IN THE SUPREME COURT OF NEW ZEALAND SC 23/2017

BETWEEN **ANNA ELIZABERTH OSBORNE**
SONYA LYNNE ROCKHOUSE
Appellants

AND **WORKSAFE NEW ZEALAND**
First Respondent

DISTRICT COURT AT WELLINGTON
Second Respondent

Hearing: 5 October 2017

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: K N Hampton QC and S N Meikle for the Appellants
A L Martin, I R Murray and E N C Lay for the First Respondent
No appearance by or for the Second Respondent (abiding the decision of the Court)

CIVIL APPEAL

MR HAMPTON QC:

As Your Honours please, Hampton. I appear for the appellants, along with Mr Meikle.

ELIAS CJ:

Thank you Mr Hampton, Mr Meikle.

MR MARTIN:

May it please the Court. I appear with Mr Murray and Ms Lay for the first respondent.

ELIAS CJ:

Thank you Mr Martin, Mr Murray, Ms Lay. Yes Mr Hampton?

MR HAMPTON QC:

In essence the appellants are putting forward, perhaps rather unusually in this Court, what is essentially a factual matter relating to what we say is a matter of considerable public importance, a matter of considerable importance in relation to the criminal justice system of New Zealand and whether that criminal justice system is a principled one applicable to all persons, whether rich or poor, or is it a system where payment of a sum of money, and I'll go into the detail of that in due course, can be used to curtail and put an end to a prosecution. We say that this is what occurred here and we take issue with the conclusion reached in the Court of Appeal at paragraph 67 – so that's found at page 118 of volume 1 – where in the judgment it's set out, having set out the narrative of events, did not consider a meeting of minds and striking of a bargain over the payment of reparation in return for withdrawal of charges, can properly be inferred from the evidence.

For the appellants we submit that the decision taken by the first respondent on the 4th of December 2013 to offer no evidence and allow the 12 health and safety charges against Mr Whittall to be dismissed in the District Court, as they were subsequently, was in pursuant of a bargain and that that bargain was unprecedented in New Zealand legal history, and we say unprincipled and unlawful. Here we have an innocence-asserting defendant facing 12 health and safety charges, maintaining his plea of not guilty, not accepting responsibility, and notwithstanding that there may have been some difficulties that were being highlighted by the defendant through his counsel in the

prosecution case, nonetheless a case that met the evidential sufficiency test but that defendant, making it "an essential feature" – and that's the wording that I'll come to and draw your attention to if I may – making it an essential feature of negotiations between his counsel and counsel for the first respondent, that all 12 charges be dropped. So an essential feature – and I will give it to you in detail when I come to it shortly, it's 8142 of the case – that they be dropped on the basis of a payment of $3.41 million, now that's 110,000 per each of the 29 families of the deceased people underground at the time of the explosion, plus an additional two for the two survivors of the explosion, on the basis of payment of that 3.41 million by Mr Whittall's insurer, and, also, the insurer of Mr Whittall and of Pike River Coal Limited, PRCL if I may say, of 3.41 million, but that was to meet in effect a judgment debt already imposed on PRCL on the 5th of July 2013 in the District Court, so discontinuance and dismissal of all charges being sought on the basis that he would then, the defendant would then arrange for payment of a debt already owed. It's not, with the greatest of respect, reparation from the defendant at all. It is to meet, in effect, a judgment debt already existing, and we say that that agreement that was reached as to that was an unlawful one.

I wish to take you immediately – just before I do that. I suggest that what lies behind me saying unprincipled is the ramifications that if this type of negotiation and outcome result is to be allowed in this Court, then what effects does it have on everyday matters in the criminal jurisdiction of the District Court. I say, for example, say a fatal motor accident, someone charged with careless driving causing death, maintaining his or her innocence, so prepared to go to a trial on careless driving causing death. And the prosecution, perhaps not having the strongest of cases, but the defendant saying, "Look, I've got someone standing over my shoulder," not necessarily a relative – and I say that conscious of a certain remark made by Your Honour Justice Glazebrook in the *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) case – but saying "I will, in effect, pay a lump sum that will pay for the funeral expenses of the deceased person, and of something towards emotional trauma to the family, and on the basis of the Pike River, or Mr Whittall decision, you should take that into account and the case should

be, you should offer no evidence, the harm has been remedied as far as possible by the defendant, and the case should be dismissed." So I suggest that the issue that this Court faces does have ramifications and one could think of other sort of factual situations where that might pertain as well.

Before I go to the factual matters that I wish to emphasise, I suggest that it is a struggle to understand what was meant by the Court of Appeal in its decision at paragraph 69 that the proposal by Mr Whittall amounted to a conditional reparation undertaking that in the event the prosecution terminated the payment would be made. For the first respondent today their submissions take up that part of the decision of the Court of Appeal and at paragraph 40.1 of the first respondent's submissions, the first respondent says, that WorkSafe, the Court of Appeal was right to say there was no meeting of minds. It goes on to say this, "WorkSafe submits that was correct for the following reasons: The proposal amounted to a conditional reparation undertaking, ie it would only be paid in the event the prosecution terminated, but was not paid in return for the withdrawal of the charges."

WILLIAM YOUNG J:
Can I just pause there? When I first saw this it reminded me of the example that we were given in law school about a unilateral contract. I will pay you £100 if you walk to York. The offer isn't accepted by the offeree otherwise than by walking to York. So it did seem to me that this was that sort of contract. "We'll pay $3.4 million if the prosecution is discontinued." The prosecution is discontinued; the bargain is complete. That's what your argument is, as simple as that.

MR HAMPTON QC:
Yes, yes it is, and I suggest that that's dancing on the head of a pin, it's semantic gymnastics with respect.

ELIAS CJ:
Perhaps it's too much, you would say, concentration on the elements of contract.

MR HAMPTON QC:

Yes, yes.

WILLIAM YOUNG J:

Well you can't expect a bargain to stop a prosecution to be in the form of a deed that's signed, sealed and delivered, it's always going to be –

MR HAMPTON QC:

Well the old authorities speak about it not being in black and white but here I suggest, and that's why I wanted to take you to some of the facts, that here you get as close as may be to black and white, with the greatest of respect.

WILLIAM YOUNG J:

Well there's argument about the bargain which is it a bid odd if there wasn't a bargain.

MR HAMPTON QC:

Well, post – the effect of it, and that's exactly the point I was, one of the points I was coming to, because why else would you say, no, that's not what we agreed to in effect, which indicates rather more that –

ELIAS CJ:

Do you mean the consequential argument are you referring to there?

WILLIAM YOUNG J:

This is where Mr Stanaway says, gets the third version of the letter –

ELIAS CJ:

Oh, yes.

WILLIAM YOUNG J:

Or the second version of the letter in October and says, hold on, that's not what we actually agreed to.

