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

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2018-004-010070
[2020] NZDC 10157

MARITIME NEW ZEALAND
Prosecutor

v

FULLERS GROUP LIMITED
Defendant

Hearing: 16 December 2019

Appearances: C Paterson and R W Belcher for the Prosecutor
K Burkhart and G Beresford for the Defendant

Judgment: 5 June 2020

NOTES OF JUDGE NICOLA MATHERS ON SENTENCING

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[1] Fullers Group Limited ("Fullers") is charged pursuant to ss 36 (2), 37(1), 48(1) and 48(2)(c) of the Health and Safety at Work Act 2015 ("the Act"). The maximum penalty is a fine of $1.5 million. Pursuant to s 155 of the Act I may make an order requiring Fullers to undertake a specified project for the general improvement of work health and safety within a period specified in any order I might make.

[2] Maritime New Zealand ("MNZ") seeks a fine, reparation orders for those injured in the incident, a project order as proposed by Fullers and 50% of MNZ's external legal costs.

[3] By way of initial summary I record from the summary of facts, to which Fullers has pleaded guilty, its breach of duty as a PCBU which is to ensure, so far as is reasonably practicable that:

> (a) the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking; and/or
>
> (b) the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person; and/or
>
> (c) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their heath and safety arising from work carried out as part of the conduct of the business or undertaking.

[4] The summary of facts continues to record that it was reasonably practicable for Fullers, in compliance with its duties under the Act to:

> (a) provide sufficient off-run training time for [a trainee master], to practise berthing the Kea, so that the trainee master could consistently berth the Kea safely, prior to berthing the Kea on-run with passengers on board; and/or
>
> (b) provide more prominent safety warnings and advice to passengers aboard the Kea about the need to remain seated while berthing.

The facts

[5] On 9 November 2017 at approximately 9:30 pm, Kea, one of Fullers ferries with 52 passengers on board, was approaching Devonport wharf ferry terminal. Kea was under the command of [the training master], a very experienced master. He was supervising [the trainee master]'s training to become master of Kea. [The trainee master] is an experienced master of Fullers ferries but was being trained in the intricacies of the Kea.

[6] As the Kea approached the wharf at between two and four knots, with [the trainee master] at the helm and with [the training master]standing next to him supervising the approach, Kea suddenly veered to starboard and collided with the wharf. Neither [the trainee master] nor [the training master] were able to correct the situation in time before the collision. Several passengers were injured and I will return to their injuries and claims for reparation in due course.

[7] The cause of the Kea suddenly veering off course remains "unspecified". I note the concession by MNZ that "Devonport wharf is considered a more difficult wharf" due, it seems, to tide and wind gust influences. It is helpful to record the Fullers accident report to MNZ as follows:

> **Investigation Findings**
>
> Following a review and investigation it was found that the incident was as a result of both systems and tidal influences causing the vessel to deviate from its intended path and make contact with the pier.
>
> **Key Learnings**
>
> The outcome of the investigation showed that insufficient training specifically on berthing of the KEA is a risk not only to the business but to those who travel onboard the vessel, largely in part to her propulsion system which takes more time to get to grips with than the twin screw system currently in use within the fleet. More time should be spent on berthing of the vessel rather than transit voyages between Auckland and Devonport.

[8] There have been two previous collisions by Kea in May 2009 and February 2015.

[9] It is necessary to record Kea's "distinctive" design. It is designed so that it can be driven both ways. It has an Azimuth propulsion system uncommon in New Zealand vessels. The controls operate in a counter-intuitive manner. Importantly for the sentencing is that masters "require specific training and practice time to learn to operate Kea". It is comforting to note that Kea is to be phased out. However Kea has made many thousands of crossings without incident.

[10] I have received voluminous but helpful submissions largely brought about by the proposed project order, the scarcity of other decisions on point, and the issues relating to consequential loss. In the defendant's submissions Fullers has frankly admitted that it did not provide [the trainee master] "sufficient off-run training time" but fairly adds that [the training master], had confidence in allowing [the trainee master] to take the helm. Fullers has also admitted that it did not provide "more prominent safety warnings and advice to passengers aboard the Kea about the need to remain seated while berthing".

