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NORTHERN TERRITORY OF AUSTRALIA

LOCAL COURT

No: 21910591, 21911231

NT WORKSAFE

and

BREAKTHROUGH (NQ) PTY LTD

and

PROBUILD (NT) PTY LTD

JUDGE LOWNDES

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 24 SEPTEMBER 2019

Transcribed by:
EPIQ

HIS HONOUR: Yes, the two matters of Probuild v Breakthrough.

MS NGUYEN: Yes it's Nguyen, I appear for the NT Work Safe.

HIS HONOUR: Good, thank you.

MR NOTTLE: Nottle, your Honour, I appear on behalf of Breakthrough and Mr Betteridge who is the managing director of – sorry I appear on behalf of Probuild.

HIS HONOUR: Probuild, yes.

MR NOTTLE: Mr Betteridge who is the managing director of Probuild, he's on the telephone link.

HIS HONOUR: Good okay, thank you. Good morning.

MR BETTERIDGE: Good morning.

MS ESPOSITO: Your Honour, I'm on the phone appearing on behalf of Breakthrough, Esposito, E-S-P-O-S-I-T-O, initial M of Esposito Lawyers.

HIS HONOUR: All right, thank you. Very well I'll now proceed to deal with these matters.

Both companies have been charged with offences, contrary to the *Work Health Safety Act*. Probuild has been charged with failing to comply with a health and safety duty. Breakthrough has been charged with the same offence, but also an offence contrary to s 39, failing to comply with a duty to preserve incident site.

First of all, I note the fairly early guilty pleas of both corporate defendants and extend to each of those defendants a substantial discount in the order of 25 per cent.

The maximum penalty for an offence contrary to s 32, is $1,500,000 for a body corporate which is relevant here and the maximum penalty for an offence contrary to s 39 is $50,000 for a body corporate, again relevant in the present case.

Exhibit 1 in these proceedings was an agreed set of facts which I don't propose to repeat, they have been tendered in evidence and those facts speak for themselves.

In mitigation, counsel for both defendants put forward a general description of their corporate client's operations and general attitude towards safety. In relation to Probuild, the court was informed that the company is a family business based in Alice Springs, had commenced operations in 1993, but a small business and was a commercial construction company specialising in remote area construction.

However, relevant to the present matter, that company expanded its operations in 2015 to the Top End and that's where the work incident occurred in 2017.

The company comes before the court, there's no relevant priors and presents as a company that's always had a very responsible attitude to safety, indeed a positive safety conscious culture and a serious commitment to safety. Clearly what happened on the day in question was not typical of the company's commitment to safety.

The other factor and extremely relevant is that at the relevant time there were in place safety policies and guidelines which is indicative of the company's normal commitment to safety. However, on the occasion in question, there was a failure to implement those important polices and guidelines.

Furthermore, Probuild has a very strong community profile and has made significant contributions to the community, including sponsorships.

I was asked by the prosecutor to be very circumspect about the amount of weight that I ought to attach to the testimonial material because that material did not make any reference to the matter now before the court and tended to be of a general nature.

That aside, I have no doubt in my mind that what happened on the occasion in question was a complete aberration and not typical of their normally responsible attitude to safety and I'm prepared to accept that in the past, the company has made significant contributions to the community.

Breakthrough, I also received submissions from counsel for that corporate defendant and again, that is a company operating a family business, that's done so for 30 years. This is the first offence committed by the company and I was taken to other material which, in my opinion, mitigates the offending.

The company cooperated in the investigation and though accepts that despite all systems were in place or should have been in place, there was a disregard for work health and safety matters on this particular occasion.

In cases like this, of course, one must start with looking at facts that are relevant and for sentencing exercises and I found the case of *Comcare v Commonwealth* quite constructive in that regard, though equally helpful was the decision of Southwood J in the *Damday* case.

When one looks at the relevant factors, any penalty that the court is to impose must do such as to draw attention to occupational health and safety generally to ensure workers, whilst at work, will not be exposed to risks to their health and safety.

