EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [98]

IN THE DISTRICT COURT
AT HUTT VALLEY

CRI-2017-096-003507
[2017] NZDC 26648

WORKSAFE NEW ZEALAND
Prosecutor

v

DIMAC CONTRACTORS LIMITED
Defendant

Hearing:	17 November 2017
Appearances:	Sarah Backhouse for the Prosector Finn Collins for the Defendant
Judgment:	24 November 2017

RESERVED JUDGMENT OF JUDGE S M HARROP AS TO SENTENCE

Introduction

[1] Dimac Contractors Limited ("Dimac") is for sentence having pleaded guilty to one charge under ss 36(1)(a), 48(1) and (2)(c) of the Health and Safety at Work Act 2015 ("the Act"). The incident which gave rise to this charge occurred on the very day the Act came into force, 4 April 2016. In pleading guilty Dimac has acknowledged that it failed to ensure, so far as was reasonably practicable, the health and safety of its workers, in particular [Employee 1] and [Employee 2], while they were at work in

Dimac's business or undertaking, namely carrying out earthworks and that their failure exposed their workers to a risk of death or serious injury arising from exposure to live electricity.

[2] The maximum penalty faced by Dimac, being a corporate entity, is a fine of $1.5 million. Had the incident occurred the previous day, when the Health and Safety in Employment Act 1992 applied, the maximum fine would have been $250,000.

Facts

[3] The facts which form the basis for sentencing are set out in the summary of facts which has been agreed for the purposes of sentencing. I record that particularly because in his written submissions Mr Collins, in contending that Dimac's culpability was lower than WorkSafe contends, sought to clarify Dimac's knowledge as to whether the relevant electricity line was live.

[4] In the absence of an application by the defendant under s 24 of the Sentencing Act for a disputed facts hearing, I am able to proceed only on the basis of the summary of facts. As will be seen however, this sentencing is significantly influenced by Dimac's financial capacity to meet a fine so that in the end the determination of the appropriate fine based on culpability but without reference to ability to pay, while important, becomes academic.

[5] Dimac carries out excavation, land development and site clearing services. Its general manager is Robert McWhirter. It has five fulltime employees comprising two truck drivers, two machine operators and a labourer. Its sole director is Mr McWhirter's wife and the shares are held by the McWhirters and their family trust.

[6] Wallaceville Developments Limited ("WDL") is a property development company which owned land in Upper Hutt on which it was proposing to undertake a residential property development. There was some contaminated ground soil on the site which needed to be removed prior to the subdivision being undertaken. Dimac was engaged to carry out the earthworks involved and supplied a digger and driver and other workers to carry out the work including [Employee 1] and [Employee 2].

Gillies Group Management Trust ("GGMT") was engaged to provide a project manager. Engeo Limited ("Engeo") is an engineering consultancy firm which was engaged to carry out onsite testing, identify areas of contamination and arrange for remedial work to be carried out.

[7] The site contained two sets of overhead power lines, a 11 kv line and 240 kv line. The former was to be reticulated from overhead to underground as it was to be used for the property development project but the latter was not needed for the project at all. It did not at the time of the incident service any buildings or customers. The 240 kv line ran through the contaminated area along four power poles; it formerly serviced residential properties which had been demolished years ago. The second of the four poles appeared to be decrepit. The 240 kv line had an uninsulated neutral wire and an insulated phase wire. The neutral wire between poles two and three had been cut or broken before WDL purchased the site and was hanging from pole two having been wound up into a coil and was sitting on the ground. The phase wire was still suspended between poles two and three, but was sagging.

[8] On the morning of 4 April 2016 the project manager, a worker from Engeo, McWhirter and four other Dimac workers including [Employee 1] and [Employee 2] attended a site meeting. The project manager told Mr McWhirter that he thought the 240 kv line had been disconnected because the poles looked decrepit and it did not service any buildings, but he said that he was not sure, so the line should be treated as live. Mr McWhirter advised the project manager that the earthwork could be completed without encroaching into a four-metre zone around the lines.

[9] Later that morning earthwork began in the contaminated area and five Dimac workers were on site initially including Mr McWhirter, [Employee 1] and [Employee 2]. [Employee 1] was removing soil from an area near the 240 kv line using a digger. The digger slewed and its boom struck the 240 kv line (the phase wire) between poles two and three. This caused pole three to snap and fall to the ground. Four Dimac workers and one from Engeo were in the area but no one was harmed, including [Employee 1].

