor preparation work which included removing carpet and underlay from the dining area and removing ceramic tiles from the dining area.

[11] The homeowner continued to live in the house while a range of refurbishment work was carried out. She had engaged several companies to undertake the work and was, essentially, supervising the process.

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6 At [28].

[12] Neither IEL nor Mr Gannaway identified a risk of asbestos being disturbed by the flooring work before work began. They did not put in place a process to assess any such risk.

[13] On 21 June 2021, after Mr Gannaway lifted the carpet and underlay, vinyl floor covering was discovered. Mr Gannaway said that some of the vinyl was loose, so that it lifted when the carpets were pulled up. The homeowner believed the vinyl to have been intact when the carpets were removed. In any event, loose sections of the vinyl were lifted and removed by Mr Gannaway. Some of it was broken in the process. While Mr Gannaway was removing parts of the vinyl, he identified a risk that the vinyl product may have contained asbestos. He told the homeowner of the risk. He then put the broken vinyl pieces into the back of his vehicle. In lifting the vinyl and removing it from the house, Mr Gannaway disturbed the backing of the product – which had the potential to release asbestos fibres into the air. The asbestos was transported by Mr Gannaway and disposed of in a waste bin provided by IEL, but which was not approved for asbestos disposal. Mr Gannaway did not tell IEL about any of this.

[14] Exposure to asbestos carries with it a risk of developing asbestos-related diseases and disorders of the lungs and pleura (the tissue that wraps around the outside of the lungs). The risk comes about through the tiny asbestos fibres that are released into the air when asbestos-containing material are disturbed.

[15] While the vinyl was being removed by Mr Gannaway, two workers came to the property to begin preparation work for painting. Mr Gannaway told them about the asbestos flooring and they worked in the kitchen for the rest of the day.

[16] On 23 and 24 June, a kitchen contractor was at the property to install kitchen cabinets. He had concerns about the damaged asbestos flooring and raised them with the homeowner. The homeowner told the kitchen contractor that Mr Gannaway, too, had suspected that the damaged flooring contained asbestos. The kitchen contractor spoke to his head contractor and raised his concerns, and he spoke also with IEL and Mr Gannaway. This is the point in time at which IEL became aware of the issue.

[17] Mr Cole from IEL spoke with Mr Gannaway and asked why he had not called him when the vinyl was lifted so that he could have arranged for the immediate sealing (referred to as "encapsulation") of the existing vinyl. In any event, Mr Cole then arranged for another contractor called Vinyl Installations to encapsulate the old vinyl by installing a product called Thinsulate together with vinyl planking in the affected areas the following week. He told Vinyl Installations about the asbestos issue, that testing was underway to confirm whether the vinyl contained asbestos and, because he (Mr Cole) had not been to the site himself, he asked Vinyl Installations to carry out its own risk assessment before entering the site and beginning work.

[18] This – together with a failure to assess risk before the work began – was the window in which IEL's culpability falls to be assessed. When it learned of the asbestos issue, a plan needed to be prepared to better manage the work from that point; to consider whether work should have stopped until the test results were through.

[19] The series of events from the point in time at which IEL became aware of the issue included the following:

(a) On 25 June 2021, the head contractor for the kitchen work withdrew its services until it was safe to work.

(b) On 25 June, the homeowner engaged Canterbury Home Inspections Limited to undertake an asbestos test.

(c) On 28 June, the asbestos test was conducted and the homeowner emailed all of the contractors, including IEL, notifying them of the testing.

(d) On 29 and 30 June, Vinyl Installations installed Thinsulate and vinyl planking in the areas over the top of the asbestos vinyl as mentioned above.

(e) On 1 July, the asbestos testing results were received and indicated that the vinyl contained chrysolite asbestos.

(f) On 5 July, the homeowner arranged an asbestos air test to see if it was safe for works in the kitchen and dining room to continue. This test indicated that airborne fibre levels were acceptable. Further surface testing gave positive results. An environmental clean was recommended to remove contamination.

(g) On 9 July, the homeowner engaged a specialist company to undertake the environmental clean and engaged another specialist company to take two swab samples following the clean. The swab samples confirmed there to be no asbestos fibres present on the surfaces.

[20] Subsequently, IEL has, in association with the franchise organisation under which it trades, developed a safe system of work for identifying and managing asbestos. The system developed includes a requirement to undertake asbestos identification at a property before any demolition or refurbishment work begins.

