IN THE SUPREME COURT OF NEW ZEALAND

SC 23/2017
[2017] NZSC 175

BETWEEN	ANNA ELIZABETH OSBORNE AND SONYA LYNNE ROCKHOUSE Appellants
AND	WORKSAFE NEW ZEALAND First Respondent
AND	DISTRICT COURT AT WELLINGTON Second Respondent

Hearing:	5 October 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	K N Hampton QC and S N Meikle for Appellants A L Martin, I Murray and E N C Lay for First Respondent No Appearance by or for Second Respondent
Judgment:	23 November 2017

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **A declaration is made that the decision of WorkSafe New Zealand to offer no evidence in the prosecution of Peter William Whittall was unlawful.**

C **Costs are reserved. The parties may file memoranda by 31 January 2018 if an order for costs is sought.**

REASONS

Elias CJ, William Young, Glazebrook and O'Regan JJ [1]
Ellen France J [102]

ELIAS CJ, WILLIAM YOUNG, GLAZEBROOK AND O'REGAN JJ
(Given by Elias CJ)

[1] It is contrary to the public interest and unlawful for an arrangement to be made that a prosecution will not be brought or maintained on the condition that a sum of money is paid. The principle is not in contention on this appeal. The issue is, rather, whether WorkSafe New Zealand[1] acted to give effect to an unlawful agreement of this nature when it offered no evidence on charges against Peter William Whittall for breaches of the Health and Safety in Employment Act 1992.[2]

The prosecutions

[2] Twenty-nine men died following explosions at the Pike River coal mine on 19 November 2010. Two others were injured but survived. WorkSafe described what happened as "the employment related disaster of a generation." At the sentencing of the mine owner, Pike River Coal Ltd, for breaches of the Health and Safety in Employment Act, WorkSafe submitted that the case was "as serious as one can contemplate … not only with regard to the breath taking omissions and failures at the mine but also in terms of the number of men killed". The view that the omissions and failures in safety at the mine were "breath taking" is also substantiated by the 2012 report of the Royal Commission into the explosions.[3]

[3] The Pike River mine explosions were the subject of investigation by the police for possible criminal offending under the Crimes Act 1961 and investigation by the

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1 WorkSafe New Zealand is the government agency with responsibility for workplace safety legislation, having succeeded to the responsibilities formerly undertaken by the Department of Labour and then the Ministry of Business Innovation and Employment, following restructuring of government activities in July 2012 and December 2013 respectively. The initial investigation and charging decisions in issue in the appeal were undertaken by the Department of Labour. I have, however, referred throughout to WorkSafe New Zealand.

2 The Health and Safety in Employment Act 1992 has now been replaced by the Health and Safety at Work Act 2015, enacted following the Pike River disaster: see Health and Safety Reform Bill 2014 (192-1) (explanatory note) at 1.

3 See Graham Panckhurst, Stewart Bell and David Henry *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (30 October 2012) vol 1 at 15. The findings of the Royal Commission led to the creation of WorkSafe: Health and Safety (Pike River Implementation) Bill 2013 (130-1) (explanatory note) at 1.

Department of Labour (later WorkSafe) for breaches of the Health and Safety in Employment Act. The investigations were launched within days of the explosions.

[4] Twelve charges under the Health and Safety in Employment Act were laid in November 2011 against Mr Whittall, a director and chief executive officer of Pike River Coal. Eight of the charges were laid under s 56(1) of the Act on the basis that Mr Whittall, as director and officer of Pike River Coal, had "directed, authorised, assented to, acquiesced in, or participated in" the safety failures of the company. These are stand-alone charges that can be laid under s 56 whether or not charges are brought against the company. The failures alleged were principally in relation to the management of the risk of methane gas explosion and inadequacies in ventilation.[4] The remaining four charges were laid under s 19 of the Act for alleged failures of Mr Whittall as an employee to take all practicable steps to avoid harm to others.[5] Under s 54A(2) of the Act, the laying of charges by WorkSafe prevents any private prosecution for the breaches.

[5] Mr Whittall was the only natural person charged in relation to the safety conditions at the Pike River mine. But at the same time the charges were laid against Mr Whittall, the company itself was charged in relation to similar breaches of the Act. Three charges under the Health and Safety in Employment Act were also brought against VLI Drilling Ltd, a contractor engaged by Pike River Coal.

[6] It was unnecessary under the Health and Safety in Employment Act for the charges based on the safety conditions at the mine to attribute responsibility for the explosions and therefore the deaths.[6] WorkSafe did not seek to do so in the charges it brought.

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4 Section 56(1) of the Health and Safety in Employment Act provides that where a body corporate fails to comply with the Act "any of its officers, directors, or agents who directed, authorised, assented to, acquiesced in, or participated in, the failure is a party to and guilty of the failure and is liable on conviction to the punishment provided or the offence, whether or not the body corporate has been prosecuted or convicted."

5 Section 19 makes it an offence for an employee to fail to take "all practicable steps to ensure … that no action or inaction of the employee while at work causes harm to any other person".

6 See ss 6, 18, 19 and 56.

[7] VLI Drilling pleaded guilty and was convicted in respect of the three charges laid against it. On 26 October 2012 it was fined a total of $46,800.[7] The sentencing Judge, Judge Farish, described the culpability of VLI Drilling as "moderate."[8] She expressly found there to have been no causal connection established between the omissions by VLI Drilling and the explosions but declined an invitation to discharge it without conviction on the basis that the offence was in allowing unsafe conditions and "[t]he culpability is the same regardless of whether the risk materialised".[9] The Judge allowed a discount of 25 per cent to reflect VLI Drilling's early guilty pleas and further total discounts of 30 per cent in recognition of its cooperation with the investigation, amends to the families of the deceased, and the steps it had taken to improve its operations.[10]

[8] Pike River Coal, by then in receivership, pleaded not guilty but thereafter did not actively defend the charges. The charges were determined following a formal proof hearing in March 2013 at which the company was not represented. Pike River Coal was found guilty in April 2013 and convicted on nine charges.[11] Judge Farish, in entering convictions, found that the failures of the company in relation to methane and ventilation management were causative of the explosions[12] and that failures in relation to panel geology[13] represented "crucial and fundamental error".[14] These findings that the safety failings of Pike River Coal had caused the explosions and therefore the deaths and injuries meant that a sentence of reparation was available.[15]

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7 *Department of Labour v VLI Drilling Pty Ltd* DC Greymouth CRI-2011-018-1036, 26 October 2012.

8 At [48].

9 At [34].

10 At [51]–[53].

11 See *Department of Labour v Pike River Coal Ltd* DC Greymouth CRN-1101-8500-202/202,211, 18 April 2013 (an interim judgment); and *Department of Labour v Pike River Coal Ltd* DC Greymouth CRN-1101-8500-202/202,211, 3 May 2013 (the final judgment).

12 *Department of Labour v Pike River Coal Ltd* DC Greymouth CRN-1101-8500-202/202,211, 3 May 2013 (final judgment) at [34].

13 A "panel" is a specific area of coal extraction within a mine. The geological properties of a panel and its surrounding rock affect the risks associated with mining that coal: for example, the chance that roof of the "goaf" (the void left behind once the coal is mined) will collapse, causing a windblast effect and/or expelling explosive gas or coal dust. In turn, this affects the safe width of mining operations (the wider the extraction the more likely the roof of the goaf is to cave in): see Graham Panckhurst, Stewart Bell and David Henry *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (30 October 2012) vol 2 at 12–16, 159 and 168.

14 *Department of Labour v Pike River Coal Ltd* DC Greymouth CRN-1101-8500-202/202,211, 3 May 2013 at [118].

15 A sentence of reparation can be made only to compensate for loss proved to have been caused by offending: see s 32(1) of the Sentencing Act 2002.

[9] At sentencing on 5 July 2013 Pike River Coal was fined a total of $760,000 and ordered to pay $3.41 million in reparations to the survivors and to the families of the 29 men who died.[16] In sentencing the company, Judge Farish referred to its "systemic and sustained series of errors and omissions from the mine's conception to its ultimate demise".[17] The hazards were said to be well known, predictable and preventable. Health and safety issues were "not given priority by the company" which, at the time of the explosions "was under extreme pressure to produce coal" and was "well behind in their production targets".[18] The Judge highlighted the company's significant departure from safety standards, including departure from the company's "own acknowledged plans and safety plans".[19] She indicated that the fine imposed reflected her assessment that the case was within the worst kind, justifying maximum penalties.

[10] As the Judge's sentencing remarks indicate, it was appreciated that the chances of payment of the fines and the reparations were doubtful. Judge Farish however expressed some optimism that a combination of the directors and shareholders could yet come up with the reparation ordered.[20] In that connection she referred to the fact that the directors had significant insurance. The company itself was however already in receivership at the time of the sentencing and was eventually removed from the register without the payments being made.

[11] Mr Whittall pleaded not guilty to all charges under the Health and Safety in Employment Act. Preparation for summary trial began. It included substantial disclosure, some of which proved contentious, and the briefing of expert evidence.