[10] The phase wire remained attached to the fallen power pole and was tangled around the digger boom. [Employee 1] got out of the cab of the digger. In doing so he was not harmed.

[11] Mr McWhirter and the project manager were not in the area at the time and did not see the incident.

[12] A worker from Engeo who did see the incident called the project manager and informed him of what had occurred. The project manager went to the area of the incident. Work had stopped.

[13] The project manager rang Mr McWhirter but was unable to contact him. He then phoned Wellington Electricity Lines Limited ("Wellington Electricity"), the relevant lines distribution company, but was unable to contact anyone. The project manager left a message with Wellington Electricity about the incident.

[14] Mr McWhirter called the project manager back and was informed of what had occurred. Mr McWhirter asked whether there had been any sparks arising from the contact of the digger with the line and was told there had not been, on the advice of the Dimac workers. Mr McWhirter then told the project manager to instruct [Employee 2] to cut the line that was around the digger boom. The project manager advised Mr McWhirter that he had phoned Wellington Electricity and was waiting for a response. After the call from Mr McWhirter, the project manager told [Employee 2] that Mr McWhirter thought [Employee 2] should cut the line. The project manager went to do another task in another area on the site.

[15] [Employee 2] retrieved a set of insulated cutters and cut the phase wire. He was unharmed. The project manager then received a call from Wellington Electricity confirming that a technician had been dispatched. He found on arrival that the phase wire had been cut. A technician from Northpower Limited sent by Wellington Electricity arrived on the site later that day and tested the phase wire that had been cut by [Employee 2]. He found it was live with a reading of 238-240 kv.

[16] As Dimac accepts, it exposed its workers to the risk of death or serious injury, specifically to the risk of electric shock by the hazard of operating mobile plant near live power lines. In particular [Employee 1] was exposed to the hazard of live electricity when he struck the live phase wire with the digger and left the cab of the digger. [Employee 2] was exposed to the same hazard when he cut the live phase wire. The hazards associated with live electricity are well known. Accidents may result in severe burns and can be fatal.

[17] The following particulars were included in the charge to which Dimac pleaded guilty, failing to:

(a) Develop an adequate process to identify and manager electrical hazards;

(b) Ensure the power lines were not live before work commenced;

(c) Ensure work was done in accordance with the safe distances in the New Zealand Electrical Code of Practice for Electrical Safe Distances – NZECP 34:2001;

(d) Instruct workers not to approach the power line after the pole had fallen;

(e) Restrict access by workers to the fallen line;

(f) Wait for professional advice as to the status of the fallen power line before allowing work to continue.

[18] Section 30 of the Act sets out a hierarchy for managing risks to health and safety. Fundamentally, Dimac had a duty:

(a) To eliminate risks to health and safety, so far as reasonably practicable; and

(b) If it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

[19] Because the 240 kv line no longer serviced any buildings and was not needed for any other purpose, the power should have been disconnected before any work began, thereby eliminating the hazard of live electricity. Even if that were not reasonably practicable, the risk was to be minimised by following the code of practice mentioned above. In addition, regulation 17(1)(a) of the Electricity (Safety) Regulations 2010 requires that safe distances be kept between mobile plant and any electric line, of at least four metres, in the absence of written consent from the line owner. Wellington Electricity has advice on its website about the four-metre rule.

[20] WorkSafe's investigation revealed that Dimac had completed a Job Safety Analysis but had not identified the power poles or power lines as hazards. The 240 kv lines were not tested to determine whether or not they were live before work began. Dimac was told by WDL to treat the 240 kv lines as if they were live because it was not sure whether or not they were live. Dimac had told WDL that it would not be necessary to do any work within four metres of the 240 kv lines. Sections of the contaminated area had been delineated with cones by Engeo, but at least one of these was within four metres of the 240 kv lines. The digger was operated within four metres of the 240 kv lines. A four-metre exclusion zone was not implemented by the defendant. There were no measures put in place that showed workers where the four metres from the 240 kv lines was. Spotters were not consistently used when the work was done near the 240 kv lines and were not being used at the time when the lines were hit by the digger. It is possible to apply for the written "close approach" permit mentioned above but this was not done because Mr McWhirter said he did not think one was needed as he thought the 240 kv lines were dead. Dimac's workers were wearing personal protection equipment required for asbestos work namely rubber gloves, disposal overalls, face masks and gumboots or coveralls.