District Court decision

[21] The District Court Judge began his assessment of an appropriate sentence for IEL by identifying the factors and principles to be applied. He identified six relevant sets of authorities or provisions.[7]

[22] First, he set out the four steps in the approach to sentencing that were identified in *Stumpmaster v WorkSafe New Zealand* – the guidance judgment for sentencing under s 48 of the Act.[8] Those steps are as follows:

(a) assess the amount of reparation;

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

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7 *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway,* above n 3.

8 At [9]; and *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020. Section 48 relates to more serious offending than that in question here – failing to comply with a duty that exposes an individual to a risk of death, various injury or serious illness – but the approach to sentencing there is relevant also for offending under s 49.

(c) determine whether further orders under ss 152–158 of the Act are required; and

(d) make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[23] Secondly, the Judge identified the culpability bands for offending under s 49 that were put in place in *East by West Company Ltd v Maritime New Zealand*.[9] These bands are as follows:

low culpability	:	up to $85,000
medium culpability	:	$85,000 to $200,00
high culpability	:	$200,000 to $335,000
very high culpability	:	$335,000 to $500,000

[24] Thirdly, the Judge set out s 151 of the Act which is in the following terms:

> **151 Sentencing criteria**
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> (1) This section applies when a court is determining how to sentence or otherwise deal with an offender convicted of an offence under section 47, 48, or 49.
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> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
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> (a) sections 7 to 10 of that Act; and
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> (b) the purpose of this Act; and
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> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
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> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
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> (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to

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9 *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway*, above n 3, at [7]; and East *by West Company Ltd v Maritime New Zealand* [2020] NZHC 1912, (2020) 18 NZELR 90.

the extent that it shows whether any aggravating factor is present; and

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

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[25] Fourthly, the Judge set out the factors that had been identified as relevant for sentencing under the Health and Safety in Employment Act 1992 by the Court in *Department of Labour v Hanham v Philp Contractors Ltd* and which the Court in *Stumpmaster* endorsed as remaining relevant under the Act.[10] Those factors include, as relevant:

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 22 of the Act.

(b) An assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

[26] Fifthly, the Court identified, as required by s 151(2)(b), the key purposes of the Act, which (by way of summary) are the protection of workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks, securing compliance with the Act and providing a framework for continuous improvement and higher standards of work health and safety.[11]

[27] Sixthly, the Judge referred to certain of the purposes and principles of sentencing in ss 7 and 8 of the Sentencing Act 2002. He referred to the purposes in

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10 *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway*, above n 3, at [9]; *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC); and *Stumpmaster v WorkSafe New Zealand*, above n 8, at [37].

11 At [10]; and HSWA, s 3(1).

s 7 of denunciation, deterrence, accountability, promoting responsibility and reparation and to the s 8 principles of gravity, seriousness and consistency.[12]

[28] Having identified these principles and provisions, the Judge referred, in the context of the first of the four *Stumpmaster* steps, to the fact that IEL had reimbursed the owner of the property for the $2,735.85 in costs she had incurred in having the asbestos vinyl tested and in having the remedial work done.[13]

[29] The Judge then proceeded to consider IEL's culpability by reference to the *Hanham* factors only.[14] His assessment of the *Hanham* factors as they relate to the facts in this case are as follows:

(a) The operative acts or omissions: the Judge noted that, in pleading guilty, IEL accepted that it could have taken reasonably practicable steps to identify whether asbestos was present in the floor to minimise the risk of harm resulting from it.

(b) The nature and seriousness of the risk of harm: the Judge assessed the risk as being potentially very serious as, in some cases, absorption of asbestos fibres in the lungs can lead to serious illness and death.

(c) The degree of departure from prevailing standards: the Judge noted that the risks associated with asbestos are well known.

(d) The obviousness of the hazard: the Judge considered that, as asbestos was commonly used in floor coverings for many years, it must have been known to those in the flooring industry that asbestos may have been present in the property that was built during the period asbestos was used.

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12 At [12]–[14].
13 At [15].
14 At [16]; and *Department of Labour v Hanham and Philp Contractors Ltd,* above n 10.

(e) The availability cost and effectiveness of the means to avoid the hazard: the Judge said that the means to minimise the risks associated with asbestos in floor coverings were readily available at minimal cost.

(f) The current state of knowledge of the risks and potential harm: the Judge saw there to be no lack of knowledge about the risks and potential harm associated with asbestos in floor coverings or about how the risk should be managed.