[12] The police investigation took longer to be concluded than the Health and Safety in Employment Act investigation. One of the charges being investigated was manslaughter and, unlike the charges under the Health and Safety in Employment Act, it required demonstration to the criminal standard that the conduct of the defendants caused the death of the men in the mine. In July 2013 the police announced they would

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16 *Department of Labour v Pike River Coal Ltd* DC Greymouth CRI-2012-018-822, 5 July 2013 (sentencing judgment) at [41].
17 At [4].
18 At [5].
19 At [35].
20 At [20].

not be laying charges under the Crimes Act. There was "insufficient evidence to prove a causal link between the actions of any individual and the specific events which led to the explosion", as was required for a charge of manslaughter.[21] Although the police acknowledged that there was "enough evidence to support a charge of criminal nuisance",[22] they concluded that a prosecution for criminal nuisance did not meet the public interest test under the Solicitor-General's Prosecution Guidelines,[23] "given the ongoing prosecutions led by [WorkSafe] under the Health and Safety in Employment Act".

[13] The present appeal concerns the eventual decision of WorkSafe to offer no evidence on all charges against Mr Whittall after he agreed to make a payment into court of $3.41 million. The source of the money was director insurance which, although not available to pay fines under the Act,[24] seems to have been available for the payment proposed and was being used for the costs of Mr Whittall's defence. As a result of the decision to offer no evidence, the charges against Mr Whittall were dismissed in December 2013.[25] The District Court made an order for payment out of the money in satisfaction of the order for reparation earlier made against Pike River Coal.

Judicial review

[14] Anna Elizabeth Osborne and Sonia Lynn Rockhouse applied for judicial review in the High Court of the WorkSafe decision to offer no evidence and the decision of the District Court to dismiss the charges against Mr Whittall. Ms Osborne is the widow of Milton Osborne and Ms Rockhouse is the mother of Ben Rockhouse. Both men died in the mine. The applicants claimed that the decisions of WorkSafe and the District Court were unlawful because they were based on a bargain to stifle

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21 It had not been possible to establish the cause of the explosion because the mine remained inaccessible after the explosion.

22 An offence punishable by up to one year's imprisonment under s 145 of the Crimes Act 1961 for any unlawful act or omission to carry out a legal duty known to be an act or omission which would endanger others.

23 The Guidelines are described below from [27].

24 Health and Safety in Employment Act, s 56I.

25 *Department of Labour v Whittall* DC Christchurch CRI-2012-018-821, 12 December 2013.

prosecution and failed to comply either with the Solicitor-General's Prosecution Guidelines or the purposes of the Health and Safety in Employment Act.[26]

[15] The claims have been unsuccessful in the High Court and the Court of Appeal.[27] The claim in respect of the decision of the District Court is no longer maintained and does not need to be dealt with when describing the history of the litigation. The challenge that remains live is that relating to the decision by WorkSafe to offer no evidence to the charges. The appellants seek a declaration that the decision to offer no evidence was unlawful. It is accepted by them that orders to set aside the decision to offer no evidence and to require the prosecution to proceed is no longer an available option with the passage of time.

[16] In the High Court, Brown J considered that the claims for judicial review were "not amenable to judicial review" because he considered the allegations did not amount to abuse of power or the exceptional circumstances which could justify review of the wide discretion available to prosecutors.[28] In case wrong in that view, Brown J indicated why in any event he considered there was no error which would justify judicial review.

[17] WorkSafe had accepted that an agreement to make a payment in return for the charges being dropped would constitute an illegal arrangement which would not be consistent with the Solicitor-General's Prosecution Guidelines.[29] It argued however that the arrangement was a voluntary one which WorkSafe was entitled to consider with other matters properly bearing on the decision whether or not to continue the prosecution. Brown J accepted the WorkSafe position. He took the view that the payment made by Mr Whittall, although conditional on no evidence being led, had not been pursuant to an illegal "binding bargain" to stifle prosecution (such as WorkSafe had accepted would not be consistent with the Solicitor-General's Prosecution

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26 Other bases of review were advanced in the High Court and Court of Appeal but are no longer pursued. It is therefore unnecessary to refer to them for the purposes of these reasons.

27 *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 (Brown J); and *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 (Kós P, Randerson and French JJ).

28 *Osborne v WorkSafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 at [42].

29 At [54].

Guidelines).[30] The Judge took the view that WorkSafe had not fettered its discretion and had arrived at its decision after considering a range of matters it was able properly to consider. The prospect of securing the payment of the reparation order made against Pike River Coal was a matter it was entitled to take into account consistently with the Solicitor-General's Prosecution Guidelines in the absence of a binding agreement that payment would lead to the withdrawal of the charges.[31]

[18] Other matters taken into account by WorkSafe (such as the high cost of the trial, the "low" prospects of guilty verdicts, the fact that any fines imposed were not likely to be substantial fines, and the fact that a comprehensive report about the disaster had been obtained through the Royal Commission) were not irrelevant considerations, as the applicants had suggested, but rather considerations which, even if they might have been differently weighed, could not justify judicial review of the discretion of the prosecutor.[32] The Judge also rejected the arguments that WorkSafe had failed to consider the objects of the Act and had failed to meet the claimed legitimate expectations of the applicants that they would be consulted about the decision to discontinue the prosecution (a matter no longer pressed in this Court).[33] He took the view that although there was no reference in the documents evidencing WorkSafe's consideration of the decision to s 5(g) of the Health and Safety in Employment Act (requiring "appropriate response to a failure to comply with the Act depending on its nature and gravity"), it could not be said that the object was not one to which WorkSafe had regard.

[19] On appeal, the Court of Appeal differed from the High Court in taking the view that the decision to offer no evidence was justiciable. It accepted however that it would be rare for relief to be available because of the wide range of considerations open to the decision-maker.[34] Such exceptional error could, it thought, have arisen in the case in three circumstances: if the decision to offer no evidence had resulted from an unlawful bargain to stifle prosecution; if the decision was inconsistent with the

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30 At [57]–[59].
31 At [60]–[63].
32 At [64]–[77].
33 At [78]–[94].
34 *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [32]–[53].

Solicitor-General's Prosecution Guidelines; and if WorkSafe had failed to act in accordance with the purposes of the Act contained in s 5(g).[35]

[20] The Court of Appeal concluded it could not be inferred from the evidence there was "a meeting of minds and striking of a bargain over the payment of reparation in return for withdrawal of charges".[36] The Court of Appeal pointed to four considerations that had driven its conclusion that there was no "improper bargain":[37]

(a) Although discussions between counsel had the characteristics of a negotiation, counsel for WorkSafe did not have authority to settle the outcome.

(b) It was Mr Whittall who put forward a "conditional reparation undertaking: that in the event the prosecution terminated, the payment would be made" but "it was then for WorkSafe to make its decision whether to pursue the prosecution or not"; it was proper for the conditional reparation undertaking to be a factor in the final decision.

(c) The decision was made by the Chief Inspector, Response and Investigations, Keith Stewart, who was "an independent public servant", not interested in the outcome or the bargain and free of any mindset arising out of the negotiations because he had not been party to them; Mr Stewart's initial assessments as to whether to proceed with the prosecution were principally concerned with the prospects of success and were undertaken without reference to the conditional offer; the offer was taken into account only at a late stage when Mr Stewart was reassured, after legal advice, that it was proper to do so.

(d) It was not suggested that Mr Stewart had acted in bad faith and nor could it be suggested that he did not fulfil the applicable test of bringing a "fair and honest mind" to the decision whether to proceed with the prosecution.

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35 At [51].
36 At [67].
37 At [68]–[72].

[21] The Court of Appeal therefore concluded that, on the facts, the decision to offer no evidence on the charges was not taken as a result of bargain. Rather, it accepted that Mr Stewart had made the decision with a "fair and honest mind", which the Court of Appeal considered to be the test for a bargain to stifle prosecution.[38] In that decision Mr Stewart was "entitled in law" to consider the "conditional reparation undertaking".[39] The Court considered that it was appropriate to take into account the reparation enabled by the conditional payment and took the view that the reparation ordered against Pike River Coal (which was otherwise unlikely to be paid) could not be "disentangle[d] from Mr Whittall's proposal".[40]

[22] The Court of Appeal was critical of the submission that the decision did not reflect the Solicitor-General's Prosecution Guidelines because under them rectification of harm is a factor only where it is accepted by the victims. It pointed out that the Guidelines are not a code.[41] The Court considered that it was open to WorkSafe to prioritise recovery of the reparation ordered against Pike River Coal over any acknowledgement of responsibility or other accountability on the part of Mr Whittall.

[23] Nor did the Court accept that the arrangement was contrary to the policy of s 5(g) of the Act. That section looks to "an appropriate response to a failure to comply with the Act depending on its nature and gravity". The Court of Appeal took the view that "[t]he section does not preclude a prosecutor from facilitating finality in the dismissal of charges" and said that it was not clear that Mr Whittall's alleged offending ("rather than [Pike River Coal's] proven offending") was grave.[42] In any event, the weighing of factors such as the gravity of offending was held to be "beyond the proper scope of judicial review of a prosecution decision".[43]

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38 At [71].
39 At [72].
40 At [77].
41 At [77].
42 At [82]–[84].
43 At [84].