MR HAMPTON QC:

It may be helpful, if Your Honours please, to take you to the sequence of events from 8 July 2013 on, and most of the materials that I'll be referring to are under tab 41 of the case on appeal, volume 3. If I start with an email from Mr Stanaway for the first respondent to Mr Grieve for Mr Whittall. So it's really at paragraph 16 of the appellants' submissions, but I want to take you to the documents themselves. So page 407 with Mr Stanaway emailing Mr Grieve suggesting a meeting. First paragraph, "I realise it is dependant on the police charging decision on manslaughter charging (whatever that will be) being notified to your client before our meeting but I would be available to meet in Wellington on Thursday 26 July." Thursday or Friday. Just pausing there. the decision as to whether the police were going to take manslaughter charges or criminal nuisance charges was made on the 17th of July 2013. A summary of that can be found at tab 42, page 438. It's a convenient summary but it was part of the evidence in the High Court. Page 438, at the conclusion of the police criminal investigation police issued a media statement saying there'd be no criminal charges laid. Insufficient evidence to support manslaughter because of the lack of a causal link in relation to the lesser charge of criminal nuisance police said, "There is enough evidence to support a charge of criminal nuisance. However, the public interest test under the Solicitor-General's Prosecution Guidelines is not met given the ongoing prosecutions led by the Ministry of Business, Innovation and Employment (MBIE) under the Health and Safety in Employment Act (HSE). A charge of criminal nuisance laid by police raised issues of double jeopardy, given the ongoing MBIE prosecutions. There is also the potential for a criminal nuisance charge to adversely impact on the MBIE court process. A further consideration was that any penalty arising from a police led criminal nuisance charge was unlikely to be greater than the MBIE led prosecutions."

So that when Mr Stanaway opens the exchange on the 8th of July, the police decision as to whether they were going to continue with prosecutions is imminent, and as we know they decided not to carry on, one of the reasons being the existence of the health and safety charges. And in that email in the third paragraph, "Accordingly with respect, I suggest that unless you are able

to meet on a similar basis; ie with a willingness to resolve the matter with pleas of guilty to some charges and with instructions to that effect, the meeting would be largely futile." So that's indicating would could be said to be principled, in the wider sense of principled, discussions about a possible plea bargain of some sort, if I can use that phraseology.

So the next step in the chronology is that decision of 17 July, police announce no prosecution as to manslaughter or criminal nuisance. Then the next step along the way is Mr Stanaway and Mr Grieve, pursuant to that email arrangement, meet and Mr Grieve makes it clear that he has no instructions to agree to a guilty plea to some of the charges, and following that meeting Mr Grieve at page 411 writes to Mr Stanaway, 7th of August 2013. Now there are two passages in particular that I want to highlight here. In the first paragraph Mr Grieve comments about the need for a very lengthy and expensive trial that will be subject to detailed challenges. So it's setting out quite clearly that this is an innocence-asserting defendant still. Then this paragraph, "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."

So the bargain is being, the basis for a possible bargain is being laid out there, and then in the fifth paragraph, so at the bottom of that page, "We," the defence team, "do not want to waste valuable time taking detail instructions, considering what aspects of the defence can be disclosed and preparing a comprehensive proposal if the essential feature," now I highlight that, and I haven't highlighted it in the written submissions, but I highlight it here, "if the essential feature from our perspective, namely the dropping of all charges, would in reality be destined for rejection from the outset." Now I stress "the essential feature".

The next step is to take you to Mr Stanaway's letter to Mr Grieve of 20th August 2013, page 415, where first he acknowledges that earlier letter

I've just spoken of. Paragraph 2, "Currently on the table (on a without prejudice basis) for discussion, is the central arrangement that the insurers for Mr Whittall/PRCL would make a voluntary payment of a realistic reparation payment to the Pike River disaster victims, conditional on MBIE electing not to proceed with any of the charges against Mr Whittall."

Paragraph 3, Mr Stanaway says, "I have had discussions with a number of MBIE staff and it is fair to say that the proposal is not dismissed out of hand and that it is worth of further discussion. However, as outlined to you 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." I would pause and say that the error in that sentence is referring to the "most principled." It should be saying, simply, "the principled and appropriate way of dealing with this" is that way. Because, in effect, I say that the offer of money – this, when I come to it, the idea of it, as it's put, a voluntary payment – shouldn't have entered into this at all. Either the prosecution had a case, and the money was irrelevant and it went to trial, or if it didn't on review have a case, then it shouldn't have gone to trial. Either way the money was irrelevant, I suggest, or should have been irrelevant.

WILLIAM YOUNG J:
Paragraph 5 is quite interesting.

MR HAMPTON QC:
Yes, I was going to go onto that because there's the discussion about appropriate other steps including exploring restorative justice processes.

WILLIAM YOUNG J:
It's the first line, "Withdrawal of the charges alone in return for a substantial voluntary reparation."

MR HAMPTON QC:
Yes. The next step that I want to take you to is the letter of 16th October 2013, which is at page 418, and this is the first of three versions of this letter. It's

paragraph 2, “The purpose of this letter is 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.” Then under the heading “Proposed $3.41 million payment” at paragraph 5, “In advance of the $3.41 million being made available, it is proposed (with precise terms to be agreed) that (a) the Ministry 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 … .” And it’s this letter that ultimately is the basis on which, or which is used by the first respondent to make the determination of 4th December not to proceed with the charges. It’s quite clear in its wording, it is proposed that the Ministry will not proceed with the charges, and that’s required in advance of payment being made. So if the charges are withdrawn the payment will be made.

There are elements of almost – one must be careful what one says, I suppose – but almost coercive behaviour in relation to this. Look, $3.41 million is owed on an already existing judgment debt, and we’ll facilitate its payment, but only if these charges are dismissed. Now is that, if accepted as it was, is that a principled approach to how our – is that a principled approach to take? I suggest not.

Further on that letter I just draw your attention to one other passage and that’s starting at page 420. Conclusion, paragraph 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.” That’s why I use the word “coercive”, in a way. This all in the context of the families – who did have, I suggest, at least some interest, they’d say more than some, in what was going on – were being kept entirely out of the circuit. They knew nothing of this.

ELIAS CJ:

Was it a common insurance policy?

MR HAMPTON QC:

I think for the directors and the company.

ELIAS CJ:

For all, for the directors and the company, but what about the – yes, all right. I understand.

MR HAMPTON QC:

He, Mr Whittall was a director at the time.

ELIAS CJ:

Yes, yes.

WILLIAM YOUNG J:

The policy covered the company directors and officers, and under the Health and Safety in Employment Act 1992 policies can provide cover for reparations but not fines.