[30] On the basis of this assessment, and noting there to be no helpful comparable authority, the culpability of the appellant was assessed to be towards the upper end of the low band referred to in [23] above. A starting point of $75,000 was fixed.[15]

[31] The Judge did not believe there to be any personal aggravating factors involving the appellant. He then reduced the starting point to $52,500:

(a) in recognition of guilty plea, he gave a reduction of 25 per cent;[16] and

(b) in recognition of improved future processes, he gave a discount of five per cent.[17]

[32] Reductions were not made for remorse, good character or cooperation.[18]

[33] At this point, the Judge referred to what he described as a submission from IEL that it should be discharged without conviction. He asked, in terms of the test in s 107 of the Sentencing Act, whether the consequences of conviction would be out of all proportion to the gravity of the offending. He assessed the gravity of the offending to be reflected in the end point fine of $52,500 and found there to be no consequences, beyond those which would flow from any conviction, that would warrant a discharge without conviction.[19]

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15 At [19].
16 At [21].
17 At [26].
18 At [22]–[24].
19 At [28]–[34].

[34] Finally, the Judge considered IEL's financial capacity or ability to pay any fine in response to a submission about IEL's weak financial position. The Judge observed, from evidence on the financial position, that IEL's modest bottom lines were a product of drawings for the company's director and shareholders (Mr and Mrs Cole) such that it was not appropriate there be a reduction under this head.[20]

[35] Because it is relevant when considering relative culpability of IEL, on the one hand, and Mr Gannaway, on the other, I mention here the sentence imposed by the District Court Judge on Mr Gannaway. As observed already, the maximum fine under reg 26 of the Regulations with which Mr Gannaway was charged, is $10,000. The District Court Judge set a starting point of $1,800 (referring to it as falling within the low end of the medium band) and awarded a 25 per cent discount for a guilty plea and a 10 per cent discount for remorse and remedial steps. The resulting figure of $1,170 was rounded down to a $1,100 fine.[21]

Principles on appeal

[36] Appeals against sentence are allowed as of right under s 244 of the Criminal Procedure Act 2011 and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.[22] As the Court of Appeal said in *Tutakangahau v R* a "court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[23] It is appropriate for this Court to intervene and substitute its own views only if the sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[24]

Sentencing under the Act

[37] Section 151 of the Act provides that, in sentencing IEL under s 49, the Court must apply the Sentencing Act and must have particular regard to the matters set out

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20 At [42] and [43].
21 At [55].
22 Criminal Procedure Act 2011, ss 250(2) and 250(3).
23 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
24 *Ripia v R* [2011] NZCA 101 at [15].

in that section. The section is set out in paragraph [24] above. It directs, amongst other things, the Court to have particular regard to ss 7 to 10 of the Sentencing Act. While, as mentioned in [27] above, the District Court Judge identified certain of the purposes and principles of sentencing in ss 7 and 8 of the Sentencing Act, he did not do so in a comprehensive way. The purposes of sentencing in s 7 that are of relevance here include (by way of summary) to hold an offender accountable for any harm done, to promote a sense of responsibility, to provide for the interests of victims, to provide reparation, to denounce the conduct, to deter the offender or others, to protect the community and to assist in an offender's rehabilitation.

[38] The District Court Judge referred to some of the s 8 principles of sentencing but, again, not in a comprehensive way. The s 8 principles (by way of summary) include a consideration of the gravity of the offending, the seriousness of an offence, reserving maximum penalties for the most serious cases, consistency with appropriate sentencing levels, effects on the victim, imposing the least restrictive outcome that is appropriate in the circumstances and considering the personal circumstances of the offending.

[39] Section 9 of the Sentencing Act identifies aggravating and mitigating factors that must be taken into account by a Court. They are addressed later in this decision.

[40] Section 10 requires the Court to take into account any measures taken by an offender to offer amends, financially or otherwise, for the harm that has occurred.

[41] The way in which the matters to which the Court is to have regard in s 151 of the Act are to be applied is provided for in the four-step *Stumpmaster* process, referred to in [22] above: after assessing reparation, the Court is to fix the amount of the fine by reference to the guideline bands, it is to have regard to aggravating and mitigating factors, it is to determine whether any further orders in ss 125 to 128 of the Act are required, and it is then to make an overall assessment of proportionality and appropriateness, including consideration of an ability to pay.