[11] Fullers, in admitting it did not take practicable steps to ensure the safety of the public in breach of HSAWA, nevertheless submits that its culpability is materially less than portrayed by MNZ.

[12] I return now to the injuries suffered by passengers. The most serious injuries were sustained by [passenger 1] who was standing on the top part of the starboard stairwell. The collision caused [passenger 1] to fall to the bottom of the stairwell, hitting [their] head. I have carefully read [passenger 1's] victim impact statement which sets out fully [the] injuries, the hospital treatment and the recovery period. I have also been helped by the impact report of [passenger 1's] [sibling, passenger 2], and [their] own consequential claim. Then I have considered the claim by [passenger 3], a [medical professional] who was on the Kea at the time and assisted [passenger 1] prior to the arrival of the paramedics. I accept the contents of those reports and will address the reparation amounts during the final decision process.

[13] Before embarking upon the normal sentencing approach, it is necessary to record that in this case the defendant has sought a project order pursuant to s 155 HSAWA. There has been no previous assessment of project orders in conjunction with the proportionality test, as required by the *Stumpmaster* decision.[1] The proportionality assessment, of course, needs to be addressed after the assessment of a fine and before the final penalty.

[14] A project order pursuant to s 155 of the Act provides:

> (1) A court may make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within the period specified in the order.
>
> (2) The order may specify conditions that might be complied with in undertaking the specified project.

[15] In addition, there are three jurisdictional prerequisites that must be satisfied:

> (a) a specified project;
>
> (b) for general improvement of work health and safety;
>
> (c) to be carried out within a specified period.

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

[16] In this case the defendant has put forward a detailed proposal for a project order and MNZ has advised me that it supports the making of the proposed project order. Even though MNZ supports the making of the order it is for the Court to be satisfied in terms of s 155 before such an order can be made. When this matter first came before me, and after having read the helpful written submissions of counsel and having heard counsels' oral submissions, I indicated that I was satisfied that a project order should be made and its terms did satisfy me in terms of s 155 of the Act. I therefore made the project order, as sought, so that Fullers could commence to implement it.

[17] When considering whether to make a project order I agree with MNZ that additional factors may be relevant to the grant of an order. MNZ has suggested that project orders must demonstrate at the very least that they:

(1) go beyond compliance with HSAWA;

(2) have a meaningful connection to the conduct for which the defendant is to be sentenced;

(3) do not propose things which already exist;

(4) require engagement from workers; and

(5) require something above and beyond existing health and safety obligations.

[18] Although I consider that the above factors may be considered before an order is made I do not accept that they should in any way become a mandatory list before a prosecutorial authority even considers the appropriateness of a project order. I agree with Mr Beresford, counsel for the defendant that the above factors are not set out in s 155. However it seems to me to make sense that, subject to my cautionary note above, the above factors logically follow from the requirements of s 155. I note also the defendants concerns that the multiple factors, as set out above, must not be what they call "conversation killers" and must not stifle innovation. The facts proposed must remain guidelines and not necessarily requirements.

[19] The defendants proposed project order is I accept, for the genera improvement of work health and safety. It provides for a specific timeframe. The defendant describes its proposed learning teams as:

> An approach to safety which is more effective than traditional approaches, in particular, it is more effective in involving workers in problem identification/

> solving than traditional methods of thinking about health and safety. So it is an approach to safety which will promote higher safety standards.

[20] Having carefully considered the proposed project order I am satisfied that it meets these grounds.

[21] Today I have received a joint memorandum of counsel seeking amendment to the term of the proposed project order. The necessity for the amendment has arisen in light of the uncertainties that Covid-19 has generated. I accept that the amendments are necessary and the project order will be amended accordingly.