MR HAMPTON QC:

Yes, and I can't tell you as to the detail of that particular policy, and what, whether in fact that part of the policy was the part that was being used. It rather suggests that it wasn't. It was rather more a general cover that was being used to finance Mr Whittall's defence.

ELIAS CJ:

Was the – well it probably was both, wasn't it? Was the $3.41 million order that was made, I'm sorry I should have –

MR HAMPTON QC:

It was made by Judge Farish in the District Court on –

ELIAS CJ:

Yes, and against the company?

MR HAMPTON QC:

Yes, against the company, PRCL.

ELIAS CJ:

And why were the, I can't remember, there was a transfer of the proceedings in respect of Mr Whittall, did these prosecutions start off together did they and then they –

MR HAMPTON QC:

The informations or the charging documents – it may have been informations still in those days, I'm not sure – but the charging documents I think were initially laid in Greymouth, the company and Valley Long Haul charges were dealt with in the Greymouth Court and then a change of venue was sought, really I think for purposes of the ease as much as anything, to Wellington.

ELIAS CJ:

But that was for the directors' prosecution was it?

MR HAMPTON QC:

For the prosecution of Mr Whittall, yes.

WILLIAM YOUNG J:

Was there any reason why the Pike River policy didn't respond to the reparation order that was made by Judge Farish in the first instance?

MR HAMPTON QC:

I can't answer that.

JUSTICE GLAZEBROOK:

It must have been a directors and officers policy, rather than one of liability –

MR HAMPTON QC:

I think it –

WILLIAM YOUNG J:

You think it was just directors and officers?

MR HAMPTON QC:

I think it was directors and that's why it was being used to mount this defence and they were saying, well, look instead of putting all this money into Mr Grieve and others' pockets for defending, it could go and be used to –

WILLIAM YOUNG J:

There's a pot of money and we can give it to you or we'll spend it fighting the charges?

MR HAMPTON QC:

Yes.

ELIAS CJ:

But it was irrelevant to the company because the company wasn't insured so this was only – this was no different from the defendant offering to pay the money in effect. There's no commonality of interest in moving the money, or allocating the money as between the company and Mr Whittall. It was only ever available as a directors' indemnity?

MR HAMPTON QC:

That's my understanding; that's my understanding.

ELIAS CJ:

Sorry, thank you, I just wasn't clear on that.

MR HAMPTON QC:

And the PRCL company had by then gone into liquidation. I've got the Theresa May cough, sorry.

ELLEN FRANCE J:

Judge Farish in sentencing Pike River at page 321 of volume 3, tab 23, talks about, has some information there about the insurance policy so she's talking about the remaining and majority shareholder as New Zealand Oil & Gas et cetera and the receivers tell me in the affidavit that the company does have statutory liability insurance but there's only 156,000 remaining.

MR HAMPTON QC:

Right, page?

ELLEN FRANCE J:

321, so I took from that that there may have been another insurance policy that might have been relevant to reparation but there wasn't in fact enough money left, but I might be wrong about that.

MR HAMPTON QC:

Yes she goes on to, well I can take it further than what is the material contained there, where she talks indeed about the woeful inadequacy of New Zealand Oil & Gas's coverance on. And then, so going back to where I was at paragraph 14, page 421 and then again it's, I suggest, indicative of bargaining negotiations. According to paragraph 15, page 421, "Accordingly for all the above reasons I look forward to hearing from you about whether our proposal is acceptable to the Ministry." So again, the same tenor of wording.

Now from – and this is at, in, the appellants' submissions – from 19 November to about 3 December – and that is based on what Mr Stewart has said in his affidavit – Mr Stanaway met with MBIE, the prosecutors, and discussed his review of matters relating to the continuation of the prosecution of Mr Whittall and that first version of 16 October letter.

On the 4th of December, the prosecution through Mr Stewart – and I shall go to his affidavit, volume 2, tab 12 and it's starting at page 161 or 160 – where at paragraph 52 Mr Stewart describes meeting at the MBIE offices with Mr Stanaway and various other named people. 53, the purpose was to

discuss the matters in Mr Stanaway's advice as to evidential matters and public interest considerations. Then Mr Stewart details the likelihood of successful prosecution being low for the reasons he then sets out. Then details the public interest reasons and over on to page 161, "In addition to Mr Stanaway's advice we also discussed the matters raised in the without prejudice and confidential to counsel letter from Mr Grieve dated 16 October 2013. At the meeting concerns were expressed as to the legality and propriety of considering an offer of voluntary payment in the context of the public interest component for the prosecution decision. No conclusion on this issue was reached at the meeting but we are all conscious of the importance of ensuring the offer was dealt with in a proper manner and only taken into consideration if appropriate to do so. No decision was made." Then there is another meeting on 28th November.

ELIAS CJ:
Sorry, before you just go on, did you want to make any comment on the matters in paragraphs 54 and 55 on your way through? It's fine if you don't. I just wondered if you did.

MR HAMPTON QC:
Well 54 there were certain matters listed that made for potential, some, difficulty with the prosecution but still having assessed all those matters they still came to the view that the evidential sufficiency test was met.

ELIAS CJ:
Yes.

MR HAMPTON QC:
In the public interest matters, I suppose the only – paragraph 55 – what I suggest is missing from that assessment are two things and they are related. One is the fact that the police by now have, reliant on the H and S prosecutions proceeding, have dropped their interest in the matter, as I have already alluded to and secondly and related, there is no discussion in there at all of one of the objects of the legislation, section 5(g).

ELIAS CJ:
Yes.

MR HAMPTON QC:
It doesn't appear at all and it is something I may comment on a little later, because it doesn't enter into any of these discussions and any of the decision-making at all.

ELIAS CJ:
Yes.

MR HAMPTON QC:
I suppose I was really highlighting in a way the terminology used, the discussion of the offer and it's a word that turns up in paragraphs 57, 59, 60, 63 and so on, it's quite clear that – and on into 64, that this was an offer that had been made and was being considered, so it's that –

WILLIAM YOUNG J:
I mean the fact that it's made without prejudice suggests it's by way of settlement, the language "without prejudice".

MR HAMPTON QC:
And "without prejudice" is repeated in the discussion as well, if Your Honour pleases, yes it is that terminology, it's got all the hallmarks of bargaining negotiations and with respect to the Court of Appeal and with respect to my learned friend's submissions, there's no real analysis of that in depth in the Court of Appeal decision, with respect, as to that bargaining negotiation that was ongoing.