[42] It is important to emphasise, as the Full Court did in *Stumpmaster*, that all of the s 151 factors must be considered.[25] That includes, in particular, the instruction in s 151 to apply the Sentencing Act. While the factors set out in *Hanham*, referred to in [25] above cover many of the s 151 factors, they by no means do so comprehensively.

The alleged errors and the issues on appeal

[43] In the context of the grounds of appeal, referred to in [8] above, IEL submits that the two errors made by the Judge were "fundamental in the context of the sentencing hearing and explain why the fine imposed was manifestly excessive". It submits also that the errors were such that the Judge approached the penalty submission for IEL (that a conviction and discharge was appropriate) on a flawed basis. It is submitted for IEL that the errors were compounded when the Judge failed to allow sufficient credit for mitigating factors.

[44] To recap, the alleged errors are these:

(a) the finding that IEL had received positive test results for the asbestos-containing material and failed to inform a third party contractor of them, who then carried out work on the site; and

(b) the view that counsel for IEL had sought a discharge without conviction.

[45] I address the first error, primarily, in considering the Judge's approach to the starting point for the fine. And I deal with the second error in considering the Judge's approach to the third and fourth stages in the sentencing process.

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[25] *Stumpmaster v WorkSafe New Zealand*, above n 8, at [23] and [37].

The starting point

The effect of the factual error

[46] In describing the facts upon which his assessment of culpability was based, the District Court Judge said:[26]

> (f) The owner of the property had the old vinyl tested for asbestos. She received a positive test result which she passed on to IEL and Mr Gannaway on 28 June 2021.
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> (g) On 29 and 30 June 2021, another contractor engaged by IEL installed new flooring material over the asbestos vinyl. IEL did not inform that contractor of the positive test result.

[47] Both parties agree that the terms of both of these factual findings on the part of the Judge are wrong. They have their genesis in an error in [17] of the summary of facts in which the inclusion of the word "positive" was a typographical error. That paragraph reads:

> 17. On 28 June 2021, [the homeowner] emailed all the contractors at [the homeowner's property] including IEL and Mr Gannaway with an update about the asbestos test being positive undertaken and that she was awaiting the results.

[48] IEL says the position was summarised correctly in Mr Cole's affidavit in which he said:

> In any event, I engaged the services of Chris Davidson who is a vinyl installer.
>
> I talked him through the situation and explained that there was testing underway to confirm if the vinyl was asbestos backed.
>
> As I hadn't been to site by that point, I asked him to carry out a risk assessment prior to entering the site and also before starting any work onsite.

[49] This position is supported by the next paragraph in the summary of facts, which is in the following terms:

> 18. On Tuesday, 29 June 2021 and Wednesday, 30 June 2021, Mr Christopher Simon Davidson (Mr Davidson) (a sole trader trading as Vinyl Installations) installed thinsulate and vinyl planking in the kitchen/dining areas over the top of the asbestos vinyl. Mr Davidson was engaged by IEL

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[26] *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory* Gannaway, above n 3, at [5(f) and (g)].

> and had been informed of the *potential for asbestos containing material* and advised to carry out his own risk assessment at the property. *He did not confirm the outcome of the asbestos test or that results were still pending* with [the Homeowner] prior to undertaking his work.
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> (Emphasis added).

[50] It is sufficiently clear the Judge erred when he found that IEL was informed of a positive test result and then, with that knowledge, engaged a subcontractor without telling him. Counsel for both parties confirm that the factual error was raised by counsel for IEL with the Judge after he had given his oral sentencing. I understand that the Judge declined to amend the decision, saying that his sentencing remarks were based upon the agreed summary of facts to which the appellant had entered a guilty plea.

[51] The question is as to how much of a difference the error made in the Judge's assessment of IEL's culpability when setting the starting point for the fine. Counsel for IEL has said that the difference is significant – that instructing a contractor to enter the site in the knowledge of a positive asbestos test result is bordering on egregious. Whereas, knowing there to be just a risk of asbestos-containing material on site, passing that on and advising a subcontractor to carry out their own risk assessment is, it is said, of considerably less concern.

[52] For WorkSafe it is submitted that, had the Judge placed significant emphasis on the typographical error, he would have placed the offending in the medium culpability band.

[53] I do not see the distinction mentioned in [51] to be so great. IEL's culpability turned, not only upon the lack of a system to identify asbestos issues prior to any demolition or refurbishment work, but to the lack of a process following the identification of a potential asbestos risk.