[21] After the pole and line had fallen there was no exclusion zone marked out to keep workers away from the fallen line. Cutting the lines was not a safe method of removing the downed line. The Northpower Limited technician removed the line by climbing the first pole and cutting the jumpers that fed the 240 kv line. That should only be done by a person competent in carrying out electrical work and none of Dimac's workers were so competent.

[22] In summary Dimac failed to ensure the health and safety of its workers both before the work began, either by eliminating or at least minimizing the hazard, and after the pole fell by failing to ensure its workers kept away from the line until professional advice was obtained.

[23] Dimac cooperated with WorkSafe throughout the investigation of the incident and has not previously appeared before the court. It has pleaded guilty at an early stage.

Approach to sentencing

[24] This is one of the first sentencings under the Act and as yet there are no guideline appellate judgments to assist this court. However counsel agree, as do I, that the leading case under the previous legislation, *Department of Labour v Hanham & Philp Contractors Limited*[1] should continue to inform sentencing under the Act. The High Court there noted that the sentencing process in this kind of case involves three main steps:

- Assessing the amount of reparation
- Fixing the amount of the fine
- Making an overall assessment of the proportionality and appropriateness and position of reparation and the fine

[25] WorkSafe submits that some adjustment to this is required as a result of some legislative changes under the Act and suggests that there should be a third step prior to the fourth, namely the making of any other orders which are appropriate under the Act including ordering payment of the regulator's costs and bringing the prosecution, adverse publicity orders, orders for restoration, work health and safety project orders and training orders. I accept WorkSafe's submission in principle but in this case no specific order other than costs is sought. I defer consideration of that application to the end of the sentencing exercise.

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[1] High Court Christchurch CRI-2008-409-0000002, 18 December 2008 (Randerson and Panckhurst JJ)

[26] The key provisions governing the sentencing process are ss 151 and 22 of the Act which provide:

> **151 Sentencing criteria**
>
> (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.
>
> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (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 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.
>
> **22 Meaning of reasonably practicable**
>
> In this Act, unless the context otherwise requires, *reasonably practicable*, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
>
> (a) the likelihood of the hazard or the risk concerned occurring; and
>
> (b) the degree of harm that might result from the hazard or risk; and
>
> (c) what the person concerned knows, or ought reasonably to know, about—
>
> (i) the hazard or risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[27] It is not necessary to repeat the well-known provisions of ss 7 to 10 of the Sentencing Act but the purpose of the Act is important to record. Section 3 provides:

3 Purpose

(1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—

(a) protecting workers and 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

…

(2) In furthering subsection (1)(a), 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 practicable.

[28] Accordingly Dimac was required to give its workers, so far as reasonably practicable, the highest level of protection available from the risk of exposure to live electricity on 4 April 2016.

[29] The first express provision in s 151 is the risk of, and a potential for, illness, injury, or death that could have occurred.

[30] Here there is no doubt that [Employee 1] and [Employee 2] in particular were exposed to the risk of death or at the very least serious injury by way of burns; the potential for these to occur was high.

[31] Section 151(2)(d) then requires the court to have particular regard to whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred.

[32] I accept WorkSafe's submission that it is a matter of good fortune that neither [Employee 1] nor [Employee 2] were killed or suffered serious injury. There was a high risk of this and it was not managed. It was extremely fortunate that [Employee 2] cut the line with insulated cutters and did not make contact with the line. The fact that he used such cutters was a credit to his own common sense; these were not provided by Dimac nor did Dimac instruct him to use any particular tools to cut the lines. Further, while he was wearing some protective equipment this was to protect him from asbestos in the ground soil, not live electricity.

[33] In addition there were other workers in the vicinity who were at risk.

[34] Clearly this case could easily have involved at least one if not two fatalities.

[35] The next statutory factor is the safety record of the defendant. As I have already noted there is no aggravating aspect here; Dimac has not previously appeared before the court nor is there any evidence of any earlier health and safety issue which has come to the attention of WorkSafe.

[36] The next factor is the degree of departure from prevailing standards in the sector/industry as an aggravating factor. I accept WorkSafe's submission that given the sort of work it does Dimac ought to have known about the risk of working near power lines and been familiar with addressing such risks. I also accept its submission that there is no reason why Dimac could not have ensured that the power lines were disconnected, thereby eliminating the risk of harm. This would have been relatively easy to do and there were no adverse consequences to other members of the community. The 240 kv lines did not service any buildings nor were they needed for the project itself. Given the statutory principle in s 3(2) this was a serious and easily averted failure by Dimac to provide the requisite highest level of protection to its workers.