On the 4th of December – and this comes from Mr Stewart's affidavit from pages 163 through to 166 there is set out Mr Stewart's decision at 163, paragraph 65 – the decision made not proceed with the prosecution to offer no evidence and to request that Judge Farish dismiss the charges and then in paragraph 67 concluded, "The test for evidential sufficiency was met but the

likelihood of obtaining a conviction was low and continuing was not in the public interest." And then at paragraph 68 he expands in some detail, in some subparagraphs. The reasons which include 68.7, "The offer of a voluntary payment, 3.41 million," 68.9, "The unlikelihood of Court ordered reparation being received from PRCL by the victims, taking into account PRCL's financial position. The without prejudice offer created the prospect of a third party paying that reparation." Now there I suggest is the bargain, the reason lying behind the bargain and then 69, "Following my decision Mr Stanaway was instructed to seek to discontinue the prosecution on the basis no evidence would be offered."

So in the period immediately following that, Mr Stanaway informed Mr Grieve and it's really at paragraph 70 on page 166 of Mr Stewart's affidavit of 7 December. Mr Stanaway contacted Mr Grieve and asked for an open version of the 16th of October letter. Now that letter was to be found at, under tab 41 still, so volume 3 at page 425. Mr Grieve sends a second and open version –

ELIAS CJ:
Following the decision?

MR HAMPTON QC:
Following the decision, yes. Now my learned friend in his chronology refers to it as being a draft, I'm not quite sure where he sees it as a draft, but nonetheless I draw attention to two things, well, one particular thing in relation to this letter and that is the second paragraph –

ELIAS CJ:
Sorry, I've lost it, is it 425?

MR HAMPTON QC:
425.

ELIAS CJ:

Thank you.

MR HAMPTON QC:

And what I'd ask you to do in due course is to look at paragraph 2 in this letter and compare it with paragraph 2 in the first version of the letter at page 418. At 418, "The purpose of this letter is 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 for the families of the 29 men who tragically lost their lives in Pike River coal mine." In the version that came on 6 December, that is post the decision, we have that paragraph 2 being replaced with paragraphs 2 and 3 at page 45, "It is understood that you have been reviewing the issues of evidential sufficiency and public interest as they apply in this case, in the context of the Solicitor-General's 2013 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 is a relevant and appropriate public interest consideration. In short, a proposal is that a voluntary payment of $3.41 million be made available." Sort of strange piece of post facto insertion which rather indicates that there is a trying to be some sort of covering over, or making somehow more acceptable the decision-making process within WorkSafe. It is a curious insertion. As we've said in our written submissions, it's hard to escape the conclusion that this paragraph was inserted so that the open offer dovetailed with the decision-making process by WorkSafe.

There are some other differences in this second version of the letter. We draw attention to some of the provision that paragraph 6(e) which differs from the corresponding 5(e) in the – sorry, comparing page 426, 6(e) with 419, 5(e) which simply said, "Trustees for each of the 31 trusts, sign trust deeds and a form that we can prepare establishing the structure, paying each of the 110," and then we get the new (e), "Trustees for each of the 31 trusts countersign letters acknowledging the distribution is being made on behalf of the company's directors and officers in recognition of harm arising directly or indirectly from the explosion or any subsequent events arising from those

explosions," has again the ring to it of trying to achieve a conclusive settlement of various other aspects as well.

Mr Stanaway, by email 6 December, takes this up and it's at page 429. "As discussed this afternoon I am afraid that para 6(e) of the letter you have forwarded to me today is unacceptable and is not the basis on which I provided advice to the MBIE nor for that matter, the basis on which their decision was made." It touches on, Your Honour, William Young J's point made earlier, it confirms really there was an agreement, a bargain had been met and the terms were altered, or attempted to be altered.

ELIAS CJ:
Well, a bargain met and implemented?

MR HAMPTON QC:
Yes.

ELIAS CJ:
On which the decision was made?

MR HAMPTON QC:
Yes. And I won't read it all, "My advice in MBIE decision was based on your original letter of 16 October and our personal discussions that confirmed that there was no longer any condition attached to the payment of 3.4 as had been previously indicated. I'm not sure what the purpose of para 6(e) is but I am concerned that possibly appears to be an effort to reintroduce an earlier condition discussed. I note your phone advice that is not the intention. MBIE cannot in any event bind the trustees or families to any such arrangement without their approval. The trustees may wish to take independent legal advice. If the arrangement is to proceed, the original letters will need to be replicated as far as possible." And then goes on to say "An alternative is simply that $3.4m is paid into Court as the payment of the reparation ordered against PRCL." So satisfying that earlier decision. "I have not sent your letter

to MBIE yet as I do not want to cause alarm and hope that this can be sorted out."

Then Mr Stanaway follows that up and this is at page 430, this is the email to Mr Grieve of 7 December, so the day following. "I advised MBIE that the arrangement as I understood it from the original letter was that the 3.4 million was intended to represent the payment on the emotional harm reparation ordered by Judge Farish against PRCL which would be otherwise unpaid. This is a payment which was proposed with the only condition that the charges against Mr Whittall were dismissed." I suggest it's pretty clear what the position was. And he goes on, "Understandably I have very clear instructions to ensure there is absolutely no issue or condition with the 3.4 million payment before offering no evidence." It's quite clear 3.41 million was to be paid to offer no evidence, that's the bargain that was made.

So then on the – finishing the narrative – on 7 December 2013 Mr Grieves sends third and final version of the 16 October letter. That's to be found in a different place other than tab 41, it's tab 26 at page 337. So it is in the same volume, volume 3. It still contains the revamped paragraph 2, it's now 2 and 3 as I've discussed, that doesn't change. It, on page 338 omits entirely the one that had been raised as a problem 6(e) so there's now no equivalent 5(e) or 6(e), it's taken out entirely. And I think there was one other change and I have lost it now. Sorry, it contains a new 5(c), which is an additional – well 5(b) and 5(c), 5(b) is altered and 5(c) is a new proposition. The former 5(b) had said, "Will comprise allocations of $110,000 to each trust." That's just with the amounts calculated by Judge Farish when sentencing the company. 5(b) at page 337 is now, "Will comprise allocations of $110,000 for each of those families and survivors and the amount calculated by Judge Farish when ordering that they be compensated for the significant loss and ongoing trauma that she found had been caused by the actions of the Company." (c), the new provision, "Will be paid into Court for it to be distributed to the families of the 29 men who died and the two survivors." So that's an additional part that goes in. Which really takes me through the factual issues that I wish to

highlight and say from that trawling through those, that material, that it clearly shows in my submission that there was a bargain.

In my submission, it was unprincipled and unlawful. It should not have occurred. It sets – the Court of Appeal having endorsed it in the way it has – sets I suggest a dangerous precedent. It's easy to say thin edge of the wedge, but I suggest it has that potentiality and really it's on that basis that we say that this decision made by the prosecutor, MBIE, was wrong. It was an unlawful bargain and recognising the realities that we're now nearly seven years since the disaster itself, some four years since this was "resolved" in the way it was. The relief that was sought in the High Court and then in the Court of Appeal is simply a declaration from this Court. Now I feel that –

O'REGAN J:
A declaration saying what?