The appeal

[24] From the decision of the Court of Appeal, Ms Osborne and Ms Rockhouse appeal with leave.[44] WorkSafe no longer contends that the decision to offer no evidence is not justiciable. It accepts the approach to judicial review of prosecutorial discretion taken by the Court of Appeal. WorkSafe also continues to accept, as it did in the High Court and Court of Appeal, that an agreement not to prosecute in return for payment is contrary to public policy and the Solicitor-General's Prosecution Guidelines and is illegality that would justify judicial review to quash a decision based on it to offer no evidence.

[25] The appeal turns on whether the Court of Appeal was right to hold that the conditional arrangement made by Mr Whittall to pay the reparations ordered against Pike River Coal was not an agreement to prevent the prosecution but an offer of voluntary payment which WorkSafe was entitled to take into account in making its decision about prosecution. In order to address this matter it is necessary to traverse the facts behind the offer and the decision made by WorkSafe in some detail. Before doing so we set out the legal framework in which prosecution decisions are taken under the Health and Safety in Employment Act.

Prosecution under the Health and Safety in Employment Act

[26] The charges against Mr Whittall were laid in the District Court by information by Mr Stewart who was, at the relevant time, an inspector appointed under the Health and Safety in Employment Act.[45] The laying of the informations by an inspector precluded any private prosecution for the breaches of the Act.[46] By March 2013, when the formal proof hearing against Pike River Coal was heard, Mr Stewart was Chief Inspector, Response and Investigations and the manager who headed the Pike River investigation team.

[27] The case against Mr Whittall proceeded under the provisions of the Summary Proceedings Act 1957. As public prosecutions, the informations were subject to the

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44 *Osborne v WorkSafe New Zealand* [2017] NZSC 90.

45 Section 54A(1) of the Health and Safety in Employment Act. The functions of inspectors include investigation and enforcement under the Act: s 30.

46 Section 54A(2).

general responsibilities of the Solicitor-General and the Guidelines established by the Solicitor-General. Since the coming into effect of the Criminal Procedure Act 2011, the role of the Solicitor-General in the "general oversight of public prosecutions", including through the maintenance of guidelines and general advice and guidance, has been recognised by statute.[47] In the present case, the decision to offer no evidence explicitly invoked the Solicitor-General's Prosecution Guidelines. That reliance is consistent with the expectations expressed in the Guidelines that "[a]ll public prosecutions … whether conducted by Crown prosecutors, government agencies or instructed counsel, should be conducted in accordance with these Guidelines".[48]

[28] The Guidelines provide that prosecutions should be initiated or continued only if the "test for prosecution" is met.[49] There is provision for review of the charges before trial to determine whether the charges should be prosecuted or, among other things, withdrawn.[50]

[29] The Guidelines describe the "test for prosecution" as being met if:

> 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
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> 5.1.2 Prosecution is required in the public interest – the Public Interest Test.

[30] The Guidelines require each test to be "separately considered and satisfied before a decision to prosecute can be taken".[51] They are to be considered in sequence, with the evidential test being satisfied before consideration of the public interest test.

[31] The evidential test is met where "there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence".[52] Credible evidence is evidence which is "capable of

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47 Criminal Procedure Act 2011, s 185.
48 *Solicitor-General's Prosecution Guidelines* (Crown Law, 1 July 2013) at [2.1].
49 At [5.1].
50 At [9].
51 At [5.2].
52 At [5.3].

belief".[53] The Guidelines provide that only evidence which is or reliably will be available and legally admissible can be taken into account in reaching a decision to prosecute. This evidence must be capable of meeting the criminal standard of proof. What is required by the evidential test is that "there is an objectively reasonable prospect of a conviction on the evidence".

[32] The public interest test is based on a broad presumption that it is in the public interest to prosecute where there has been a contravention of the criminal law.[54] Where the case is serious the presumption is "a very strong one". It is recognised however that prosecution resources are not limitless. In addition it is recognised there will be circumstances in which, although the evidence gives a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. The illustration is given of considering a diversionary option if the defendant is a youth.

[33] The Guidelines provide an illustrative list of factors to be considered under the public interest test.[55] As is relevant to the present case, listed public interest considerations in favour of prosecution include:

(a) the seriousness of the offence, described as "the predominant consideration"; and

(b) whether the offender has created "a serious risk of harm".

[34] A list illustrative of public interest considerations *against* prosecution include:[56]

(a) where the court is likely to impose "a very small or nominal penalty";

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53 At [5.4].
54 At [5.7].
55 At [5.8].
56 At [5.9].

(b) where the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgment or a genuine mistake;

(c) where the offence is not on any test of a serious nature, and is unlikely to be repeated;

(d) where prosecution will have a detrimental effect on physical or mental health of victims; and

(e) where the defendant is of a vulnerable age, has no previous convictions, or was suffering from significant mental or physical ill health at the time of the offending.

[35] The Guidelines recognise explicitly that prosecution may not be appropriate:[57]

> Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants should not be able to avoid prosecution simply because they pay compensation) … .

[36] It is indicated that in regulatory prosecutions, relevant considerations "will include an agency's statutory objectives and enforcement priorities".[58]

[37] Finally, the Guidelines provide that "[c]ost is also a relevant factor when making an overall assessment of the public interest".[59]

The proposals to "resolve" the case

[38] Preparation for the hearing of the charges against Mr Whittall was well-advanced by October 2013. Before the decision was taken not to offer evidence, 90 witness briefs, some unsigned, had been provided to the Court and to defence counsel and some 600,000 documents had been reviewed for disclosure.

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57 At [5.9.10].
58 At [5.10].
59 At [5.11].

[39] At some time before 8 July 2013 (when, is not clear) Crown counsel and counsel instructed for Mr Whittall opened discussions about resolution of the charges. Mr Stanaway, the Crown Solicitor in Christchurch who was advising WorkSafe, referred to earlier discussions when inquiring in an email of 8 July to Mr Grieve QC, representing Mr Whittall, as to the "possibility" of "meeting to attempt a plea arrangement resolution to the charges Mr Whittall faces". Mr Stanaway advised that he had "firm instructions to attempt to resolve the case with a plea arrangement and there is a willingness to do so from [WorkSafe]'s position, within the new Solicitor General Prosecution Guidelines" which now had the "recognised consideration" of "cost and best use of resources".

[40] The meeting did not take place immediately. At the time of this communication the police investigation had not been concluded. Mr Stanaway's email of 8 July contains an acknowledgement that any meeting would be dependent on the police charging decision on manslaughter, "whatever that will be", being notified to Mr Whittall. Mr Grieve noted in his reply of 9 July that both counsel would be "wasting our time absent a Police announcement". He also said that he could not responsibly advise Mr Whittall "until we see the evidence relied upon by the informant". Disclosure by WorkSafe was under way at this point but was not completed.

[41] The police announced on 17 July 2013 that they would not be laying charges. As has been indicated, that was explained on the basis that manslaughter was not appropriate because there was insufficient evidence to prove that the actions of any individual had led to the deaths at Pike River and that a charge of criminal nuisance was not in the public interest given "the ongoing prosecutions led by [WorkSafe] under the Health and Safety in Employment Act".

[42] With the police prosecution cleared away, a meeting was held between Mr Stanaway and Mr Grieve on 2 August 2013. Mr Grieve in later correspondence with Mr Stanaway said that these discussions were held "at your request". The result of the meeting was that Mr Grieve wrote on 7 August 2013 to make a proposal for a resolution of the prosecutions. The letter referred to the meeting which had taken place between counsel on 2 August. It was described as a meeting "on a without prejudice counsel to counsel basis" to discuss "possible ways to conclude the

[WorkSafe] prosecutions without the need for a very lengthy and expensive trial at which the various allegations would be the subject of detailed challenge". The "essential" basis of the proposal had apparently been discussed at the earlier meeting. Mr Grieve commented that "given the recency and ambit of the discussions I see no need to rehearse the detail now, save to say that the essence of the arrangement that I proposed involved a voluntary payment of a realistic reparation payment, conditional upon the informant electing not to proceed with any of the charges against Mr Whittall". Other conditions which had been discussed might become relevant "later", but that would "depend upon whether the essential elements I have referred to can be agreed".

[43] Although the meeting had ended "on the basis that the defence would put forward a formal written proposal", Mr Grieve suggested that before that step was taken an indication should be given by WorkSafe as to whether, "subject to reaching agreement on the many details to be identified" the essential arrangement identified would be agreed to. Mr Grieve noted that there was little point in taking further time to prepare a comprehensive proposal "if the essential feature from our perspective, namely the dropping of all charges, would in reality be destined for rejection from the outset".

[44] Mr Stanaway did not reply until 20 August but it is clear that counsel for the parties had been in touch by telephone in the meantime. The without prejudice letter sent by Mr Stanaway recited that:

> Currently on the table (on a without prejudice basis) for discussion, is the central arrangement that the insurers for Mr Whittall/[Pike River Coal] would make a voluntary payment of a realistic reparation payment to the Pike River disaster victims, conditional on [WorkSafe] electing not to proceed with any of the charges against Mr Whittall.