[37] Even without the primary obligations to eliminate the risk, I also accept that it would have been relatively easy to put in place measures to mitigate it, such as demarcation by traffic cones and the us e of spotters to ensure that no work was done

within a four-metre exclusionary zone. According to Mr McWhirter it was not necessary to work any closer than that.

[38] Under s 22 the determination of what is "reasonably practicable" is informed by the extent of the risk and the available ways of eliminating or minimising it having regard to the cost of doing so.

[39] This is a situation where the costs of both eliminating and minimising the risk were minor and so both could have been easily achieved.

[40] For these reasons I essentially accept the WorkSafe submission that the level of culpability on the part of Dimac was in the region of the high end of medium culpability (Ms Backhouse described it as being on the cusp between medium and high culpability). I do not accept Mr Collins submission that culpability was in the low to medium range.

[41] Mr Collins sought to assert, based on reference to Mr McWhiter's interview by WorkSafe, that there was an unequivocal understanding prior to the incident that the 240 kv line was dead, but this is not what the agreed summary of facts says. The factual basis on which I assess culpability is that while there was an *indication* (both from appearances and advice from WDL) that the line may have been dead, Dimac were told that this was not clear so the line should be treated as live. Nothing was done to ensure that it was not live and Mr McWhirter's approach appears to have been that it did not matter whether or not it was live because the work could be completed without encroaching the four-metre zone around the lines. However, eliminating the hazard entirely would have been easy, as would ensuring compliance with the four-metre zone. Neither was done.

[42] I accept the level of culpability is less than it would have been had no consideration at all been given to the lines or had Dimac been aware that the 240 kv line was live but carried on without taking any step. However the fact remains that, applying the statutory criteria, there was a reasonably high level of culpability because of the obviousness of the risk, the gravity of the likely consequences, the relative ease

of removing it as well as mitigating it and the nominal cost and inconvenience of doing so.

[43] It is not strictly relevant to the culpability assessment that (fortuitously) no harm let alone death resulted. That is because the focus of the legislation is on the elimination or minimisation of *risk* of harm. However I accept as the absence of an aggravating factor that no one was ultimately hurt, let alone killed. Had such likely harm actually occurred, especially one or more fatalities, then obviously the penalty would have needed to be increased because of the presence of that significant aggravating factor.

[44] In summary, I conclude that Dimac's failures put this case at the high end of medium culpability.

Sentencing bands

[45] Having reached that overall assessment of the level of culpability, the question is how I should determine the appropriate starting point for the fine which ought to be imposed, taking into account the new and substantially-increased maximum penalty.

[46] Ms Backhouse submits, uncontroversially, that the culpability bands from the *Department of Labour v Hanham & Philp Contractors Limited* case should be adapted having regard to the substantially increased penalty. Under the Health and Safety and Employment Act 1992 the maximum penalty for strict liability offences by a body corporate was a fine of $250,000, so the fine is now six times greater.

[47] In *Department of Labour v Hanham & Philp Contractors Limited* the High Cout said[2]:

> "[57] Accepting that a broad assessment is involved and that sentencing is not a mathematical exercise, starting points should generally be fixed according to the following scale:
>
> - low culpability: a fine of up to $50,000
> - medium culpability: a fine of between $50,000 and $100,000

[2] At [57] to [60]

- high culpability: a find of between $100,000 and $175,000

[58] The figure of $175,000 at the upper end of the high culpability band is not intended to preclude a greater fine up to the statutory maximum. Higher levels may be required in some cases of extremely high culpability.

[59] A substantial uplift in existing levels of fines is needed to reflect the 5-fold increase in maximum fines effected in 2003, the effects of inflation, the ongoing cost and seriousness of workplace accidents and the need for deterrence. Significantly, s 8(c) and (d) Sentencing Act require the court to impose penalties at or near the maximum for offending within or near to the most serious of cases unless circumstances relating to the offender make that inappropriate. Sentencing levels under s 50 HSE have not generally reflected this statutory policy.

[60] It is important to reiterate that the level of fines suggested reflect starting points before taking into account financial capacity, the payment of reparation or any other aggravating or mitigating factors relating to the offender. Tailoring to the individual circumstances of the case remains essential, as is the need to avoid undue hardship."

[48] Ms Backhouse submitted that the *Department of Labour v Hanham & Philip Contractors Limited* approach might translate into the following bands:

- Low culpability: a fine of up to $400,000
- Medium culpability: a fine of between $400,000 and $800,000
- High culpability: a fine of between $800,000 and $1,200,000
- Extremely high culpability: a fine of between $1,200,000 and $1,500,000.