MR HAMPTON QC:
I haven't given thought to the exact wording, but that this –

WILLIAM YOUNG J:
That there was an illegal agreement to stifle the prosecution.

MR HAMPTON QC:
I suppose it was an unlawful – it was an unlawful bargain that had the effect of, yes.

ELIAS CJ:
Well it's a judicial review application, it's a judicial review of the determination, is it not?

MR HAMPTON QC:
Yes, it's the determination of the 4th of December.

ELIAS CJ:

The 4 December determination.

MR HAMPTON QC:

Determination, yes.

O'REGAN J:

So that that was unlawful?

GLAZEBROOK J:

So the decision was in pursuance of an unlawful bargain?

MR HAMPTON QC:

And it was an unlawful bargain and it had the effect of stifling the prosecution.

ELIAS CJ:

Well it would just be that the decision to offer no evidence made on 4 December was unlawful, wouldn't it?

GLAZEBROOK J:

Well it would be because it was in pursuance of an unlawful bargain. I suppose the reasons could say that rather than the declaration.

ELIAS CJ:

I must say I have some difficulty with "bargain" in this context. I know it's used but it's used in different senses, and one wonders whether some of the problem has been because the Court of Appeal has looked to the trappings of contract so I'm a little nervous about that, but that's a matter for consideration.

MR HAMPTON QC:

Yes, the declaration would be as to the unlawfulness of the determination itself, Ma'am, I think.

O'REGAN J:

So that's all you're seeking?

MR HAMPTON QC:

That is all, realistically, we're seeking. We cannot go further than that. It would be an impossibility.

ELLEN FRANCE J:

The pleadings were – although now it's on a slightly different basis – but they sought a declaration that the decision is unlawful, invalid and unreasonable, is how you put it.

MR HAMPTON QC:

I knew we must have turned out minds to it at some stage.

O'REGAN J:

Unlawful probably covers the grounds.

ELIAS CJ:

Well it covers this ground anyway, the one you've been spending your time on.

MR HAMPTON QC:

Well really that's – I mean in reality that's the ground I want to spend the time on. I'm not sure that I want to occupy your time with too much else because I see this as the crux of what – I've mentioned section 5(g) in passing –

ELIAS CJ:

Yes, I was going to ask you about section 5(g).

MR HAMPTON QC:

I suggest that that is, and I'm not sure where I put it in the –

ELIAS CJ:

Well I suppose what you, when we went through the letter you were saying that the purposes of the Act, which are required to be considered under section 5(g), or whatever it is, aren't there.

MR HAMPTON QC:

They're not there at all, and the only mention of the, of section 5(g), or the Health and Safety Act at all, is post the decision itself. It doesn't appear in any of the discussion material or in the decision – Mr Stewart's formal decision – itself. The only reference to the Act comes at Mr Stanaway's memorandum to the District Court of the 11th of December, so this is the document he put forward to the District Court in support of offering no evidence and that the charges be dismissed, and that's to be seen at tab 31 in volume 3 at page 372.

ELIAS CJ:

Sorry, so you didn't seek any relief in relation to the outcome in the District Court, is that right?

MR HAMPTON QC:

Initially yes we did. In the High Court we sought relief – as to the District Court decision itself Ma'am?

ELIAS CJ:

Yes.

MR HAMPTON QC:

Yes, we did, and it's in volume 1, under tab 1, the statement of claim at page 15, there's a number of causes of action pleaded. One was that the, in effect, that the Court should have been, as it were, an auditor, and said is this a valid and proper decision that has been made in relation to these charges –

WILLIAM YOUNG J:

Get on with prosecuting it. But it's a bit too late now.

MR HAMPTON QC:

And the second was that this Judge who dealt with it was the Judge who –

ELIAS CJ:

Yes, well I understand that, well that's not before us.

MR HAMPTON QC:

No, no.

ELLEN FRANCE J:

We're in tab 2, aren't we now? Because that's your amended statement of claim?

MR HAMPTON QC:

Sorry, I think it's the same thing. I think it's the same cause of action and relief, case 31, yes, you're correct.

ELLEN FRANCE J:

Yes.

ELIAS CJ:

But the position is that that is not before us.

MR HAMPTON QC:

That's not, no.

ELIAS CJ:

No, thank you. We would not –

MR HAMPTON QC:

It's dropped away, quite frankly in my mind it's dropped away to the core issue that I have been speaking of today.

ELIAS CJ:

Yes.

MR HAMPTON QC:

I'd add the – I don't give away the 5(g) because it's simply not considered. I was going to look at that memorandum.

ELIAS CJ:

Yes.

MR HAMPTON QC:

It's at pages 34 and 35 I think. So 372, 373, so Mr Stanaway, this is his memorandum to the Court as counsel for the informant. "It is clear that the considerations listed in the Prosecution Guidelines are not exhausted. Here there is at least one specific consideration which requires attention in the Employment, Health and Safety domain there is a need to recognise the significance of special and general –

GLAZEBROOK J:

Sorry, where are you?

MR HAMPTON QC:

I'm sorry –

ELIAS CJ:

About 34.

GLAZEBROOK J:

Oh, yes.

MR HAMPTON QC:

372, sorry, paragraph 34, "It is clear that the considerations listed in the Prosecution Guidelines are not exhaustive. There is at least one specific consideration that requires attention. In the employment health and safety domain there is a need to recognise the significance of special and general deterrence so far as to keep workers safe, particularly in inherently dangerous industries. The informant has taken into account and carefully weighed the

competing factors." Now that is the only reference. You cannot find any reference – and that is post the decision – but you cannot find any reference to the Health and Safety Act and section 5(g) in the materials leading up to the decision of 4 December.

ELIAS CJ:
And this doesn't identify what was relevant. It's simply in the –

MR HAMPTON QC:
It's a very generic, yes, assertion and we simply say that the Court of Appeal as it did –

ELIAS CJ:
Is that an entirely fair way to characterise the 4 December decision? I know it has no reference to section 5(g) but does it otherwise look at matters that the Act requires to be taken into account? I'm sorry, when we went through it I wasn't looking at it with this lens.

MR HAMPTON QC:
Mr Stewart refers to the MBIE decision at paragraph 66 of his affidavit and it's to be found in volume 3 under tab 27 at page 341. Just making sure that I haven't misled you in any way, but I don't think this is my –

ELIAS CJ:
Sorry, before we were going through Mr Stewart's affidavit, but this is the decision document?

MR HAMPTON QC:
This is the actual decision document. It's a five or six page document. Some of it is taken out, the legal advice itself. But on a quick scan, just refreshing myself, I cannot see any reference to Health and Safety legislation or the Act itself, let alone 5(g) in the decision.