[45] Mr Stanaway reported that the proposal had not been dismissed "out of hand" by WorkSafe and was "worthy of further discussion". However, as he had apparently already outlined to Mr Grieve, he considered "the most principled and appropriate outcome would be a plea of guilty by Mr Whittall to at least one charge with an agreed summary and stance on the issues of causation and reparation".[60] Additionally, Mr

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[60] It may be noted that a sentence or order of reparation against Mr Whittall would have been possible

Stanaway doubted whether "withdrawal of the charges alone in return for a substantial voluntary reparation payment would suffice". He referred to discussions about other steps, including the exploration of restorative justice processes or a statement of regret or apology. Mr Stanaway concluded by recognising that prompt resolution was desirable to avoid further financial expenditure. He advised that he would be speaking with senior members of WorkSafe and would advance discussions with them further.

[46] It is not clear from the material before the Court whether there was further contact between counsel, but on 16 October 2013 Mr Grieve emphasised in a letter to Mr Stanaway that the proposals he made depended on the Ministry not proceeding with any of the charges laid against Mr Whittall. The purpose of the letter was:

> … to provide you with more details of a proposal previously discussed with you in very general terms, namely, that a voluntary payment of $3.41 million be made available to the families of the 29 men who tragically lost their lives in Pike River's coal mine and the two men who survived the 19 November 2010 explosion.

[47] The letter separately addressed the payment and the "proposal benefits":

> **Proposed $3.41 million payment**
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> 3. While it is acknowledged that nothing can replace their loss, it is envisaged that a voluntary payment to the families could go some way to alleviating the financial pressures on the families and serve as a meaningful recognition of such loss.
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> 4. It is proposed that the voluntary payment:
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> (a) Will be made on behalf of the directors and officers of Pike River Coal Ltd (in receivership) (the **Company**) at the time of the explosion to individual trusts established in the terms of a trust deed (which we can prepare) for the families of each of the 29 men who died and the two survivors, and
>
> (b) Will comprise allocations of $110,000 to each trust consistent with the amounts calculated by Judge Farish when sentencing the Company.
>
> 5. In advance of the $3.41 million being made available, it is proposed (with precise terms to be agreed) that:

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only if it were proved or admitted that his actions had caused harm to identified victims: see above at n 15.

(a) [WorkSafe] will not proceed with the charges laid against Mr Whittall by advising the Court that no evidence will be offered in support of any of the charges.

(b) A private meeting will be arranged at which Mr Whittall will express sympathy on behalf of the Company to the families and survivors and will convey his personal empathy and condolences.

(c) Each of the Company directors at the time of the explosion will be asked by Mr Whittall to attend this meeting.

(d) Any public statement by [WorkSafe] and/or the Crown about the charges against Mr Whittall being withdrawn will be made in terms agreed with me.

(e) Trustees for each of the 31 trusts sign trust deeds in a form that we can prepare, thus establishing a structure for the payment of each of the $110,000 sums.

6. My instructions require me to emphasise that if the proposed resolution is to proceed, the sooner this happens the better for all concerned. I have been instructed that the proposed payments could be made available promptly insofar as we are concerned. I envisage that from our perspective the whole matter could be finalised possibly before the third anniversary of the first explosion but certainly pre-Christmas should these stipulations be acceptable to [WorkSafe].

[48] The "proposal benefits" identified in the letter were the significant economic and resource benefits in concluding the matter promptly, particularly given the costs of disclosure and trial preparation. Difficulties with WorkSafe's capture and preservation of files of evidential significance were referred to, together with inadequacies in the way in which the electronic data had been used and collected. All these were said to indicate that there would be costly pre-trial applications and that "[b]y withdrawing the charges, not only will all these costs and burdens be avoided, but the extensive judicial and prosecution resources required for a defended hearing of up to 16–20 weeks in length could instead be utilised elsewhere".

[49] The letter concluded:

14. The voluntary payment of $3.41 million is economically viable only if Mr Whittall's continuing preparation costs can be terminated promptly. If this cannot be achieved, the proposed payment will not represent any saving over the cost of proceeding to trial and in that event, whatever the outcome, I believe that the families will not receive anything like the amount offered.

> 15. Accordingly, for all the above reasons, I look forward to hearing from you about whether our proposal is acceptable to [WorkSafe]. …

[50] Some of the arrangements in the letter were subject to modification before, eventually, an open (that is to say, non-confidential) letter was sent by Mr Grieve on 6 December and a final version, after further discussion, was sent on 7 December. Both later iterations were, however, based on the same essential proposal and both remained dated 16 October. Both parties proceeded on the basis that "[i]n advance of the $3.41 million being made available … [WorkSafe] will not proceed with the charges laid against Mr Whittall by advising the Court that no evidence will be offered in support of any of the charges".

[51] Before that happened there had to be final sign-off by WorkSafe and finalisation of the detail of the arrangement (as the letter envisaged) including as to notification to the Court and the families affected and press releases. There was further email communications relating to these matters. On 22 November 2013, Mr Stanaway notified Mr Grieve that the timing of a proposed meeting with the families of the deceased men and the "formal court appearance to offer no evidence (if that is the decision)" could not be finalised until he had instructions from WorkSafe. He expected to receive those instructions on "Tuesday next" (that is, 3 December, although the decision was not in the end made until 4 December).[61]

The WorkSafe decision to offer no evidence

[52] The proposal was discussed by WorkSafe over some days. Discussions with an ad hoc panel assembled by Mr Stewart (which included senior managers from WorkSafe, counsel and representatives of the Solicitor-General) were held during the week of 18 November and the matter was considered further at meetings on 26 and 28 November. At the 26 November meeting it appears that concerns were expressed about the "legality and propriety of considering an offer of a voluntary payment in the context of the public interest component of the prosecution decision". Mr Stewart acknowledged in his evidence that there were concerns expressed at the meeting as to the propriety of considering an offer of voluntary payment.[62] No final conclusion was

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[61] As 22 November 2013 was a Friday, this would either have been Tuesday 26 November or Tuesday 3 December. The latter seems more likely.

[62] In a second affidavit Mr Stewart acknowledged that he first became aware "that Mr Whittall's

reached "but we were all conscious of the importance of ensuring the offer was dealt with in a proper manner and only taken into consideration if it was appropriate to do so".

[53] Legal advice was sought and a second meeting was held on 28 November in which Mr Stanaway advised those present about a further without prejudice discussion with Mr Grieve in relation to the 16 October letter. Mr Stewart said that concerns were again expressed at the 28 November meeting about the appearance of "chequebook justice". On the other hand, the officials "considered this was the only prospect of securing the payment to the families of the reparation order made against [Pike River Coal]". Further legal advice was then taken from in-house counsel, as well from Mr Stanaway and Crown Law, although privilege in the advice was not waived and details are not before the Court.

[54] The decision taken on 4 December by Mr Stewart with the approval of Geoffrey Podger, Deputy Chief Executive (Health and Safety Group), was that:

> … the charges against Mr Whittall should not be proceeded with on the grounds they no longer meet the public interest test.

[55] Mr Stewart later indicated in his evidence that a factor that weighed with those making the decision was that, although "the test for evidential sufficiency was met … the likelihood of obtaining a conviction was low and continuing with the prosecution was not in the public interest". Counsel for WorkSafe accepted in this Court however that the decision to discontinue the prosecution was based solely on assessment of the public interest, not on insufficiency of evidence.

[56] The file note recording the decision taken on 4 December identifies the relevant factors as being:

> **FACTORS CONSIDERED IN DECISION MAKING**
>
> 25. The following factors were considered relevant and were taken into account by the decision makers in the decision not to proceed with the charges against Mr Whittall –

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counsel had offered to make a voluntary payment of reparation" in August 2013. He said he did not recall seeing the 7 August letter from Mr Grieve to Mr Stanaway. He said the voluntary payment proposal was unexpected because WorkSafe had expected a guilty plea.

(a) The difficulties associated with obtaining a successful prosecution against Mr Whittall due to –

    (i) Witness unavailability;[63]

    (ii) Contests between expert witnesses;

    (iii) Indicated and anticipated procedural/pre-trial issues;

(b) That Pike River Coal Ltd (in receivership) was the principal offender and has been held to account, with record fines and reparation ordered;

(c) The seriousness of the offence – there is no causative link alleged, and the maximum sentence is likely to be a fine only, in the tens of thousands of dollars.

(d) That the Royal Commission has heard evidence and provided a comprehensive report on the tragedy;

(e) The matters in a "without prejudice and confidential to counsel" proposal from Mr Whittall's counsel, (which will be superseded by an open letter for disclosure purposes if required);

(f) The unlikelihood of court-ordered reparation being received from [Pike River Coal] by the victims; and

(g) The high costs associated with continuing the prosecution, particularly in light of procedural issues which the defence had indicated it intended to raise pre-trial.

The decision summary is signed by Mr Stewart and Mr Podger. Mr Stewart confirmed the factors taken into account in his affidavit.

[57] A draft press release prepared apparently at the same time the decision was taken (but to be released on 12 December following the expected court hearing), indicated that one of the factors taken into account was the likelihood of a low sentence and "the fact that reparation orders would be unlikely to be imposed". The draft press statement also described the voluntary payment as being "to meet the reparation ordered by Judge Farish at the Pike River Coal Limited sentencing".