[49] I note that this does not simply increase the fine levels by a factor of six. If it did the respective figures would be $0 to $300,000, $300,000 to $600,000, $600,000 to $1,050,000 and $1,050,000 to $1,500,000.

[50] However, I accept Ms Backhouse's submission that when there has been an increase in the prescribed penalty it is not simply a mathematical exercise to increase the appropriate fines.

[51] Mr Collins drew my attention to the approach of Judge Gilbert in *WorkSafe NZ v Rangiora Carpets Ltd*[3] where His Honour endorsed the following bands:

Culpability Band	**Fine**
Low	$0 to $150,000
Low/medium	$150,000 to $350,000
Medium	$350,000 to $600,000
Medium/high	$600,000 to $850,000
High	$850,000 to $1,100,000
Extremely high	$1,100,000 +

[52] As Judge Gilbert observed, at some point appellate guidance will need to be provided on these matters but at the moment District Court judges simply need to do the best they can in all the circumstances. His Honour acknowledged that the bands and sentencing levels he had proposed were to some extent instinctive but he considered, and I respectfully agree, that the inclusion of further bands provided a more workable framework than WorkSafe had suggested (His Honour had had the same submission from WorkSafe as I have). Importantly, as Judge Gilbert also noted increasing the number of bands would assist with consistency in sentencing which is required by s 8(e) of the Sentencing Act.

[53] I am therefore prepared to adopt same banding approach as Judge Gilbert as indeed Mr Collins urged me to.

[54] Ms Backhouse submitted that a starting point for the file of around $800,000 was appropriate; Mr Collins (invoking his view of culpability) $200,000.

[55] For the reasons stated earlier I consider this offending is at the higher end of the medium band of offending; in terms of Judge Gilbert's bands I place it within the

[3] [2017] NZDC 22587 – District Court Christchurch 4 October 2017

Medium/high band. While the application of the bands is necessarily somewhat arbitrary and instinctive, I consider the least restrictive starting point I can properly adopt is $650,000.

[56] I note this is still comfortably below half the maximum available penalty. I take into account that there were (at least) two lives clearly exposed to fatal risk. However, as I have noted, the fact that no fatality resulted, or indeed any harm at all, is the absence of a significant aggravating feature, which would if present have increased the starting point up to at least the $800,000 to $850,000 level, albeit that the payment of reparation would in such event have been a highly relevant antecedent factor before setting the level of fine.

Personal aggravating and mitigating factors

[57] There are no personal aggravating features but as counsel agree there are mitigating factors. There must be a 25% reduction for the early guilty plea but in addition counsel agree that up to a 15% additional reduction should result from Dimac's cooperation and remorse, its previous good safety record and the remedial action it has taken (5% each). I agree.

[58] As to the latter, Mr McWhirter's affidavit of 3 November 2017 notes that the company has learnt from the incident. It has changed its health and safety compliance provider. He says that staff now understand that if there is any onsite risk they are to call him directly and that he will then attend the site in person to assess the hazard and take action or advice as appropriate. I observe that while that is laudable, it does not on the face of it seem to amount to the necessary proactive approach required by the legislation; staff should not be the sole identifiers of onsite risk warranting contacting Mr McWhirter. However, I accept Mr McWhirter's evidence that there are already comprehensive site-specific health and safety plans prepared for each job. I accept then that a degree of discount remedial action is appropriate.

[59] There is in my view a further mitigating factor, not raised by counsel in this context, which justifies a further 10% reduction. Mr McWhirter explains that the company's turnover has decreased dramatically since the incident. He believes that is

because Dimac is not currently being invited to tender by Hutt City Council which has been a key source of its work since it commenced trading in 1992. He believes this is because it is well known, both to council officers and in the industry generally, that Dimac is being prosecuted for this incident. He can think of no other reason why the council would since the incident have declined to invite tenders from Dimac.

[60] He also points out that most commercial work is awarded based on comprehensive tender submissions which require disclosure of any prosecution under the Act. As he observes, Dimac is therefore impacted not only by any fine imposed by the court but simply by the fact that the prosecution has jeopardised its ability to tender successfully for commercial civil projects thereby resulting in a substantial loss of potential income.