ELIAS CJ:

I can't see why the legal advice would be deleted in this context. Anyway, never mind. It is really about sufficiency of, well about the considerations which must include some legal considerations on which presumably they took advice.

MR HAMPTON QC:

Yes, well, I think at early stages it was asked for, refused, a certain amount was made available, particularly the materials under tab 42. For better or worse it was decided that – tab 41 sorry – the view was taken that that, in itself, that material that I've largely gone through today, was sufficient to found the argument that was being made.

ELIAS CJ:

So the factors considered in decision-making at 345, are they the, do they cover the ambit, and you say they don't include the purpose of –

MR HAMPTON QC:

The object of the legislation itself.

ELIAS CJ:

Yes, the object.

GLAZEBROOK J:

And you say also that in any of the other material like Mr Stewart's affidavit, there's no indication that this was an incomplete list of the factors taken into account.

MR HAMPTON QC:

No, not mentioned at all. The first mention of the legislation is the 11 December memorandum of Mr Stanaway's. Which is a week after the events and of the charges being discontinued.

ELLEN FRANCE J:

And that was all that was referred to in the High Court, wasn't it?

MR HAMPTON QC:

Yes.

ELLEN FRANCE J:

The December, the later memorandum?

MR HAMPTON QC:

Yes it is and the same position the Court of Appeal, from that the Court of Appeal – the discussion in the Court of Appeal was at tab 7, page 122, about the section 5(g) starting from paragraph 80 on.

ELIAS CJ:

Were you intending to make any submission on these paragraphs?

MR HAMPTON QC:

No, I think I can only repeat what is in the written materials Ma'am, that the Court of Appeal doesn't specifically deal with the question, it simply repeats what Justice Brown said in the High Court and then doesn't deal with the section 5(g) issue at all and we say it was a purpose that should have regard paid to it in terms of the decision whether to prosecute or not.

ELIAS CJ:

Well, they say it doesn't fetter WorkSafe's discretion; I'm not sure really what that means?

MR HAMPTON QC:

But I'm not quite sure, I mean surely one of the objects of the legislation that you're looking at in terms of prosecution should be considered. I mean it should fetter, I suggest, if we are going to use that sort of term. Legitimate that it should be looked at and discussed in the context of a decision to prosecute or not.

ELLEN FRANCE J:

In terms of section 5, the object of the Act, all of those provisions, including (g) come under the heading of, "Promoting the prevention of harm" and one of the factors that Mr Stewart does refer to, I know you raise another objection to that, but is the Royal Commission report and what he says is, "We considered that a meaningful contribution to addressing the harm by the disaster," and then 5(g) is talking about a range of enforcement methods – but I suppose you can't call the Commission so much an enforcement method – but might that be some consideration of that object, at least in a general way?

MR HAMPTON QC:

I suppose it has some reference to it but it doesn't address the issue which I suggest underlies this prosecution that directors cannot just hide behind the corporate veil, they do have responsibility and this prosecution was carrying a message to directors that they simply cannot hide behind a company that's, by the way, gone into liquidation and say we're not personally responsible. So that's the importance, this is the, a lesson that should be learned through this prosecution.

ELIAS CJ:

Isn't the importance of 5(g) that in considering enforcement methods and accepting there's a range of those, the purpose that it identifies is that it must be an appropriate response depending on nature and gravity and your submission, as I understand it, is that in the decision-making documents we have, there's no focus on that, is that right?

MR HAMPTON QC:

Yes and this is 29 men dead. It can't be, with respect, much more significant than that. The other point raised in relation to the Royal Commission, Mr Whittall gave evidence in the first two phases of that inquiry which were to a considerable extent setting up preliminary matters, but when it came to the third phase, which was a discussion as to what went wrong in the explosion itself, what led to the explosion, he, as he was entitled to do, said, "I refuse to give evidence on the ground that I might incriminate myself."

ELIAS CJ:

What is the submission you make from that? That the Royal Commission wasn't a total answer?

MR HAMPTON QC:

Yes.

ELIAS CJ:

I see.

MR HAMPTON QC:

And in that sense the Royal Commission doesn't cover the object under 5(g), I suppose, is what I'm directing it towards. I suspect that I've probably covered what I really do want to cover today, if the Court pleases.

ELIAS CJ:

Yes, thank you Mr Hampton.

MR HAMPTON QC:

No questions from Your Honours?

ELIAS CJ:

Not on my quick sideways glance.

MR HAMPTON QC:

I'll retreat quickly then, thank you Ma'am.

ELIAS CJ:

Yes Mr Martin.

MR MARTIN:

E ngā Kaiwhakawā o Te Kooti Mana Nui, tēnā koutou. May I begin by acknowledging the tragic circumstances out of which this case arises. In making these submissions the respondent is keenly aware of the loss the appellants and the other families have suffered. The respondent means no

disrespect in submitting that there was, in this case, no improper bargain between the prosecutor and defendant to stifle or suppress the prosecution, and no reviewable error in the prosecutor's decision to offer no evidence. The Solicitor-General's Prosecution Guidelines were applied. An evaluative assessment of the weight to be given to the relevant factors in a public prosecution lies beyond the scope of judicial review. To provide context I propose, if it pleases the Court, to start with the Court's general approach to judicial review of prosecution decisions, then look at the decision in question, before turning to why there was no improper bargain.

So if I may start with justiciability to begin with. The proposition that is submitted is that prosecutorial decisions will generally be justiciable, although the intensity of review and remedial response is restricted. Intervention by the Court will only be warranted in exceptional circumstances. I'm referring here to the respondent's written submissions at paragraph 33. The respondent does not take issue with the Court of Appeal's distinction between justiciability and the intensity of review or availability of review. While the Court of Appeal did not accept a jurisdictional bar to reviewing prosecutorial decisions, the Court of Appeal has confirmed the principles explaining the exercise of judicial restraint in respect of prosecutorial decisions.

If I can take you to paragraph 34 of the Court of Appeal's decision, this is at tab 7 of volume 1, at paragraph 34 the Court of Appeal sets out a number of grounds there that exist as good reasons for the exercise of judicial restraint in the review of prosecutorial discretion. At 35 the Court continues to discuss one of a number of points. That point is discussing the exercise of restraint by the Court, and it is submitted that – on page 108 – the final subparagraph of paragraph 35 is particular germane here. Absent abdication of discretion, relief is likely only on review in exceptional cases. But a prosecutorial decision will generally be justiciable albeit the intensity of review and remedial response may be restricted.

The Court of Appeal went on to discuss in the following paragraphs, particularly at 37 and 38, the distinction between a decision to prosecute and a decision not to prosecute, the latter being the instance here.

ELIAS CJ:
Well is that distinction one that you're maintaining, supporting?

