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NORTHERN TERRITORY OF AUSTRALIA

WORK HEALTH COURT

E X T R A C T

No: 22114160, 22114277

WORK HEALTH AUTHORITY

and

TITAN PLANT HIRE

JASON FRANK MADALENA

JUDGE O'LOUGHLIN

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 15 MARCH 2023

Transcribed by:
EPIQ

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HIS HONOUR: I will proceed then to sentence and for the benefit – I think I've got family here and media that aren't shown on camera. Okay. So, Mr Madalena, one of the defendants was the sole Director and share holder of the other defendant, Titan Plant Hire Proprietary Limited. Mr Madalena had direct control over the operations of that business in Darwin.

Pursuant to s 19 of the *Work Health and Safety (National Uniform Legislation) Act,* there is a duty where the company had to ensure as far as reasonably practicable that the health and safety of people was not put at risk by the work carried out by that business. And under s 27 of the Act, Mr Madalena had to exercise due diligence to ensure the company complied with that duty.

The company hired out heavy machinery where the nature of that business meant that the work performed necessarily involved a risk to persons in the vicinity of that machinery. On 29 April 2019, Mr Beaumont reasonably and properly said that he was not qualified to load the excavator in question on to the back of his prime mover. He properly and reasonably left it to others, namely Mr Murray and Titan Plant Hire and its staff to control how the excavator was to be loaded on to the tray of that prime mover.

The prime mover had one large bucket attached to it and within that bucket there were three other buckets - - -

MR MCCONELL: The excavator, your Honour.

HIS HONOUR: Excavator. Thank you. Which were not secured and the trenching bucket which I see in the photograph provided to me, is outside of the bucket and I take it that's the one in question that fell and it appears to, I'm guessing, weigh perhaps a few hundred kilograms. And of course, that is a danger.

On 29 April 2019, no induction or training was given to Mr Murray on the loading of the excavator. No induction or training was given to Mr Beaumont on how to be a spotter to safely assist in the loading of that excavator. When Mr Murray and Mr Beaumont arrived at the premises to collect the excavator, those premises were unsecured and most staff were on duty in the yard.

Mr Murray found a diesel mechanic and asked if that was the excavator which they were to take and the diesel mechanic said, "I'm pretty sure." The mechanic asked Mr Murray if they were all right and Mr Murray replied, "Yep. We're all good." Mr Murray and Mr Beaumont were then left alone to load the excavator on to the back of the prime mover.

All of that was in breach of the businesses own safety systems. The Occupational Health and Safety Management Plan stated that all visitors would complete an induction plan. That didn't happen. The Safety Management Plan stated that standard work procedures would be developed for all high-risk tasks.

That did not happen in respect of loading excavators and the agreed facts state that no standard work procedures were in fact prepared.

The plan says that education shall be completed prior to mobilisation. That didn't happen. And no pre-mobilisation briefing was provided. The two men were left alone to load to the excavator without the guidance, education and training of the kind that was stipulated in the defendant's own safety plan. Mr Murray told Mr Beaumont where to stand and what to do during the loading of the excavator.

During the loading, a member of the staff – a yard member of the staff of the defendants arrived but did not intervene. As Mr Murray was moving the boom into place over tyres, one of the buckets fell out of the large bucket and it struck Mr Beaumont causing fatal injuries. This incident, this loss of life could easily have been avoided. The safety plan was presumably printed on to paper and placed in a folder and left on shelf.

None of its measures, which I have mentioned, were put into action. They were merely ink on paper. When Mr Madalena was interviewed by investigators, his statements indicate that the safety failings leading up to the death of Mr Beaumont were the standard method of operating. He said that his business did not induct visitors.

He did say that the business checks if someone is, "Competent or Confident" before leaving them to load heavy machinery i.e. If they were thought to be competent or confident. It may be unfair to take this answer literally but it does suggest that if a confident person is there, then they are set free to load machinery without any guidance or induction.

Importantly, at no stage during the interview with investigators did Mr Madalena claim that his staff on that day had failed to follow his or his company's systems. I am left with the impression that a competency assessment was like what happened on this fateful day. "You all right?", "Yep, we're all good." That's the essence of the facts and now turning to determination of penalty.

I find that Titan Plant Hire and Mr Madalena knew of the risks. The likelihood of the risk of something – a person being injured in the loading of an excavator was significant. The potential consequences of the risk were death or serious injury. Measures were readily available to eliminate or minimise that risk. Those measures were not expensive or difficult to implement.

It may be that one of those measures might include or necessitate an extra employee who could do those inductions and perform training or act as spotter. And it might be that an extra staff member is needed at each of the three sites or the defendant but that is not an unreasonable expense to minimise the risk of injury or death. The defendants drafted a policy but did not follow it.

In the interview, Mr Madalena admitted they did not follow it. It leads me to conclude that the seriousness of this breach is beyond low-range. It's beyond mid-

range. We are not at the very top of the range of category 2 offence, like that of the Department of Defence which was dealing with live rounds fire and there was a prior conviction. But we are at the higher end of the range.