[54] However, either way, IEL's culpability is relatively limited. Mr Gannaway did not tell IEL of the asbestos issue when he was lifting the vinyl. IEL learned of it only two days later and made arrangements, immediately, for the area to be sealed – although the contractor undertaking the sealing work did not do so until five days later.

Sentencing Act considerations

[55] Having discussed IEL's conduct in the context of the *Hanham* factors, the Judge said that he assessed its culpability "as towards the upper end of the low band" and took a starting point of a fine of $75,000.[27]

[56] While IEL does not take issue with the assessment of culpability as being in the low band, it does take issue with the starting point and says, amongst other things, that the Judge failed, in terms of s 8(g) of the Sentencing Act, to impose the least restrictive outcome that is appropriate in the circumstances. I agree that, in addition to the Judge's consideration of conduct under the *Hanham* factors, there are a number of relevant provisions in the Sentencing Act that are on point and that were not assessed. They include these:

(a) Under s 7(a) a purpose of sentencing is to hold an offender accountable for harm done to the victim and the community. Here, harm is difficult to assess as the effects of inhaling asbestos fibres can take many years to be known. However, it is fair to say, as IEL does, that the small area exposed to asbestos was sealed, no further remedial work was required and testing carried out showed there to be no airborne asbestos and no surfaces were detected as containing asbestos.

(b) Under s 7(f) a purpose of sentencing is to deter the offender or other persons from committing the same or similar offences. Here, the effect of the conviction on IEL (which was devastating by Mr Cole's account) and the remedial steps put in place are such that little is needed to deter this company and its officers from committing similar offences.

(c) Under s 7(g) a purpose of sentencing is to protect the community from the offender. For the same reasons as those given in subpara (b) above, this principle is not a primary concern here.

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[27] *WorkSafe New Zealand v Inspired Enterprises Limited*, above n 3, at [19].

[57] IEL has submitted, in addition, that s 8(e) of the Sentencing Act was given inadequate consideration by the Judge. That provision describes a principle of sentencing that requires the Court to take into account the general desirability for there to be consistency in sentencing levels between similar offenders and co-offenders committing similar offences in similar circumstances.[28] Disparity in sentences may lead to a reduction of a sentence on appeal only where the disparity between the sentences imposed cannot be justified and is gross.[29] The question is always whether the starting point adopted is within an acceptable range by reference to the judge's assessment of the particular culpability factors.[30]

[58] While IEL does not take issue with the fact that Mr Gannaway, as a sole trader, was charged under the Regulations with an offence carrying a significantly lower maximum penalty, the consistency-based submission looks at the placement, in starting point and proportionality terms, of Mr Gannaway's offending within the bands relevant to the offence under the Regulations and with the comparative placement within bands relevant to IEL's offending.

[59] In many ways, the culpability of Mr Gannaway, on the one hand, and of IEL, on the other, are similar: neither used a process to assess the site for asbestos risk at the outset or to manage risks from asbestos when identified. Both workers are sole traders but under different corporate structures. At another level, IEL was the head contractor – but it did rely on Mr Gannaway's expertise in performing services on its behalf. As discussed in [13] to [15] above, Mr Gannaway's onsite actions gave rise to the asbestos issues and he failed to inform IEL, as his principal, of the risk he had identified.

[60] Moreover, it is important to consider the District Court Judge's approach to Mr Gannaway. The Judge saw Mr Gannaway's omission in failing to identify the asbestos in the flooring as being something for which "a conviction and discharge would have been appropriate". However, it was the "second aspect of the offence" – the incorrect disposal of the asbestos – which was seen by the Judge as being more

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28 *R v Lawson* [1982] 2 NZLR 219 (CA) at [223]; *Zimmerman v R* [2014] NZCA 523 at [14]; and *O'Sullivan v R* [2015] NZCA 147 at [21].

29 *R v Rameka* [1973] 2 NZLR 592 (CA); *R v Lawson*, above n 28; and *Singh v R* [2013] NZCA 245.

30 *Arnott v R* [2015] NZCA 236 at [12]; and *Smith v R* [2021] NZCA 169 at [41].

serious because it created "a serious risk that asbestos fibres might be released into the air".[31] It is on that basis that the Judge assessed Mr Gannaway's culpability to be at the low end of the medium band. IEL's offending does not include that more serious aspect of Mr Gannaway's offending. Comparatively speaking, the placement of IEL's offending within the band relevant to the offence for which it has been charged should be markedly lower than that placement adopted for Mr Gannaway.