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63 In his affidavit in the proceedings, Mr Stewart indicated that "at least 14 notified prosecution witnesses" were unavailable because they were outside New Zealand and it was anticipated that it would be difficult to secure their attendance. Other witnesses were "reluctant".

[58] The families of the men who died and the two survivors were not consulted before the decision to offer no evidence was taken. Mr Stewart said in evidence that one of the reasons for this was the "very high risk with such a large group the confidentiality would be compromised and the offer withdrawn".

[59] As a result of the decision, on 5 December Mr Stanaway was instructed by WorkSafe to offer no evidence on the charges against Mr Whittall.

Continuing discussions and the dismissal of the informations

[60] The decision was communicated to Mr Grieve. On 6 December, apparently in response to a request to make the letter of 16 October an open one and not "without prejudice", Mr Grieve sent Mr Stanaway "a copy of my 16 October letter". He drew attention to new provisions in the letter "relating to the method of payment" but there were further new elements in the letter including some additions described in a later letter[64] by Mr Grieve as having been suggested by Mr Stanaway. They included a new paragraph 2 which read:

> It is understood that you have been reviewing the issues of evidential sufficiency and public interest as they apply to this case in the context of the Solicitor-General's 2013 Prosecution Guidelines. The proposal which follows is made on the basis that we consider that it should be taken into account in the course of your review as a relevant and appropriate public interest consideration.

[61] A new paragraph 3 followed:

> In short, the proposal is that a voluntary payment of $3.41 million be made available to the families of the 29 men who tragically lost their lives in Pike River's coalmine and the two men who survived the 19 November 2010 explosion.

[62] Under the amended letter, payments were to be made to trusts for each of the families of the deceased men and the survivors, with releases for the directors and officers in respect of any further claims. Mr Stanaway responded on the evening of 6 December to advise that this requirement was not acceptable and that the releases appeared to be an attempt to introduce a new condition attached to the payment of the $3.41 million as had (he said) been suggested earlier in the discussions. He pointed

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64 Of 28 February 2014.

out that WorkSafe could not bind the trustees or the families and advised that "[i]f the arrangement is to proceed, the original letter will need to be replicated as far as possible". Mr Stanaway queried the need for setting up of trusts to receive the payments and suggested that the costs could be saved if the $3.41 million "is paid into court as the payment of the reparation ordered against [Pike River Coal]".

[63] This suggestion as to how the payment should be treated was followed up by Mr Stanaway with a further email on 7 December:

> I advised [WorkSafe] the arrangement as I understood it from your original letter was that the $3.4m was intended to represent the payment of the emotional harm reparation ordered by [Judge] Farish against [Pike River Coal] which would be otherwise unpaid. This is a payment which was proposed with the only condition that the charges against Mr Whittall were dismissed.
>
> While I understand there may be other considerations for the insurers now, any variation in the arrangement which changes the character or appearance of the arrangement that I advanced to [WorkSafe] will not be acceptable.
>
> That includes any suggestion that the recipients would be required before receipt of the payment to acknowledge that the payment to them would be in reduction of any future claims by them against insured parties.
>
> Understandably I have very clear instructions to ensure that there is absolutely no issue or condition with the $3.4m payment before offering no evidence.
>
> I request that serious consideration be given to cutting through all of this by making an unconditional payment into Court.
>
> Is there any real risk that the payments made would not be taken into account in reduction of any future successful claims against insured parties?

[64] Mr Grieve advised in response that this suggestion was accepted and that it had been "reflected in the further copy of my 16 October letter now attached". Mr Grieve also amended Mr Stanaway's draft memorandum to the Court to reflect the final arrangement respecting payment and in particular to delete reference to the insurer as "neither necessary or appropriate". He indicated however that he would be filing his own memorandum to the Court to counter what he thought to be the impression conveyed in the WorkSafe memorandum, which Mr Whittall did not accept, "that there is sufficient evidence to proceed against Mr Whittall but the administrative difficulties have led to the decision not to continue".

[65] In the meantime, Mr Stanaway arranged a hearing before Judge Farish at 10 am on 12 December. A memorandum filed before the hearing by Mr Stanaway was supplied in draft to Mr Grieve. It advised the Court that, in accordance with the Solicitor-General's Prosecution Guidelines, the informant had "carried out an extensive review of the charges against Mr Whittall" and concluded that the public interest was served by offering no evidence. It indicated "four fundamental and significant matters to note in relation to the charges and the case against Mr Whittall generally":

(a) Mr Whittall was "primarily charged as a party to the principal offending by [Pike River Coal] on the basis that as an officer he acquiesced or participated in the failure of [Pike River Coal]". Although under s 56 of the Health and Safety in Employment Act, such offences "can properly be seen as stand alone offences carrying their own culpability", the memorandum suggested that "as with s 66 Crimes Act 1961 secondary culpability, the characterisation of the offending is based on secondary participation to that of the principal".[65] Pike River Coal had been convicted, fined substantially and had reparation orders made against it (though the memorandum acknowledged that neither the fine nor the reparation order was likely to be paid).

(b) Although Judge Farish in sentencing Pike River Coal had imposed a sentence of reparation, there was "doubt whether reparation would be ordered against Mr Whittall" since the informant had not "set out to establish a causal link between the acts or omissions amounting to failures to avoid harm [under the Health and Safety Act] and the deaths of the men". Further, any reparation would have to be "commensurate

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65 It should be acknowledged that this characterisation is doubtful. Under s 56(1) of the Health and Safety in Employment Act, officers, directors and agents of companies are parties to and guilty of any failure by a body corporate if they "directed, authorised, assented to, acquiesced in, or participated in, the failure". This liability for the offence is "whether or not the body corporate has been prosecuted or convicted". Very often an officer or director who directs, authorises, assents to, acquiesces in or participates in the failure will be the actual perpetrator since the company can act only through human agents. We are not convinced by the suggestion that comparisons with secondary liability under the Crimes Act are appropriate in this context. In any event, secondary liability may be as serious and culpable as primary liability, so the use of the category is insufficient justification for a conclusion of lesser culpability, without consideration of the actual culpability of the secondary party.

with his means to pay and would take into account any insurance policy available to meet reparation". The fact that Pike River Coal had failed to pay its ordered reparation would be a strong factor against Mr Whittall being ordered to pay reparation himself.

(c) "[I]n order to keep the charges in perspective", imprisonment was not an available sentencing option and the likely fines to be imposed against Mr Whittall "as a secondary party" would have to be commensurate with his culpability and ability to pay.

(d) An in-depth and careful analysis of the Pike River mine disaster was contained in the report of the Royal Commission.

[66] The memorandum referred to difficulties the informant might face in proof because of unavailability of witnesses and doubt as to whether the statements they had made would be admissible if they were not available for cross-examination. It was possible that even more witnesses might become unavailable before trial. The informant had also recognised that the case was complex and it was likely there would be "competing expert opinions". There was also the difficulty of proof beyond reasonable doubt because of the practical effect of lack of access to the mine. The Royal Commission had indicated that without access that made a definitive analysis problematic as to the sources of methane and ignition and similar substantial problems would be encountered in the prosecution.

[67] The memorandum set out the indicators both for and against continuing a prosecution in determining the public interest test and taken into account by WorkSafe. It advised that, in addition:

> 37. Mr Whittall has proposed that (in the event that the charges against him are not proceeded with) a voluntary payment –
>
> (a) Be made on behalf of the directors and officers of Pike River Coal Ltd (in receivership) at the time of the explosion for the families of the 29 men who died and the two survivors; and
>
> (b) Comprise allocations of $110,000 for each of those families and survivors in the amount calculated by Judge Farish when ordering that they be compensated by an order for reparation

> for the significant loss and ongoing trauma that she found had been caused by the actions of the company;
>
> (c) Be paid into Court for it to distribute to the families of the 29 men who died and the two survivors.
>
> 38. The proposed payment of $3.41m reparation made by Judge Farish (as above) of the directors and officers of [Pike River Coal] is not simply a payment made to avoid continued prosecution.
>
> 39. The informant has considered the proposed $3.41m payment on the principled and conventional basis in accordance with the Prosecution Guidelines.
>
> 40. The proposal outlined above has been treated as only one of the relevant public interest factors for a continued prosecution looked at in the context overall of the Prosecution Guidelines.
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> 41. Mr Whittall has also offered to meet privately with the families of the 29 men and two survivors to convey his personal empathy and condolences. Each of the company's Directors at the time will be asked by Mr Whittall to attend.

The memorandum also noted that a "16-20 week trial in Wellington will be a very high cost one both in financial and resource terms and best use of limited resources is an appropriate consideration". For these reasons WorkSafe advised that it offered no evidence on the charges against Mr Whittall and invited that he be discharged.

[68] The matter was heard by Judge Farish on 12 December. In her oral ruling the Judge said that it was "very important to understand that the decisions that have been reached today have been reached by two discrete processes":[66]

> They are the decision in relation to whether or not the prosecution should proceed against Mr Whittall and quite discrete and separate from that, there has clearly been another process which Mr Whittall and the other directors and their advisors have been having once I made the reparation orders in July of this year.