Again, in *Comcare v Commonwealth*, it was observed that it is a significant aggravating factor if the risk of injury was foreseeable, even if the precise cause or circumstances of the exposure were not foreseeable.

Furthermore, an offence may be further aggravated if the risk of injury is not only foreseeable, but actually foreseen and an adequate response that risk is not taken by the employer.

The gravity of the consequences of the accident does not itself dictate the seriousness of the offence or the amount of the penalty. However, the occurrence of death of serious injury may manifest the degree of the relevant deterrent to safety.

A systemic failure to appropriately address a known or foreseeable risk is likely to be viewed more seriously than a risk to which the employer was exposed, because of a combination of inadvertence on the part of the employee and a momentary lapse of supervision.

General deterrence and specific deterrence were in large as being relevant and weighty considerations. It's clear that employers are required to take all practical precautions to ensure safety in the workplace, and this requires constant vigilance and employees must adopt an approach to safety which is proactive and not merely reactive. And in view of the scope of those obligations in most cases, it will be necessary to have regard to the need to encourage a sufficient level of diligence by the employer in the future. This is particularly so where the employer conducts a large enterprise which involves inherent risks to safety.

It goes without saying that regard must be had to the maximum penalties set by parliament as indicative of the seriousness of the offence that is to be considered. However, it was also the case that the maximum penalty is reserved for the worst type of offending or the worst type of offender. One must always focus upon the objective seriousness of the offence.

It's very sad in this case that there were in place, in my view, sufficient safeguards and guidelines and policies that could have prevented this unfortunate accident occurring. However, there was a failure to comply with those and I must say, it is difficult to understand how that really happened, but it did happen.

And it is a solitary lesson that even with the best of intentions and the best documented polices and guidelines, things like this do happen and so the court really must do the best it can to ensure that the formulation of sound policies and practices are not in vain. And they really have to be adhered to as an absolute priority.

One of the matters that I had to consider here was the respective culpability of the two defendants. This was not an easy task because it's a fundamental sentencing principle that where two defendants are before the court and are due to be sentenced, then there would be some parity in the sentencing exercise. And one of the things that might warrant a departure from that principle is that a defendant might be more morally responsible or more morally culpable, then the other defendant. So one has to make that comparative analysis.

I think it's clear in this particular case that each of the defendants had a statutory duty and they were concurrent duties and they were non-delegable duties. I think

that's important to keep that in mind when I come to consider whether one defendant was more culpable than the other.

I've carefully considered the agreed facts and again I say it's not necessary for me to repeat what is contained therein. But it seems to me that what happened on the occasion in question was a failure to observe well established policies and I think it would be artificial indeed to differentiate one defendant from the other. I think at the end of the day each of the failures were indispensable conditions for what occurred.

I suspect that if one defendant had failed to observe policies but the other picked up on it, then I'm pretty sure that we wouldn't be here today. So it was a combination of those failures that contributed to the accident.

So I don't propose to differentiate between the two defendants in terms of their moral culpability, I think that would be artificial in the extreme. And I'm also, in coming to that, I'm reinforced by the fact that the act makes it quite clear that in a case where you've got a main contractor and a subcontractor, they are concurrent duties and each has that responsibility. And in cases like this, that responsibility has to be shared and that reinforces my view that each is equally culpable for what happened.

I heard a submission from counsel for Breakthrough that I could lift the corporate vail to look at the good character of the sole director. That was a very interesting point and one at the end of the day I'm not sure that I've reached a completely firm view about that.

But it's quite clear that for breaches of safety regulations, in some instances, both a company and a director can be prosecuted. In this particular case, the directors of these companies weren't prosecuted, the corporate entities were.

It seems to me that when we talk about lifting the corporate vail in your contemporary parlance, piercing the corporate vail, then we're looking at cases where at the end of the day, it would appear that the directors behind the company were the real cause of the offending and if they are, then they're separately prosecuted as opposed to the corporate entity.

So there are a number of situations where the corporate vail can be lifted and that is where there's some fraud, the company's been used as a sham or a façade, there's a group enterprise between the corporate entity and the directors. I don't propose to deal with the abundance of cases that deal with that.