[61] For all of these reasons, I am satisfied that the starting point adopted by the Judge, at the top end of the low band, was an error and that a starting point at the mid-point for the lower band – $42,500 – is appropriate. While, for reasons I come on to give, I do not see a conviction and discharge as being available here, a starting point at this level reflects the fact that it was wrong not to have systems in place before entering the site and upon identification of a risk, but that IEL's culpability was always low.

Mitigating factors

[62] It is IEL's submission that a global discount of 45 per cent from the starting point is appropriate to reflect IEL's early guilty plea, its genuine remorse, its full cooperation with WorkSafe throughout its investigation, its previous good record, the improvements it has put in place to strengthen its management of asbestos and the $2,735.85 payment it made to the homeowner.

[63] As mentioned already, the Judge awarded a global discount of 30 per cent: 25 per cent for the early guilty plea and five per cent for the improvement processes. No discount was given for remorse, cooperation, good record or the payment made to the homeowner to make amends. IEL says that, guilty plea aside, a discount of five per cent for the other mitigating factors is insufficient and is inconsistent with other sentencing decisions. For the reasons I go on to give, a global discount of 45 per cent (including for the guilty plea) is in my view appropriate in the particular circumstances of this case.

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[31] *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway*, above n 3, at [48] and [49].

Relevant principles

[64] The level of discounts for offenders under the Act for mitigating factors has been a point of contention. The Court in *Stumpmaster* cautioned that "routine standard discounts" with little analysis distorted the sentencing process by so reducing the starting points that outcomes became too low.[32] The Court observed this to have likely been a "contributor to legislative concern over sentencing levels". It said "there has been a statutory response in the form of greatly increased sentencing levels" and that to "undo this pattern of large discounts would be to impose a double increase".[33] However, it saw some correction as being necessary and concluded its comments on this area in the following way:

> [67] Next, it is contrary to sentencing principle that those with previous convictions receive the same global discount as those without when a component of that discount is a previous good record. By way of general guidance, we consider a further discount of a size such as 30 per cent is only to be expected in cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree. That is not to place a ceiling on the amount of credit, but to observe a routine crediting of 30 per cent without regard to the particular circumstances is not consistent with the Sentencing Act. …

[65] Authorities have noted also that discounts should not be given for actions such as cooperation with inspectors or remedial action to correct deficits which should never have existed. Statutory duties were, it has been said, in place for those processes in the first place.[34] However, with these cautions in mind, discounts for a lack of prior offending, reparation, cooperation and remediation have been given, quite frequently, to reflect particular circumstances.[35]

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32 *Stumpmaster v WorkSafe New Zealand*, above n 8, at [64].

33 At [64].

34 In *East by West Company Ltd v Maritime New Zealand*, above n 9, at [119(a)], the High Court emphasised that those who owe duties under the HSWA have a statutory duty to assist inspectors in the exercise of their powers, and in those circumstances cooperation is to be expected and would not usually attract a discount.

35 See for example *WorkSafe New Zealand v Ron Frew Family Partnership Ltd* [2018] NZDC 20330, where a discount of 40 per cent was given for the defendant's 50 years of operation with no previous incidents (10 per cent), being a good corporate citizen and charity contributor (five per cent), genuine remorse and immediate reparation paid (15 per cent), cooperation in the investigation (five per cent) and the remedial steps taken (considered "within [the] context of what can be properly and realistically achieved by a responsible employer" at [54]) (five per cent); *WorkSafe New Zealand Ltd v Sabre Logging Co Ltd* [2020] NZDC 13436 (10 per cent for remorse, 15 per cent for safety record, co-operation and remedial steps); *WorkSafe New Zealand v Addiction Foods NZ Ltd* [2020] NZDC 13929 (five per cent for each of safety record, remorse, "good works" in assisting complainant and five per cent for "efforts to prevent a recurrence"); and *WorkSafe New Zealand v N E Parkes & Sons Ltd* [2020] NZDC 25449 (discounts totalling 45 per cent,

Mitigating factors in this case

[66] With these comments in mind, I turn to the circumstances of this case. I look first at Mr Cole's remorse. The Judge has said that Mr Cole's affidavit showed "little if any expression of concern or regret for the exposure of people to the potential risk of airborne asbestos fibres".[36] I do not believe that to be correct. In his affidavit, Mr Cole spoke of having broken down over the charges, to having worked closely with his franchise holder to ensure that events could not be repeated and to the damage that has been caused to his relationships at home and to his mental health. He said:

> I am disappointed that I did not meet the high standards required at the time we were working at [the homeowner's] place. I truly regret what occurred and will be working hard to ensure any work done through my business properly manages health and safety risks.