[69] Judge Farish took the view that there had clearly been discussions among the directors about how to meet the reparation payments that had been ordered against the company but that they "could not honour that payment while there were outstanding charges before the Court" because it would be "inappropriate".[67] As soon however as the decision was made that the prosecution of Mr Whittall was not going to proceed

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66 *Department of Labour v Whittall* DC Christchurch CRI-2012-018-821, 12 December 2013 at [1].
67 At [8].

"then the directors, in discussions with the people that they need to discuss matters with, have made this voluntary payment and it is in recognition of the reparation order that I made in July and it is paid into Court on that basis". Judge Farish acknowledged that some might think that this was "Mr Whittall buying his way out of a prosecution" but she was clear that "it is not":[68]

> The decision not to prosecute or to continue with the prosecution has been taken at a very high level and the voluntary payment is really a side issue in terms of that determination, it is quite a side issue and I am quite satisfied of that. Mr Whittall and the directors and senior officers of the company have no obligation to honour that payment. Once these proceedings are at an end they had no obligation to honour that payment because it is quite separate and discrete from these proceedings.
>
> …
>
> So I see this outcome as being a good outcome. …
>
> [T]his voluntary payment honouring that reparation order is an acknowledgement from the directors that the company failed the 29 men and the two men that survived and therefore I am prepared to accept it on the basis that it is given and I am prepared to formally discharge Mr Whittall in relation to all 12 charges before the Court.

Bargains to stifle prosecution

[70] Because of the public interest in prosecution of offences, it has long been held that private bargains to avoid prosecution through payment or provision of other benefit are unlawful.[69] An unlawful bargain not to prosecute arises where there is an understanding or promise, express or implied, that a public offence (as opposed to a civil wrong[70]) will not be prosecuted on condition of the receipt of money or other valuable consideration. The policy of the law is that a defendant who commits what

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68 At [9]–[11].

69 See *Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch); *Clubb v Hutson* (1865) 18 CB (NS) 414, 141 ER 506; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA); and *The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 (PC). The principles expressed have been applied in New Zealand, with adaptation to New Zealand circumstances (including the prevalence of public prosecution and the relief available under the Illegal Contracts Act 1970 (now incorporated into the Contract and Commercial Law Act 2017)): *Banks v The Cheltenham Co-operative Dairy Co (Ltd)* (1910) 29 NZLR 979 (SC); *Mall Finance & Investment Co Ltd v Slater* [1976] 2 NZLR 685 (CA) at 689 per Cooke J (compare at 687 per Richmond P); *Barsdell v Kerr* [1979] 2 NZLR 731 (HC); *Re Elmsly* HC Christchurch M41/98, 2 September 1998; and *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC).

70 A distinction drawn in *Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch).

is a public wrong cannot, by settling the private injury, be "entirely freed from the punishment due to a violation of public law".[71]

[71] Compromise of the private wrong is not objectionable if it follows the conviction of the defendant because "by the previous conviction of the defendant, the rights of the public are also preserved inviolate".[72] Nor is it objectionable to take into account, when deciding whether or not to prosecute, that the defendant has previously made some amends, as long as the prosecutor is not influenced by any indirect motive and brings a "fair and honest mind to the consideration".[73] That was accepted by Bowen LJ in *Jones v Merionethshire Permanent Benefit Building Society*. But he made it clear that what is unlawful and "the one dominant test in each case" is if the prosecution itself is "made a matter of private bargain".[74] If reparation is paid and accepted on the condition that no prosecution will be maintained or if the prosecutor acts (as it was put by Fry LJ in *Jones*) on the basis of the alternatives of taking the money or prosecuting,[75] then whether the prosecutor was "independent" or "fair and honest" is immaterial. The arrangement is contrary to the policy of the law and any such bargain is treated as illegal and is unenforceable.[76] It is also immaterial that a judge may have assented to withdrawal of the charges.[77]

[72] Much of the case-law dealing with bargains to stifle prosecution is concerned with the enforceability of agreements not to prosecute in return for reparation by private complainants (who in the nineteenth century in England had the carriage of most prosecutions). The principle is, however, one of general application. In some respects it is amplified in the case of a public prosecutor. A private prosecutor is recognised to have no legal obligation to prosecute the wrong, but simply a "moral" obligation to "bring a fair and honest mind" to the decision whether or not to prosecute.[78] Public prosecutors however are subject to legal obligations and duties in

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71 At 394.
72 At 394.
73 *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA) at 183.
74 At 183 and 185.
75 At 187.
76 Subject to relief under sub-pt 5 of pt 2 of the Contract and Commercial Law Act 2017 (and formerly the Illegal Contracts Act 1970).
77 As was the case in *Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch).
78 *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA) at 183 per Bowen LJ.

respect of prosecutions for breach of law, which are subject to public law controls if exercised unlawfully, for improper purpose, or unreasonably.

[73] If obtaining reparation in return for a promise to abandon criminal proceedings is "a serious abuse of the right of private prosecution",[79] it is at least as much an abuse of the obligations of public prosecution. Such prosecution is undertaken by public officials. It is undertaken on behalf of the community in vindication of law and to protect rule of law values such as in equality of treatment. The rule of law is undermined if accountability and punishment for public wrongs turns on the means of the defendant. And the prosecution decisions of a public prosecutor must be consistent with the purpose and policies of the legislation which establishes the offence and under which the prosecutor acts. In New Zealand the prosecutor must also act consistently with the Solicitor-General's Prosecution Guidelines which set "core and unifying standards for the conduct of public prosecutions"[80] and are intended to promote public confidence in the system of public prosecution.[81]

[74] We are unable to agree with the Court of Appeal that it was material in assessing whether a bargain was reached that Mr Stewart was an independent public servant who was not financially interested in the outcome or the claimed bargain, as a private prosecutor may well be.[82] Such disinterestedness may answer any questions of personal impropriety (and there was not such suggestion in the present case), but it does not answer the public interest in ensuring that decisions to prosecute are made lawfully and reasonably in the public interest to achieve public determination of responsibility for transgressions of law.

[75] Similarly, if the evidence otherwise indicates that an arrangement has been made to drop a prosecution if payment is made, we do not think it is sufficient to ask whether the prosecutor brought a "fair and honest mind" to the decision or to conclude that he did not act "in bad faith".[83] Bowen LJ in *Jones* did not suggest such a test

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79 As it was described by Lord Atkin in the Privy Council in *The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 at 411.

80 As it was put in the Attorney-General's Introduction to the Guidelines: *Solicitor-General's Prosecution Guidelines* (Crown Law, 1 July 2013) at 1.

81 Solicitor-General's Introduction: at 2.

82 Compare *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [70].

83 At [71].

except for the general duty of a private prosecutor in discharge of the "moral" obligation in all private prosecutions.[84] In relation to decisions to discontinue a prosecution, rather, the "one dominant test in each case" he recognised was that the prosecution "shall not be made a matter of private bargain".[85]

[76] It is immaterial if an agreement to abandon a prosecution is part of the consideration for repayment of an existing debt.[86] The Privy Council has pointed out that it is frequently the case that there is an underlying debt or liability. ("Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence.")[87] It is equally immaterial that there is an underlying harm for which reparation should be made.[88] In *Clubb v Hutson*, the principle acted on was that "[i]t is to the interest of the public that the suppression of a prosecution should not be made matter of private bargain" in any case in which "the personal interest of the aggrieved party" is not the only concern.[89] That is so in the case of all criminal offences. We consider it is also the case in relation to the safety offences under the Health and Safety in Employment Act.

[77] No modification of the policy that agreements not to prosecute are contrary to the public interest is prompted by the place of reparations in the modern law of sentencing in New Zealand. Under the Sentencing Act 2002, courts are empowered to impose sentences of reparation or make orders for reparation.[90] But no such orders or sentences may be made before conviction[91] or (in the case where a defendant is discharged without conviction) before plea of guilty is entered.[92] Similarly, although

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84 *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA) at 183.

85 At 183 and 185.

86 *The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 (PC).

87 At 415–416. Delivering the judgment of the Queen's Bench in *Keir v Leeman* (1844) 6 QB 308, 115 ER 118, Lord Denman CJ held (at 316) that the rule against compromise of private prosecutions for public offences applies "whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe." The judgment of the Queen's Bench was upheld by the Court of Exchequer Chamber: (1846) 9 QB 371, 115 ER 1315.

88 As in the case of *Keir v Leeman* (1846) 9 QB 371, 115 ER 1315 (Exch Ch), where the bargain was made in respect of an assault.

89 *Clubb v Hutson* (1865) 18 CB (NS) 414 at 417, 141 ER 506 at 507 per Erle CJ.