MR MARTIN:
That there is a – the submission for the respondent is that the approach by the Court of Appeal is broadly correct that in either event there is still a requirement for exceptional circumstances. In any event the grounds are –

ELIAS CJ:
Well is it a useful distinction and do we really need to take time on it if you are not trying to urge us to develop some doctrine on that?

MR MARTIN:
I don't think it's necessary to decide this case, Your Honour. It's noted there and there's some discussion of it in the Court of Appeal's decision. The submission is that in any event, exceptional circumstances would be required to intervene, in my submission.

That was all I was proposing to touch on, on the question of justiciablility and so with that I would turn –

GLAZEBROOK J:
I do have a slight problem with the distinction myself, but if it's not germane to anything it's probably not –

ELIAS CJ:
Well I have considerable trouble with the distinction but – that's really why I was asking you – if you're not making any submission and asking us to act on it, I think we can probably pass over it, can't we?

MR MARTIN:

Well I think if –

GLAZEBROOK J:

But it's reviewable, it's reviewable on judicial review lines, then in just as in normal cases there will be a discretion as to whether there should be a remedy and various factors might be relevant to that.

MR MARTIN:

And if I can approach it this way Ma'am –

GLAZEBROOK J:

But this sort of doctrine says it has to be an abdication of discretion before there is a relief, which I have major problems with, to be frank. It's just a normal judicial review, isn't it?

MR MARTIN:

And perhaps if, just to develop that, at paragraph 45 of the Court of Appeal's decision, I think they, with respect, come to something similar in terms of a position, that the reality is, even where you have a decision not to prosecute, it will be difficult to make out grounds of review such as having regard to irrelevant considerations or failing to have regard to relevant considerations, because of the width of the considerations to which the prosecutor may properly have regard, as well as the limited scope of considerations that are truly mandatory rather than merely permissive and that is one reason why it is said the Courts will only intervene in exceptional cases.

ELIAS CJ:

Except if you develop this on the basis that the intervention is only in exceptional cases, then that is going further than *Matalulu v Director of Public Prosecutions (Fiji)* [2004] NZAR 193 (SC Fiji) really was saying in that it will be very difficult to make out the grounds. I mean that is just a matter of fact and context, isn't it? But once you start saying that the Court will only intervene in exceptional circumstances then you

are introducing an overlay of legal principle, which I don't think follows from it being difficult the establish of grounds of review in a particular case.

MR MARTIN:
And I think that wording – I introduced it in my statement. The Court of Appeal's wording, to be fair, is that the courts will only intervene in "exceptional cases" rather than "circumstances" and I think –

ELIAS CJ:
Well that's almost worse, I think. If it's put in a way that the grounds for review are likely only to be made out in very few cases because in normal circumstances those decisions are made in accordance with the Guidelines which do allow a wide range of considerations to be taken into account and of course in individual cases there will be issues of not enough evidence or defences, then there is nothing wrong with the submission that it doesn't help because it doesn't set a general principle of any kind.

MR MARTIN:
If I could take that in two parts Ma'am. Firstly, that I think is what the Court of Appeal seems to be saying at paragraph 45 which is why I took Your Honours to that paragraph, that they will be exceptional cases because of the matters that are touched on there, that the grounds for review will only be made out in rare instances.

ELIAS CJ:
It's just we all react to the word "exceptional". It would be unusual one would have thought to have a successful judicial review because, as Justice Glazebrook says and the Court of Appeal acknowledges, the range of circumstances to be taken into account are very wide, so it's going to be very difficult to say that irrelevant considerations have been taken into account.

WILLIAM YOUNG J:
But there are some policy considerations which might have to be taken into account. Decisions to prosecute can be effectively reviewed within the

context of the prosecution so to encourage review there is to encourage satellite litigation which is, on the whole, a bad thing. So that's one feature. The other feature where it is a non –

ELIAS CJ:

That is a consideration that arises whenever you are considering relief in judicial review, what internal mechanisms are there for check.

WILLIAM YOUNG J:

And then secondly, if it is a non-prosecution decision I suppose if I were a Judge being asked to review one, I would be conscious of the fact that the Judge might be coming both in a sense like prosecutor and Judge because the Court would be saying "Well, go for it, you've got to prosecute, it's mandatory" and then the Court has to hear the case, so there are some contextual considerations but they don't arise here and you are sort of running into the briar patch I think.

MR MARTIN:

I think those policy factors that Your Honour is touching on are the ones really that are raised in paragraph 34 of the Court of Appeal's decision. Granted that they then go on to draw the distinction because some of those factors don't arise where a decision has been taken to not prosecute, in other words, if a prosecution proceeds there are other ways in which the prosecution can be tested and challenged. But to come back to what in my submission is the correct approach, with respect, it is that there is good reasons for restraint –

ELIAS CJ:

No, I don't think, you're just pushing on an open door if you urge that, but the question is whether we're in that.

WILLIAM YOUNG J:

It might be better to leave the generalities and get onto the specifics.

ELIAS CJ:

Anyway perhaps it might be a convenient time to take the morning adjournment.

MR MARTIN:

I'm happy to go into the decision Ma'am after that.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.50 AM

MR MARTIN:

I propose to take you first to the prosecution decision summary, which you have already touched on this morning, as a convenient summary of the considerations that were weighed here by the prosecutor and against that preliminary factual background, I propose then to take the Court through the Solicitor General's Prosecution Guidelines and then come back to the prosecutor's evidence in perhaps a bit more detail about the considerations that were taken into account. So if I can –

GLAZEBROOK J:

We're probably more interested in you just going to answer the two particular points that have been made, whether there was an unlawful bargain, which is the primary point.

MR MARTIN:

Yes, I am happy to go to that point and deal with that first Your Honour. The improper bargain issue, the submission on this point is that there was no meeting of minds to strike a bargain over the payment of reparation, in return for withdrawal of charges.

WILLIAM YOUNG J:
Why isn't that a bargain?

MR MARTIN:
I'm sorry Sir?

WILLIAM YOUNG J:
Why isn't that a bargain, I mean you set it out at para 37, basically there's nothing wrong with a defendant undertaking to pay reparation in the event that the charges are not pursued further, well, why isn't that a bargain if as a result of that offer charges aren't pursued further and reparation is then paid?

MR MARTIN:
So you have two things going on, in my submission, Sir. You have the discussions that began as discussions about a plea arrangement and this is between Mr Stanaway and Mr Grieve and so you have those discussions that could be characterised as negotiations – I'm not going to play with the words – they are discussions clearly that become discussions about what's been called variously a voluntary payment, a conditional payment, reparation; they are about the payment and what shape that might take. But that sits as a factor –

WILLIAM YOUNG J:
But there's also, I mean it may be a factor in the decision not to prosecute, but I mean Mr Stanaway would have been furious if the 3.4 million hadn't been paid.