[67] Mr Gannaway, by way of comparison, said in his affidavit:

> I am very remorseful for my offending. I acknowledge and take responsibility for the fact that I ought to have handled the accidental discovery of asbestos at [the homeowner's property] in a safe manner. … I am committed to ensuring that this type of offending does not occur again.

[68] The Judge gave Mr Gannaway a 10 per cent discount for his remorse and for implementation of improvements but found a similar (if not more significant) statement of remorse on Mr Cole's part as warranting no discount. I do not believe that to be a sustainable position. Further, while the Judge had acknowledged earlier in his decision that the reparation payment of $2,375.85 was a relevant consideration[37] and that an order for reparation was not required as a consequence, the payment can, and should in these circumstances, be taken into account also as a relevant indicator of remorse.[38]

[69] I look next at the fact that IEL has no previous convictions and a good safety record; a factor that is relevant under s 9 of the Sentencing Act. I do not agree with

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including 25 per cent guilty plea, five per cent good character, 15 per cent for remediation and cooperation were granted reducing the starting point for the fine from $500,000 to $275,000).

36 *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway*, above n 3, at [22].

37 At [13].

38 Sentencing Act, ss 7 and 10; and *Department of Labour v Hanham & Philp Contractors Ltd*, above n 10, at [43], quoting *R v M* [2008] NZCA 112 at [31]–[32].

the Judge that "the absence of that aggravating factor does not, of itself, constitute a mitigating factor".[39] Discounts have been awarded in cases under the Act in which there have been no previous incidents or offences under the Act. For example, a discount of five per cent was credited in *WorkSafe New Zealand v Ron Frew Family Partnership Ltd* for the defendant having been a good corporate citizen and charity contributor.[40] A letter of support provided for Mr Cole describes him as generating "over $4,000 for local Canterbury charities" as an "incredibly generous and caring person".

[70] Turning to IEL's cooperation, I do not think it is right to say, as the Judge did, that IEL did not go "beyond the extent of its duty of cooperation". The Judge was referring to s 176 of the Act under which a duty is imposed to assist inspectors appointed under the Act. Mr Cole had a number of discussions with the WorkSafe investigator, worked alongside his franchise holder on the issue and was involved in amending the "Site Safe" resource materials on asbestos to improve processes for all franchise owners. He had regular meetings with WorkSafe, attended interviews and updated documents over a five-month period. In circumstances in which IEL, through Mr Cole, did everything he could have done at that stage, his cooperation in my view went beyond that which was required of him under the Act and warrants a modest mitigating discount.

[71] It is for these reasons that I am drawn to conclude that the Judge's findings on mitigating factors were in error and that a discount of 20 per cent for cooperation, previous good character, remorse and reparation is warranted, in addition to the 25 per cent discount for the early guilty plea. Applying that discount of $19,125 to the starting point of $42,500, the appropriate fine should have been $23,375.

Conviction and discharge

[72] Counsel for both parties agreed that the Judge erred when he said that counsel for IEL had sought a discharge without conviction. In fact, the submission made to the Judge for IEL was that a conviction and discharge was appropriate.

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39 *WorkSafe New Zealand v Inspired Enterprises Limited and Lawrence Gregory Gannaway*, above n 3, at [23].

40 *WorkSafe New Zealand v Ron Frew Family Partnership Ltd*, above n 35, at [13].

[73] The Judge's error was compounded by his criticism of IEL in not having made an application for discharge without conviction as required by the Criminal Procedure Rules and in not having filed supporting evidence and submissions on the point. While the Judge's approach was in error, I do not believe that in any event a conviction and discharge would have been appropriate in these circumstances. Under s 109 of the Sentencing Act, an offender may only be convicted and discharged if the Court is satisfied that a conviction is sufficient penalty in itself. Given the increase in penalties for offences under the 2003 Act, it would be rare for a conviction not to be followed by a fine.[41] And, in the circumstances here, it would not be right in my view, in terms of the consistency required under s 8(e), for a fine to be imposed for Mr Gannaway's offending but not for that of IEL.