90 See Sentencing Act 2002, ss 12(4), 32(1), 106(3)(b), 108(2)(b) and 110(3)(b).

91 Sections 32(1), 108(1) and 110(1).

92 Section 106(1).

a sentencing court is required to take into account attempts by offenders to "make amends" (including by non-monetary means), any such attempt may be considered only after guilt has been admitted or found.[93] There is no basis in the legislation for its application to a conditional offer to make amends, such as was put forward here. Even when considering the impact of reparations on sentencing following guilty plea or conviction, the courts discount amends which do not appear to reflect acceptance of responsibility and remorse for what has been done.[94] And they are alive to the risks of disparate treatment according to means.[95] The relevance and importance in prosecution decisions of achieving reparations for victims after plea of guilty or conviction is not in issue. That prospect does not prompt reconsideration of the legal policy against agreements not to prosecute in return for payment where the payment will benefit victims. The result would be contrary to the cases holding such bargains to be unlawful where victims pursued private prosecutions.[96]

[78] There is nothing in the Solicitor-General's Prosecution Guidelines which suggests that an arrangement to obtain reparation in exchange for withdrawal of prosecution is permissible. The Guidelines emphasise the "predominant consideration" in prosecution as being the seriousness of the offence and the risk of harm it has created.[97] Although the Guidelines identify that it is a relevant consideration that "the victim accepts that the defendant has rectified the loss or harm that was caused", that is not an indication that the ability to obtain reparation in exchange for withdrawal of charges is a legitimate approach.[98] The Guidelines look to prior rectification of loss or harm, not reparation conditional on withdrawing all charges. And a conditional arrangement is inconsistent with the qualification that "defendants should not be able to avoid prosecution simply because they pay compensation".

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93 Sections 10 and 4(3)(a).

94 See, for example, *R v Singh* (2003) 20 CRNZ 158 (CA); *R v Holt* [2006] DCR 669 (CA) at [66]; *R v M* [2008] NZCA 112 at [34]; *R v Harrison* [2008] NZCA 514 at [23]; *Rafiq v R* [2017] NZCA 220 at [15]; *R v Johnson* [2010] NZCA 168 at [28]–[29]; and *R v N (CA354/03)* CA354/03, 1 March 2004 at [14]–[15].

95 Compare *R v Johnson* [2010] NZCA 168 at [29] with *Gould v R* [2012] NZCA 284 at [31] and *R v F* CA169/03, 15 September 2003 at [22]–[23].

96 See above n 69.

97 *Solicitor-General's Prosecution Guidelines* (Crown Law, 1 July 2013) at [5.7].

98 At [5.9.10].

[79] There is considerable public interest in prosecuting breaches of a statute dealing with safety in employment. The policy of the Health and Safety in Employment Act set out in s 5(g) is to provide appropriate enforcement responses to safety breaches according to the nature and gravity of the failure. A bargain to stifle prosecution in this statutory context is as contrary to the public interest as in the more familiar contexts of violations of the criminal law.

[80] In the present case, WorkSafe was correct to accept that an agreement not to continue the prosecution in return for payment of money to compensate the families of the men who were lost and the men who survived would have been unlawful. The decision to offer no evidence in fulfilment of such a bargain would then have been taken unlawfully. The question that remains is whether WorkSafe was correct in the submission that, as the Court of Appeal found, there was no such bargain.

Was there an agreement to stifle prosecution?

[81] Lord Atkin, delivering the judgment of the Privy Council in *The Bhowanipur Banking Corp Ltd v Dasi*, pointed out that agreements to stifle prosecutions are "from their very nature seldom set out on paper".[99] Instead, they have to be "inferred from the conduct of the parties after a survey of the whole circumstances".

[82] The manner in which the parties describe their dealings is not determinative. In *Bhowanipur Banking Corp Ltd* the payment in issue was described as "voluntary" in much the same way that the payment at issue in the present appeal is characterised in the evidence and some of the contemporary documents as "voluntary". The Board nevertheless concluded that the parties had agreed to the payment in return for no evidence being offered and that the arrangement was unlawful and unenforceable.

[83] Nor is it determinative that the motives or reasons one party had for entering into the arrangement may include considerations other than the conditional payment. In *Bhowanipur Banking Corp Ltd*, a similar argument was advanced to that put forward in the present case: that the decision not to pursue the prosecution resulted

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[99] *The Bhowanipur Banking Corp Ltd v Dasi* (1941) 74 Calcutta Law Journal 408 (PC) at 411. The Board comprised Lord Atkin, Lord Russell of Killowen, Lord Romer, and Sir George Rankin.

from a number of considerations, not simply the voluntary payment, and included the circumstance that the principal offenders were still being prosecuted "and there is no necessity for another trial".[100] Despite these arguments, the Privy Council held that there was nevertheless an agreement to stifle the prosecution in issue: the payment was acknowledged to be a consideration for the prosecutor offering no evidence; and the prosecutor had talked of compromise and had sought adjournments of the case "obviously to arrange the compromise".[101] The fact that others, more culpable, were still being prosecuted did not affect the illegality of the arrangement to offer no evidence in return for payment.

[84] The facts in the present case have been set out in paragraphs [38] to [69]. It is necessary here only to identify what we consider to be the critical matters which lead us to disagree with the conclusions reached in the Court of Appeal.

[85] The initial contact to try to reach a resolution of the case was made by counsel for WorkSafe. It seems to have been concerned with the likely costs of the trial and the complexity of the case. It raised the possibility of Mr Whittall pleading guilty to some or all of the charges, no doubt with an indication that WorkSafe would accept that penalty would be assessed on a discounted basis to take account of the plea and an agreed summary of facts. A similar arrangement was referred to in the subsequent correspondence and it seems a reasonable inference that it was discussed at least in general terms when the first approach was made. There may be nothing wrong with such an approach or with a concern with the costs of prosecution although it is a matter it is unnecessary to consider in the present appeal.

[86] Both counsel agreed that any resolution could not be advanced until the police investigation was concluded and until disclosure was completed. It was clear that WorkSafe was looking for a pleaded outcome.

[87] When discussions took place after the police announcement in July 2013, counsel for Mr Whittall proposed, instead of a plea arrangement, "a voluntary payment of a realistic reparation payment, conditional upon the informant electing not to

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100 At 414.
101 At 415.

proceed with any of the charges against Mr Whittall". In his letter of 7 August, Mr Grieve indicated that there might be other conditions to be considered later but that would "depend upon whether the essential elements I have referred to can be agreed". He required such an indication because there was no point in developing the proposal "if the essential feature from our perspective, namely the dropping of all charges, would in reality be destined for rejection at the outset".

[88] This initial proposal is one of compromise of the prosecution. The "essential elements" were that a "voluntary payment" would be made in return for ("conditional upon") the informant electing not to proceed with any of the charges. The prosecutor was given the alternatives of taking the money or prosecuting. If accepted, this proposal would undoubtedly have constituted a bargain to stifle prosecution. Did the arrangement change in substance? We do not think it did.

[89] In Mr Stanaway's reply on 20 August he acknowledged the essential exchange "[c]urrently on the table" in which the "central arrangement" would be a voluntary payment of a "realistic reparation payment" for the victims, "conditional" on all charges not proceeding. He reported that the proposal had not been "dismissed out of hand" by WorkSafe although he suggested it would be a more principled and appropriate outcome if Mr Whittall pleaded guilty "to at least one charge with an agreed summary and stance on the issues of causation and reparation".

[90] Mr Whittall's counsel did not move on the essential condition of dismissal of all charges for the payment. The first letter of 16 October was a formal offer of a payment of $3.41 million and a meeting between Mr Whittall (and perhaps the other directors) with the families in return for WorkSafe not proceeding with all charges by advising the Court "[i]n advance of the $3.41 million being made available" that no evidence would be offered in support of them. Again, we are of the view that on acceptance this offer would have constituted a bargain to stifle prosecution.

[91] Although in the memorandum of the decision taken on 4 December prepared by WorkSafe a number of factors were identified as having been considered in the decision to offer no evidence, among the factors was "[t]he matters in a 'without prejudice and confidential to counsel' proposal from Mr Whittall's counsel (which will

be superseded by an open letter for disclosure purposes if required)". This was the offer to make payment on the basis that no evidence would be offered on the charges.

[92] The decision taken on 4 December that "the charges against Mr Whittall should not be proceeded with on the grounds they no longer meet the public interest test" was a decision to accept the offer of payment in return for not proceeding with any of the charges against Mr Whittall. It may be accepted that a number of other considerations and motives weighed with Mr Stewart and the others at WorkSafe who made the decision, but that does not detract from the bargain that was reached to end the prosecution on payment of the sum Pike River Coal had been ordered to pay by way of reparation. The payment was a bare payment in the sense that there was no basis on which Mr Whittall himself could have been ordered to make reparation without conviction and without proof or admission of responsibility for the deaths. The essential exchange was affirmed in the memorandum filed in the Court on 11 December. The memorandum recorded that evidence was not offered on the basis of factors which included the offer by Mr Whittall to make a voluntary payment "in the event that the charges against him are not proceeded with".