[61] I accept Mr McWhirter's evidence, there being no reason not to. On the contrary, it is corroborated by the evidence of Mr Strawbridge, a director of the company which has provided accountancy services to Dimac for about six years. He says there has been a substantial reduction in turnover since the incident. Prior to the incident, Dimac was a preferred supplier for Hutt City Council and had completed numerous contracts on its behalf but since the incident there has been no invitation to tender for its contracts.

[62] In my view this amounts to a significant penalty which has already been suffered by Dimac before the court imposes one and that must be recognised in assessing the appropriate fine.

[63] The upshot of this is that I reduce the sentence from the $650,000 starting point by 25% ($162,500) to $487,500 for cooperation/remorse, remedial action, good prior safety record and the consequences of the prosecution already suffered. From that figure, a further 25% reduction for the guilty plea, $121,875, is required resulting in an end fine of $365,625. This however is not the end of the process of determining the appropriate fine.

Financial capacity

[64] Section 40 of the Sentencing Act provides:

> **40 Determining amount of fine**
>
> (1) In determining the amount of a fine, the court must take into account, in addition to the provisions of sections 7 to 10, the financial capacity of the offender.
>
> (2) Subsection (1) applies whether taking into account the financial capacity of the offender has the effect of increasing or reducing the amount of the fine.
>
> (3) If under an enactment an offender is liable to a fine of a specified amount, the offender may be sentenced to pay a fine of any less amount, unless a minimum fine is expressly provided for by that enactment.
>
> (4) Subsection (4A) applies if a court imposes a fine—
>
> (a) in addition to a sentence of reparation; or
>
> (b) on an offender who is subject to an earlier sentence or order of reparation.
>
> (4A) In fixing the amount of the fine, the court must take into account—
>
> (a) the amount of reparation payable; and
>
> (b) that any payments received from the offender must be applied in the order of priority set out in sections 86E to 86G of the Summary Proceedings Act 1957.
>
> (5) When considering the financial capacity of the offender under subsection (1), the court must not take into account that the offender is required to pay a levy under section 105B

[65] Section 14 of the Sentencing Act is also relevant. It provides:

> **14 Reparation, fines, and financial capacity of offender**
>
> (1) Even if it would be appropriate in accordance with section 13 to impose a fine, a court may nevertheless decide not to impose a fine if it is satisfied that the offender does not or will not have the means to pay it.
>
> (2) If a court considers that it would otherwise be appropriate to impose a sentence of reparation and a sentence of a fine, but it appears to the court that the offender has or will have the means to pay a fine or make reparation, but not both, the court must sentence the offender to make reparation.

[66] Mr Strawbridge has annexed to his affidavit of 1 November a copy of Dimac's financial report [s 205 suppression order – financial details deleted]

[67] [s 205 suppression order – financial details deleted]

[68] [Details deleted].

[69] Mr Strawbridge says that a fine of any significance would be likely to place Dimac in an insolvent position and his recommendation to the company's officers would be to cease trading.

[70] In response to this WorkSafe filed an affidavit of 13 November from Ms Sarla Patel a senior accountant at WorkSafe. She highlighted that it was not possible to identify what Dimac's financial position would be in the next 12 months from the information provided. No projected cashflow analysis has been supplied.

[71] Ms Patel concluded, based on the information provided to her, that Dimac would be in a position to meet a fine in the region of $100,000 if paid in instalments over time.

[72] .[s 205 suppression order – financial details deleted]

[73] Mr Strawbridge concludes:

> "I believe that the company could not sustain a fine (sic) $100,000 even if it was to be paid in instalments over time. A debt of this level would definitely place Dimac in an insolvent trading position and it is likely that Dimac would have to seize trading."

[74] As Ms Backhouse observed at the hearing, on behalf of Dimac there are assertions as to what fine *cannot* be afforded but no confirmation of what fine *can* be afforded.

[75] In response Mr Collins took instructions and indicated that a fine of $50,000 could be met over a two-year period. He highlighted, as did Mr Strawbridge, that Mr McWhirter is 65 years old and there is no certainty as to how long he will remain in business. Being the key person in all respects, if he were to retire the company would be unlikely to keep operating.

[76] There is High Court authority as to the approach where financial capacity to pay a fine is in issue. Arguably the leading case is *Mobile Refrigeration Specialists Limited v Department of Labour*[4]. The case concerned an explosion at a cool store at Tamahere near Hamilton in April 2008 as a result of which one firefighter suffered fatal injuries and others were seriously injured. In the District Court Judge Spear fined one of the defendant companies, Icepac, $37,200 and ordered reparation of $95,000. The other corporate defendant, Mobile Refrigeration Specialists was fined $56,200 and ordered to pay reparation totalling $175,000.