[22] In my view project orders should be encouraged by prosecutorial authorities. I accept that *Stumpmaster* held that reparation should not necessarily be applied dollar for dollar in reduction of a fine. But, in my view, there is a distinction between reparation and a project order. Reparation is just that. A project order imposes a substantial monetary penalty of its own and has the benefits of promoting health and safety in the workplace. Project orders in terms of s 155 of the Act were brought in specifically to improve health and safety in the workplace. So when it comes to proportionality, which of course follows the starting point and other deductions, I consider that considerable weight should be given to the beneficial effect of the project order both in terms of what it will cost to a defendant and in terms of its overall benefits for health and safety in the workplace. It might, in my view in some cases, amount to a full dollar for dollar reduction particularly where a defendant has limited means because fines can in some circumstances work adversely against small companies. I do note however, that there should usually be an element of a fine to respect the normal objectives of denunciation, deterrence and to be held to account. It will always be a difficult balancing exercise in the exercise of a Court's ultimate discretion.

Penalty

[23] First, in relation to reparation for [passenger 1], I have carefully read the various victim impact statements and in particular to [passenger 1]'s suffering as a result of [their] fall. The defendant has already paid [passenger 1] $62,576 being $30,000 for emotional harm and $32,576 for consequential loss. It acknowledges that it will pay a further $5000 for emotional harm and $760 for consequential loss

reparation payable to [passenger 3] as proposed by MNZ. This gives a total sum paid by the defendant of $68,336. Essentially the difference between MNZ and the defendant relates to a starting point of reparation of $40,000 to $50,000 for MNZ as against $30,000 for the defendant. In my view the payment already made and the extra amount to be paid fairly and properly represent reparation and consequential loss for [passenger 1] and reparation and consequential loss for [passenger 3]. Therefore the reparation order will be $68,336.

[24] I see no reason why MNZ should not be entitled to half their costs as sought which I fix at $19,765.

[25] That brings me to assessing the starting point for the ultimate penalty. MNZ proposed a starting point between $500,000 and $600,000 and the defendant between $300,000 and $400,000. I assess culpability at the lower end of a medium range and I say this because it is acknowledged by MNZ that the tidal effects or sea conditions can have unexpected consequences for a Master docking a ferry at Devonport. I therefore fix a starting point for the fine at $450,000. There must be an uplift for the two previous convictions of the defendant. The previous convictions were not at the high end of culpability and I fix an uplift at 5 percent. MNZ accept that Fullers is entitled to a discount of 15% for its cooperation and remedial measures that it has taken, and I agree that discount is appropriate rather than the higher one submitted by Fullers. MNZ accepted in the submissions before me that Fullers is entitled to a full 25 percent reduction due to its early guilty plea, which I consider to be appropriate. Fullers is also entitled to a discount for its remorse and I assess that at 5% giving the end figure of $286,159.00.

[26] I now address proportionality as per *Stumpmaster*, but tempered by my earlier remarks about how to apply proportionality. MNZ proposes a 40 percent reduction from the fine to cover the proportionality issue arising from the project order I have already approved. I do not consider that percentage reductions are appropriate normally when considering proportionality. Percentages often work unfairly and are arbitrary particularly against smaller companies. In this case it is estimated that the project order will cost the defendant $300,750. Equally, I am not prepared to give a dollar for dollar reduction for the full cost of the project order. In my view when

assessing proportionality and balancing that against the Sentencing Act principles and purposes, I consider that Fuller's should receive a benefit which I fix at $200,000.00 from the estimated cost of the project order of $300,750.00. This means of course that if the project order is more than the estimate then any such extra is at Fuller's cost.

[27] For completeness and to avoid any confusion I am setting out below my calculations.

Starting point	$450,000
5% uplift for previous convictions	22,500
	472,500
15% discount for cooperation and remedial measures	70,875
	401,625
25% discount for early guilty plea	100,406
	301,219
5% discount for remorse	15,060
	286,159
Deduction for Project Order	200,000
Total	**$86,159**

[28] Fullers is therefore ordered to pay [passenger 1] the sum of $62,576 as set out in paragraph 22, to [passenger 2] the sum of $5,760 as set out in paragraph 22. The sum of $19,765 costs to MNZ as set out in paragraph 23 and a fine of $86,159 as set out in paragraph 26. In addition Fullers is to meet the total cost of the project order, which is presently estimated at $300,750.00

Nicola Mathers
District Court Judge