I take into account the defendant's good character, that there are no priors and that there is true remorse. It's hard to imagine anyone not having true remorse after hearing the grief expressed by Mr Beaumont's spouse and sister. The minor, in the scheme of things, legal question of whether or not I ought to take into account the potential double penalty suffered by Mr Madalena as he is the sole shareholder of the corporate defendant.

There are authorities going in different directions. The ones in favour of a discount to the defendant primarily turn on the diminution of the value of the company suffered by the fine which reflects again on the individual if they are the sole shareholder. That is the case here but both the company and Mr Madalena are insured and so there is no diminution in value.

To comply with the authorities, I will give a slight discount to Mr Madalena's penalty to accord with those authorities but I question the application of that. It's a slight discount in the scheme of things. The maximum penalty for the corporation is $1.5m. The seriousness – I know it's not a mathematical exercise but it is at the upper level. A range of between 80 and 90 per cent is what I've found. I've given a discount of 25 per cent.

I note that it's some time since the events but the charges were laid late and I'm aware of how sometimes these matters move slowly and I do give a 25 per cent discount for an early plea notwithstanding the apparent delay that others may feel has occurred. For the corporate entity, I impose a fine of $960,000. There's a victims levy of $1000. Costs were agreed at $55,000 weren't they?

MR YOUNG: Yes, your Honour.

MR MCCONELL: Yes.

HIS HONOUR: I am imposing those costs on the corporate entity. You don't need to be heard on that do you?

MR YOUNG: No.

HIS HONOUR: $55,000 costs paid by Titan Plant Hire Proprietary Limited. For Mr Madalena, the maximum penalty is $300,000. I understand that the elements of the charge are different but the seriousness of the breach is similar. Plea discount 25 per cent and a notional about $10,000 discount for the double penalty that those authorities talk about. I do make and impose a penalty of $180,000 with a $150 victim's levy.

Does that address everything?

MR MCCONELL: For the authority, yes, your Honour.

HIS HONOUR: Mr Liveris, is there anything further?

MR LIVERIS: Your Honour, might I have the briefest of moments just to check a matter with my instructor. It won't need an adjournment of this proceeding. Perhaps (inaudible).

HIS HONOUR: Are you going to do that somehow privately? Do you want us to bump you out into a lobby or - - -

MR LIVERIS: I think we are doing that privately right now, your Honour. Your Honour, the only matter that I would ask and I appreciate your Honour mentioned it in more significant reasons as whether you would be prepared to split the costs so that $27,500 is payable by the company and $27,500 is payable by Mr Madalena.

HIS HONOUR: Mr McConell, you don't have an objection to that do you?

MR MCCONELL: No objection to that, your Honour. Out of an abundance of caution, can I just bring to your Honour's attention that a costs order in that amount involves the exercise of discretion by the court to depart from the prescribed scale. And out of an abundance of caution, would your Honour make an order to depart from the scale and order costs as agreed?

HIS HONOUR: Where are? Section 77?

MR LIVERIS: Your Honour?

HIS HONOUR: Yes?

MR LIVERIS: Could I be heard on that, your Honour? This – the sum that was agreed between costs as effectively a negotiation on a commercial basis and it was not reflective in a without prejudice sense of anything other than that. And I would suggest in those circumstances that it's not necessary for your Honour to do that because it hasn't been the subject of argument. It has simply been a joint approach that the parties made and agreed, that quantum (inaudible) make.

HIS HONOUR: I don't think anything is going to matter out of this, Mr McConnel. Do you want me to step my way through, I think, s 77 of the Act and - - -

MR MCCONELL: Your Honour, what I want is an order for costs and that's what was agreed was that it would be an order for costs. It's implicit in the court making an order for costs that it could only have done so as a departure from the scale. And I am asking no more than that that be specified because I don't want to be met with any unexpected issue around enforcement should that become necessary.

MR LIVERIS: Well, your Honour, it was an agree sum. Both parties made submissions about it. That it was agreed that the sum of $55,000. There hasn't been argument about whether the special circumstances, whether it was required and needed. It was not an issue in the proceedings. I am asking that your Honour make the order in the sum of $27,500 for each defendant. That will remove the concern that my friend just raised about some potential further argument about that. it is a consent order.

HIS HONOUR: Gentlemen. You are making an agreement sound like an argument.

MR LIVERIS: We're content with that, your Honour.

HIS HONOUR: Costs, $27,500 on each file and to the extent that it's necessary, I have exercised the discretion to make that costs order given the nature of these types of prosecutions. Nothing further?

MR MCCONELL: No. Thank you, your Honour.

MR LIVERIS: Your Honour. Sorry, your Honour. Can I just check the victims levy imposed on a corporate entity?

HIS HONOUR: Yes. I think I said, $1000.

MR LIVERIS: Thank you, your Honour. That's all. I just wanted to check.

HIS HONOUR: Okay. Thank you. I will return to my – we might adjourn the court and we will resume in a few minutes with the other matter.

ADJOURNED