[77] Heath J dismissed the appeals against sentence by these companies. The central issue on appeal was whether Judge Spear had been correct not to adjust the fines downward based on financial incapacity to pay.

[78] Heath J emphasised the need for a defendant to provide clear evidence of financial incapacity where that is claimed. Full disclosure is required. His Honour observed[5]:

> "The need for full disclosure is supported by *R v Khan*[6]. The Court of Appeal observed that it was "essential, wherever a court determines to deal with a matter by way of monetary penalty, that there is clear and unequivocal material as to what is realistic before the course of action is pursued"[7]. When reduction of an otherwise appropriate fine is sought, that "material" will generally be in the exclusive possession of the corporate offender."

[79] At [58] His Honour added:

> "While, generally, a court should impose a fine within the offender's ability to pay, there is authority for the proposition that, in appropriate cases, fines may be imposed at a level beyond the company's apparent means. An instructive example is *R v F Howe and Son (Engineers) Limited*[8] Scott Baker J delivering the judgment of the Court of Appeal, expressed the view that "there may be cases where the offences are so serious that the defendant ought not to be in business."[9]"

[80] At [59] Heath J noted:

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[4] High Court Hamilton CRI-2009-419-94 29 March 2010
[5] At [56]
[6] CA 312/05, 7 March 2006
[7] At [41]
[8] [1999] 2 All ER 249 (CA)
[9] At [255]

> "On the other hand, in *Australian Communication and Media Authority v Clarityl Pty Limited (No. 2)*[10], Nicholson J endorsed observations in an earlier case, in which it was stressed that the potential effect of a fine putting a corporation out of business on "innocent parties such as employees and creditors, and indeed of the lessoning of competition" might justify some reduction in the fine. However, that proposition was qualified by the observation that "different considerations apply when it seems …. the practical reality is that the corporation is going out of business anyway."

[81] On the facts in *Mobile Refrigeration Specialists Limited* Heath J was not satisfied that Judge Spear had been provided by the defendants with sufficient material to justify reduction of the fines.

[82] An application for leave to appeal to the Court of Appeal was declined[11] but I note that at [22] in the Court of Appeal's judgment it expressly endorsed what Heath J had said at [57] in the High Court judgment (after referring to s 14(1) of the Sentencing Act which provides that the court may decide not to impose a fine if satisfied that an offender "does not or will not have the means to pay it") :

> "That means the court's decision is discretionary in nature. There is no jurisdictional bar to imposition of a fine, even in circumstances where it "appears" the company lacks financial capacity to pay. Where clear evidence to justify a reduction in an "otherwise" appropriate fine exists, the discretion must be exercised judicially and on a principled basis. Financial capacity to pay a fine falls for consideration in that context."

[83] In *Department of Labour v Eziform Roofing Products Limited*[12] Duffy J allowed an appeal against sentence by the department and imposed a fine of $60,000 rather than of $18,000 which had been imposed in the District Court. After endorsing the observations of Heath J in *Mobile Refrigeration Specialists* Duffy J held that the reduction for impecuniosity from $38,000 to $18,000 made by the District Court Judge was excessive. Her Honour observed[13]:

> "The reduction was just over 50%. This is in circumstances where two employees were placed at unnecessary and avoidable risk, and where one of them has suffered serious permanent injury. This was not a case where a high level of fine would have precluded Eziform from paying the reparation ordered. The insurance would cover the reparation. All Eziform had to find payment for was the fine. Nor is it a case where there was clear evidence that Eziform would go into liquidation if ordered to pay a fine. The judge placed

[10] [2006] FCA 1399
[11] [2010] NZCA 543
[12] [2013] NZHC 1526
[13] At [69]

> excessive weight on her concerns about the company's financial viability; not enough weight was placed on the need to ensure workplace safety through the deterrents and denunciations that follows the imposition of a stiff financial penalty."

[84] In the end after adopting a higher starting point as well, Duffy J concluded a reduction of just over 10% for impecuniosity was appropriate.

[85] Having regard to these principles and to the evidence before me, I am satisfied that Dimac has put before me adequate information on which to make a reasonably informed decision about the impact of the imposition of the fine which is prima facia appropriate of $365,125. I have no doubt, and indeed it is supported by Ms Patel on the evidence available to her, that a fine at that level, or anywhere near it, would be fatal to the company.