[93] The payment to be used for reparations was conditional on the withdrawal of the charges. This "central arrangement"[102] had been acknowledged by and known to WorkSafe and its advisers throughout. It was the essence of the payment arrangement, treated as such in the 7 December exchange of correspondence referred to above at [63]. Offering no evidence was understood to be "the essential feature" on which the proposal to pay reparation was based.[103] No formal offer was presented on behalf of Mr Whittall until WorkSafe had indicated through its counsel that the essential exchange would not be rejected out of hand. It was immaterial that it was Mr Whittall who put forward the conditional reparation payment in the first place. We are unable to agree with the view taken by the Court of Appeal that the circumstance was a pointer to there being no improper bargain when the offer was accepted by WorkSafe. We have already indicated at [74]–[75] why we do not agree too with the reliance placed by the Court of Appeal in its conclusion on the fact that Mr Stewart was "an independent public servant" or absence of any suggestion of bad faith on his part. The

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102 As it was referred to in the letter of 20 August quoted above at [44].
103 See above at [43].

fact that WorkSafe had other reasons of its own for resolving the charges without trial does not affect the bargain that was reached. It may well have been the case that counsel for WorkSafe did not have authority to "settle the final outcome", as the Court of Appeal said.[104] But it is clear that the decision made by Mr Stewart, who did have authority in relation to the informations, was on the basis of the negotiations undertaken by its counsel. We do not therefore accept the reliance placed by the Court of Appeal on the fact that counsel did not have authority to settle as one of the considerations that led it to conclude that there was no improper bargain.

[94] Although WorkSafe had to consider whether to accept the proposal and in that consideration took into account a number of matters legitimately of significance to it (such as the costs of the hearing), those considerations do not change the effect of the arrangement concluded with Mr Whittall. It was achieved through the acceptance by WorkSafe of the offer made by Mr Whittall, the essential terms of which were a payment in exchange for the dropping of all charges. Mr Stewart explained the reason why WorkSafe did not consult the families as being the "very high risk with such a large group that confidentiality would be compromised and the offer withdrawn". The offer of payment was accepted with the arrangement to offer no evidence.

[95] Although Judge Farish expressed the view that the "voluntary payment" was a "side issue" in the decision not to continue the prosecution and that the reparation payment had been arrived at in a separate and discrete process from the prosecution decision to offer no evidence, she did not have before her the information provided in the judicial review proceedings. It makes it clear that the payment of $3.41 million was understood throughout to be on the condition that WorkSafe offered no evidence to the charges. The High Court and Court of Appeal appreciated that the payment was "conditional" on the charges not proceeding. We are unable to accept that they were correct however to shrink from the inevitable conclusion that such arrangement was an unlawful bargain to stifle prosecution. The conclusion we reach that it was means that the appeal must be allowed.

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104 *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [68].

[96] As will be apparent, we consider that a number of the considerations which weighed with the High Court and Court of Appeal treated the question for determination as being whether the decision to withdraw charges could be impugned on general grounds of judicial review. The matters said to have been weighed by WorkSafe in determining not to proceed with the prosecution include questions of cost, the reparation able to be obtained for the families, the fact that Pike River Coal was the "principal" offender and had been convicted and fined heavily, the likelihood that any fines imposed on Mr Whittall would be low, the risks that a conviction would not be obtained because of witness reluctance and availability and difficulties with expert witnesses. It is said that the matters identified are relevant and the weight to be given to them was for WorkSafe and would not justify judicial review. Such considerations are gathered together in the memorandum relating to the 4 December decision and that provided to the District Court Judge.

[97] It is unnecessary to express any view on whether, in the absence of an unlawful bargain, the decision to offer no evidence would in any event have been lawful. The conclusion that the conditional payment was unlawful is determinative of the appeal. We should not however be taken to agree with the High Court or Court of Appeal that the justifications put forward for the decision were adequate to pass the supervisory jurisdiction of the court. It is not clear for example on what basis it is said that Pike River Coal was the principal offender and that Mr Whittall was to be treated as a "secondary party" to the breaches of the Health and Safety in Employment Act by Pike River Coal as principal. That characterisation and the analogy with s 66 of the Crimes Act does not seem easily justified on the terms of s 56 of the Act (discussed above at n 65) or in the context of the liability of a corporate body.[105] Nor does it address the distinct charges faced by Mr Whittall personally for breaches of his duties as an employee.[106] Nor is it clear why it is suggested that the Royal Commission's report was sufficient response to the matters of individual responsibility raised by the prosecution. The Commission was not asked to assess individual culpability in its

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105 Section 56 of the Health and Safety in Employment Act was contrasted with the party provision in s 66 of the Crimes Act by the Court of Appeal in *Assistant Registrar of Companies v Moses* [2004] 3 NZLR 577 at [23].

106 The basis of the four charges under s 19 of the Health and Safety in Employment Act, explained above at [4].

terms of reference. It was careful not to cut across the criminal investigations then underway.[107]

[98] In addition, there is some force in the argument advanced by the appellants that there was no explicit focus in the decision to offer no evidence on the purposes of the Act referred to in s 5(g) or the emphasis in the Solicitor-General's Prosecution Guidelines as to the significance in prosecution decisions of the seriousness of the breaches. The object of the Act in enforcement is to provide "an appropriate response to a failure to comply with the Act depending on its nature and gravity". In that connection there is no evident consideration of the seriousness of the breaches of the Act and the creation of risk entailed in the breaches beyond the indication that "no causative link [to the explosions is] alleged". (None was required to be established by the charges.) There is no reference to the assessment earlier made by WorkSafe at the Pike River Coal hearing and accepted by Judge Farish that the case concerned "the health and safety event of this generation" and that "a worse case is hard to imagine and is unlikely to ever eventuate".[108] Nor does it seem to have been treated as relevant that the option of a police prosecution for criminal nuisance had not been taken because it would cut across the public interest in the WorkSafe prosecutions and that the possibility of a private prosecution was removed by the WorkSafe informations.

[99] It is the case that the best "outcome" that might have been looked to by WorkSafe from a successful prosecution was a fine set at a level that reflected Mr Whittall's own financial circumstances. But the maximum sentences provided by the legislation for the charges were fines and fines must, in application of general sentencing principles, reflect the personal circumstances of the defendant. Both limits were known to WorkSafe in laying the charges in the first place.

[100] These matters are raised to indicate that there were issues that might have required further consideration on the pleadings if the arrangement that led to the withdrawal of the charges had not been unlawful. We express no views on how they would be assessed if it had been necessary to deal with the other grounds of judicial

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107 Graham Panckhurst, Stewart Bell and David Henry *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (30 October 2012) vol 1 at 3 and 6–7.

108 *Department of Labour v Pike River Coal Ltd* DC Greymouth CRI-2012-018-822, 5 July 2013 at [4].

review. Nor is it necessary for us to consider the extent to which it might be appropriate to consider such matters in judicial review of a prosecutorial discretion.

[101] The dispositive reasons on the appeal are those that lead to the conclusion that the conditional payment was a bargain to stifle prosecution. As a result, the appellants are entitled to the declaratory relief they seek. The appeal is allowed. We grant the appellants a declaration that the decision of WorkSafe to offer no evidence in the prosecution of Mr Whittall was unlawful. It is not clear that the appellants seek costs in this Court. Costs are accordingly reserved. The parties may file memoranda by 31 January 2018 if an order for costs is sought.

ELLEN FRANCE J

[102] I too would allow the appeal and make a declaration that the decision to offer no evidence to the charges against Mr Whittall was unlawful. I agree also with the approach of the Chief Justice as to costs. I would however express my reasoning in the manner set out below.

[103] The decisive feature of the present case is that it is simply not possible to put any distance between the way in which Mr Grieve QC for Mr Whittall put the basis for payment of the money by Mr Whittall and the decision to offer no evidence. It was always advanced as an essential, non-negotiable, condition of the discussion that Mr Whittall would not be charged. Mr Stanaway (the Crown Solicitor advising WorkSafe New Zealand), in his letter of 20 August 2013 to Mr Grieve, referred to the payment of funds in return for no prosecution as the "central arrangement".[109] The centrality of this aspect is also apparent in Mr Stanaway's rejection of other conditions Mr Grieve later sought to have imposed on payment.[110] It was quite clear that if there was a prosecution, no payment would be made. The Court of Appeal's conclusion that Mr Whittall's proposal was "a conditional reparation undertaking: that in the event

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109 See Elias CJ above at [44].
110 See Elias CJ above at [62]–[63].

the prosecution terminated, the payment would be made" was accordingly sufficient in the circumstances to constitute an agreement.[111]

[104] Against this background the fact, relied on by the Court of Appeal, that Mr Stanaway was not the ultimate decision-maker, is immaterial.[112] Mr Stanaway was not acting on his own account without instructions. (He confirmed in his email of 8 July 2013 he had "firm instructions" to attempt to resolve the case with a plea arrangement albeit he noted the need to obtain approval from WorkSafe.) Similarly, it was not relevant in this factual matrix that WorkSafe took other factors into account. That is because, in assessing the public interest factors, WorkSafe wrongly took into account the agreement to stifle the prosecution. Accordingly, I do not consider it is necessary to comment on the other factors taken into account by WorkSafe or on the amenability to judicial review of WorkSafe's assessment of those matters.[113]

[105] Nor do I see a need to differentiate the nature of the concerns about these types of bargains in a public prosecution from those in a private prosecution. Private prosecutors will have an interest in the outcome. Further, the other concern underlying the prohibition on these types of bargain – namely, the risk of extortion – is not necessarily worse in relation to public prosecutions as opposed to private prosecutions.

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111 *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 (Kós P, Randerson and French JJ) at [69].

112 At [68]–[69].

113 See Elias CJ above at [96].

[106] Finally, I would not want to foreclose for consideration where it arises the place of reparation in prosecution decisions. In other cases the approach may not always be as clear cut as it is in this one.

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