But in this particular case, I don't think that there is any valid reason for looking at the character of the director as a factor that would mitigate. But in any event, I don't think it matters a great deal because the corporate entity has no prior convictions, comes before the court as an entity with good character and so we talk about taking good character into account. Well the company's got that, there's no

need to look beyond that, in my view. But apart from that I have some more reservations about lifting the corporate vail in a case like this.

I was given the benefit of some comparable cases. And I must say those cases can only be regarded as very bare guidelines. Because no case is the same, every case is different and of course every case must be dealt with and also individual merits or circumstances.

The material that was presented to the court about enforceable undertakings, at best, is a very rough guide only. Because those circumstances are outside the sentencing process, they are processes that occur before prosecution and they are in many ways, a diversionary measure that obviates the need for a matter to come to court. So they're fairly rough guidelines and I agree with the prosecutor in that regard.

The other matters that was brought to my attention, the decision of Judge Fong Lim to mention one and the case of *Damday*, again they're very difficult – it's difficult to draw a great deal of assistance from those cases, because as I say, cases differ in their circumstances and one has to have regard to all of the relevant considerations I mentioned earlier.

In this particular case, conditions, in my view, are warranted. I don't think there could be any argument that a non-conviction would be appropriate for this offending. In my view, it was obvious that what was occurring at the worksite on the day in question did pose a very serious risk to health and safety and it's almost difficult to really understand how it happened but it did as I said before.

A conviction, of course, is a punishment in itself, it's stigmatic, it's a solemn declaration that somebody has broken the law and it is a means by which the conduct is condemned and reflects the community disapproval of this type of offending. So convictions, in my view, are totally warranted.

The question then arises, of course, is what is the appropriate penalty. Well as I said before, there are maximum monetary penalties for both offences.

Obviously when considering a fine, the fine must be a severity which is appropriate in all the circumstances of the offence and the court must impose a fine which reflects the gravity of the offending. And as I have said before, in this particular case, the risk was foreseeable indeed foreseen.

One must also have regard to, of course, the offender's financial circumstances and it's well established that the financial circumstances is quite a broad term. It not only includes income or earnings or the ability to make money, but includes assets, debts and things of a like nature.

In this particular case, I have been provided with material as to each defendant's capacity to pay. The information I have received I have suppressed for the reasons

that I articulated the last time the matter came before the court. I don't intend to address in any detail the material contained in those financial statements.

However, I am satisfied that based on the financial information I've been provided with which, as I've said, covers assets and income and all those things, that each company does have the capacity to pay a fine.

Of course, again the fine must be commensurate with the gravity of the offending and in some cases, even where a company doesn't have the capacity to pay, courts still impose substantial fines because of the need to give weight to general deterrence and specific deterrence. So I have approached the matter in that way.

I record convictions in relation – I should say something about the s 39 offence with which Breakthrough has been charged and pleaded guilty to.

The offence, in my view, is established on the material, though I must say it's not of the most serious type. In my view, it was not an example of a case where evidence was contaminated, there was just, in my view, a failure to put tools down, that should have occurred and the site should have been preserved. But I consider it's towards the lower end of the range for offending of that type.

In relation to Breakthrough, I record a conviction and of course, Breakthrough has been charged with two offences. In relation to the failure to comply with health and safety duty, the defendant is fined $30,000.

In relation to the second offence, that is failing to preserve the incident site, the company is fined $2500 and there'll be two victim levies of $1000 and the usual statutory period to pay of 28 days.

Probuild has only been charged with the offence of failing to comply with health and safety. In my view, it's appropriate to also impose a fine of $30,000 plus a victim levy of $1000, again 28 days to pay.

Is there anything arising that you wish to address?

MS NGUYEN: Nothing arising, your Honour.

MR NOTTLE: No, your Honour.

HIS HONOUR: All right. Well I'll just thank those people for appearing on the telephone link and that completes the matter.

MS ESPOSITO: Thank you, your Honour.

ADJOURNED