[86] Companies have an obligation not to trade while insolvent and it is clear that Mr Strawbridge would (with justification) in the event of a fine at that level advise Dimac to cease trading. If that happened then the workers who were put at risk on 4 April 2016, would certainly be safe from further risks because they would be unemployed. The consequences for them, as innocent potential victims, quite apart from the director and shareholders, would be far more severe than those from the incident was during which (fortuitously) no harm was suffered.

[87] Dimac has been trading since 1992 and had until this incident an unblemished safety record in an industry involving significant risks. I do not consider (and nor does WorkSafe suggest) that it is one of those companies which ought not to be in business because of its attitude to health and safety matters. On the contrary this is its first and only lapse and one involving negligence rather than recklessness . As Judge Gilbert put it in the *Rangiora Carpets* case[14]:

> "[51] Society has a strong interest in businesses operating. RCL is a good case in point. There are sixteen families in Rangiora which rely on it for their livelihood. Whilst it has breached its obligations, and as a result, one of its employees has been injured, that breach was not intentional. RCL is otherwise a responsible corporate citizen. It is nonsense to suggest that because of this single unfortunate accident, it should effectively be put to the sword if the appropriate fine is out

[14] At [51] and [52]

> of its reach, and I do not understand WorkSafe to advocate such a view.
>
> [52] Instead, RCL needs to be brought back into compliance with the health and safety regime (that has been achieved through remedial already taken) and then fined to acknowledge what has occurred. The fine will serve to mark its transgression, deter it from further offending in the future, and encourage other businesses to comply in the knowledge that if they do not they will be bitten by the regulator with the backing of the courts. In my view, it would only be in quite exceptional cases, likely involving repeat offending and/or the most egregious of breaches, that the court will impose a sentence knowing it will force a business to close its doors."

[88] I respectfully adopt and apply these sentiments.

[89] There is no doubt that any fine imposed must "bite". Fines ought not to be seen by a business as "licence fees" as simply a cost of being in business. But the bite must not be fatal or crippling.

[90] Where financial incapacity is established, as it is here, in my view the correct approach is (assuming this is still below the prima facie appropriate fine) to set the fine at the maximum the company can reasonably expected to pay, taking into account the ability to reach an arrangement for payment by instalments with the Registrar.

[91] Subject to Heath J's comments, if a highly culpable corporate defendant is undoubtedly insolvent, and therefore unable to meet any fine then, applying s 14(1) of the Sentencing Act, no fine may properly be imposed. Provided the end fine is lower, it would in my view be wrong to relate it by percentage or otherwise to the level of the earlier-determined prima facie appropriate fine. A fine cannot be greater than the defendant's ability to pay indicates, regardless of how far short it is of the fine assessed as appropriate without reference to capacity to pay.

[92] When I apply all of these considerations to the case at hand, I consider the appropriate fine is $90,000. Dimac will, on the evidence before me (which is necessarily incomplete because future cashflow is difficult to predict), only be able to meet that fine by instalments over a period of at least two or three years, perhaps longer. I am not in a position to direct what instalments are appropriate. It will be

matter for Dimac to reach an arrangement with the Registrar in accordance with its ability to pay over that period.

Costs

[93] Section 152(1) of the Act provides:

> **152 Order for payment of regulator's costs in bringing prosecution**
>
> (1) On the application of the regulator, the court may order the offender to pay to the regulator a sum that it thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offending and any associated costs).

[94] In this case WorkSafe seeks costs of $4,344.12 as a contribution towards the costs of prosecution. It says these are 50% of its actual legal costs. No contribution is sought towards the costs of the investigation.

[95] Mr Collins submits that the level of costs awarded by Judge Gilbert in the *Rangiora Carpets Limited* case, $1,228, would be appropriate.

[96] The 111 hours spent on the file by various WorkSafe solicitors seems to me rather excessive, though of course a claim is made for only half. I did appreciate the thoroughness of Ms Backhouse's submissions but no doubt the work done in this case will, to the extent it is general, be useful in future cases.

[97] Like the fine, the award of costs must also be informed by ability to pay. In the circumstances, I award WorkSafe $1,000 as a contribution to its costs.

Suppression

[98] Pursuant to s 205 of the Criminal Procedure Act 2011 I make an order forbidding publication of the evidence about the financial position of Dimac as this is commercially sensitive and publication would likely cause undue prejudice to Dimac. This order relates to paragraphs [66], [67] and [72].

S M Harrop
District Court Judge