Proportionality

[74] The final matter to be considered under the *Stumpmaster* steps, is proportionality and the appropriateness of the combined packet of sanctions imposed.

[75] It is WorkSafe's submission that, despite the Judge's error in considering whether a discharge without conviction was appropriate he, nonetheless, assessed in an appropriate way the gravity of the offending in concluding, in a proportionality sense, that the end point of a fine of $52,000 was appropriate.[42]

[76] IEL says that, in assessing proportionality, the Judge should have made a reduction to reflect sentencing principles that emphasise the desirability of imposing the least restrictive outcome and the need to adopt a consistent approach. With these principles in mind, it is said for IEL that the Judge imposed a sentence that might be warranted for corporate offenders in circumstances in which the evidence in this case showed IEL to have limited means to pay.

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41 *Department of Labour v Areva T D New Zealand Ltd* HC Rotorua CRI-2005-463-42, 9 November 2005.

42 *WorkSafe New Zealand Ltd v Inspired Enterprises Ltd and Lawrence Gregory Gannaway*, above n 3, at [32].

[77] Although the accounts that were in evidence at sentencing show Mr and Mrs Cole to have made cash drawings from the company, the Court needed, it is said, to approach the proportionality assessment on the basis that either:

(a) in reality, individuals were being sentenced here who did not warrant a fine under a framework designed for corporate offenders; or

(b) if it was right to have the company in mind, rather than Mr and Mrs Cole, then account should have been taken of the limited means of the company to pay.[43]

[78] I do not see it as being appropriate for there to be distinctions under s 49(2)(c) for different corporate offenders. Section 49(2)(a) and (b) relate to offending by individuals (for whom the maximum fines are lower). Section 49(2)(c) relates to "any other person", that is, to companies and other incorporated entities. Whether, in cases like this, surplus funds are retained in a company or paid to shareholders does not warrant a distinction to be drawn between corporate and personal offending or the ability of a closely held company to pay a fine. I agree with the conclusion reached by the Judge on this point that, if the company relied on shareholders for capital in its day-to-day operations, then it will rely on them also for the payment of any fine.[44]

Conclusion

[79] The District Court Judge did err in his assessment of a material fact and in his understanding that IEL had applied for a discharge without conviction. There is a degree of materiality in the first error but not in the second.

[80] The first error, together with a range of considerations under s 151 of the Act, leads me to a conclusion that the fine of $52,500 imposed by the Judge is manifestly

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43 Also see s 14(1) which says a court may decide not to impose a fine, otherwise appropriate, that an offender cannot pay and s 40(1) which directs a court, when imposing a fine, to have regard to the financial capacity of the defendant.

44 See *YSB Group Ltd v WorkSafe New Zealand* [2019] NZHC 2570 at [40], where it was argued there that the fine should be reduced from $100,000 to $15,000, which was the maximum the company could afford to pay for financial reasons. The Court observed that the payment of a fine is a higher priority than payments to shareholders and directors of the company, there being little if any difference between this expectation and the general expectation that a company must pay its third party creditors before it pays its directors and shareholders.

excessive through the Judge having adopted a starting point that could not properly be sustained and by providing insufficient credit for mitigating factors.

[81] I have concluded that a starting point in the middle of the lower band – $42,500 – was appropriate when assessing the level of IEL's culpability. And I have found that IEL should have been entitled to an additional 20 per cent discount for remorse, its good record, its cooperation and for the reparation it made. I find that a fine at this level is proportionate and appropriate. A conviction and discharge would be at odds with s 151 to the extent that it would undermine the principles that need to be applied here of holding the offender to account and of deterrence.[45]

Result

[82] The appeal is allowed in part. The order imposing a fine of $52,500 is quashed and is substituted with an order that IEL is to pay a fine of $23,375.00.

[83] The District Court's orders for IEL to pay $1,235.84 to WorkSafe as a contribution to the costs of investigation and prosecution and to pay court costs of $135 are maintained.

[84] If costs are sought and cannot be resolved between the parties, then the appellant may, within 10 working days from the date of this decision, file a memorandum and the respondent may, within a further 10 working days, file a memorandum in response. Any such memoranda should be limited to five pages in length.

Radich J

Solicitors/Counsel:
Chapman Tripp, Christchurch for Appellant
WorkSafe, Auckland for Respondent

[45] *Street Smart Ltd v Department of Labour* HC Hamilton CRI-2008-419-26, 7 October 2008 at [59].