MR MARTIN:
But, Sir, there's some discussion about –

WILLIAM YOUNG J:
Okay, why would he have been furious? Because there was in substance an agreement that it be paid.

MR MARTIN:

Well, there are two points if I may Sir. If it had not been paid at a point before the charges had been –

WILLIAM YOUNG J:

No, we have the charges dismissed, the money paid. Now say the charges have been dismissed and then Mr Whittall said well, actually I've changed my mind. But Mr Stanaway would have been furious.

MR MARTIN:

But Sir there's discussions in terms of the money being paid into Court on that day –

WILLIAM YOUNG J:

Because it had been agreed it would be paid.

MR MARTIN:

Well, what Mr Stanaway is doing is focusing on one part of the public interest analysis in ensuring that that is protected.

WILLIAM YOUNG J:

When was the money paid into Court?

MR MARTIN:

I understand it was paid on the day of the District Court hearing, the 12th of December.

WILLIAM YOUNG J:

Yes, but after the dismissal, or before?

MR MARTIN:

My understanding, well, I will check, but my understanding is it may have been before Sir. I stand corrected, Sir, but it was on that day, and I'm not sure –

WILLIAM YOUNG J:

All right, well, let's put it the other way. Say Mr Whittall had paid the $3.4 million and Mr Stanaway said, well, I've actually just had a change of heart, we're going to go ahead with the prosecution, I think Mr Whittall would have been furious. Why? Because he understood that wouldn't happen.

MR MARTIN:

But there wouldn't have been any recourse in that situation. The prosecution were entitled to proceed with their prosecution.

WILLIAM YOUNG J:

I know you can't enforce an agreement to stifle the prosecution, but it doesn't mean, the fact that it can't be the subject for a claim for damages doesn't mean that there isn't an agreement.

MR MARTIN:

Well, I think we're are sort of starting to drive at the heart of the issue and I'm conscious we're talking about the cases like the *Jones v Merionethshire Permanent Building Society* [1892] 1 Ch 173 (CA) case and Your Honour's decision in *Polymer*. In my submission, those are if you like, truly private bargain cases and they –

ELIAS CJ:

They were private prosecution cases weren't they?

MR MARTIN:

Well, they were cases, Ma'am, to avoid offences being brought to light by, essentially victims, so there's various parts –

ELIAS CJ:

Oh, yes, that's right, complaints.

MR MARTIN:

So there's various parties involved but in essence those cases and there are a number of them in the bundle.

ELIAS CJ:

Sorry, but *Polymer* was about the Illegal Contracts Act 1970 and enforceability wasn't it?

MR MARTIN:

Yes, it was and the facts broadly on which it arose were that you had a situation where parties, private parties were in disagreement about a payment of money, the consideration for which was in essence the non-prosecution or the non-raising of the offending, whether through private prosecution or perhaps otherwise and that's the common theme in those cases that you have private parties bargaining to avoid criminal process and in turn for money.

ELIAS CJ:

And it doesn't stop criminal process?

MR MARTIN:

Well and that would be the result if it were to continue and so the courts have to grapple with the policy issue of whether this is permissible and this is – and I'll come directly to the point, that if you had the same sort of arrangement with a prosecutor in some sort of corrupt way, then that would well – that might well be a different species of the same problem.

ELIAS CJ:

Why do you have to have the overlay of corruption?

MR MARTIN:

Well because what you have in this case, in my submission, is the public prosecution decision-making –

GLAZEBROOK J:
But doesn't that make it worse, not better?

MR MARTIN:
In my submission, operating in good faith and –

ELIAS CJ:
And again, the overlay of good faith I didn't understand, in your submissions, which are similar to the overlay of corruption that you've just referred to.

MR MARTIN:
Well it's bringing the fair and honest mind to bear on the prosecution decision overall in my submission. So just to step that back, the private bargain cases, if I can put them that way, involve the victim and another party, either the alleged offender or someone on their behalf, paying money to the victim and the victim being found to have as part of the consideration of that, promising not to raise the criminal offending.

What you have in this case is, in my submission, something quite different. You have an independent prosecutor that is turning its mind to a range of factors and is not going to receive the money. So neither Mr Stewart nor the decision-making organisation are going to receive financial gain from this decision. So what, in my submission, what is occurring here is a difficult prosecution decision.

GLAZEBROOK J:
Well in many cases they're not receiving gain in the other cases either, they're just getting money that's owed to them, because if somebody has stolen money from you, you're owed it. You're not getting any private gain, all you're getting is money back.

MR MARTIN:
Which I think that's an element Ma'am that may make those cases tricky in their own right. I take the point that Your Honour is making that in a sense

people are just trying to obtain a form of redress or reparation financially, but they are nevertheless directly financially interested and benefitting from the non-prosecution of the matter.

WILLIAM YOUNG J:

Say Mr Stanaway and Mr Grieve have sat down, written out an agreement, "We undertake to pay $3.4 million on your undertaking that the prosecution would be discontinued." Would that be a legal agreement or an illegal agreement?

MR MARTIN:

And I think Your Honour's question is premised on there being no other process and no other factors taken into account.

WILLIAM YOUNG J:

No, just in this case, that they sat down, "Well let's just get a record of where we've come to, Mr Whittall to pay $3.4 million into Court by reference to the reparation orders. We undertake not to proceed with a prosecution, signed Brent Stanaway, Stuart Grieve." Would that be a legal agreement or an illegal agreement?

MR MARTIN:

Sir, well clearly in my submission that is not anything that happened here.

WILLIAM YOUNG J:

No, well would that, in your – as I understand, the drift of what you're saying, it would be perfectly fine?

MR MARTIN:

They're hypothetical facts that are quite removed from the present case.

WILLIAM YOUNG J:

Well they're not far removed at all, because at least for the moment I'm inclined to think that that's actually what they did do, but there we may be a

part, but on the hypothesis I put to you, would you say it's an illegal agreement or a legal agreement?

MR MARTIN:
I accepted that, what you put there, without the surrounding circumstances of a prosecution decision that might well be, and I leave it at that level, but it might well be a bargain that is contrary to public policy. If there is all there is, but in the –

ELIAS CJ:
Sorry, if you say that a critical feature here is, just thinking about what you said about the fact that it's an independent prosecutor, that's awfully close to saying that it's non-justiciable isn't it? You know, that if it's a public prosecution decision, because you'll always have an independent prosecutor not receiving money directly.

MR MARTIN:
Sorry, what I am submitting, I'm not sure it's about justiciablility Ma'am, what I am submitting is that –

ELIAS CJ:
Well what's so strong about it being an independent prosecutor not receiving public money?

MR MARTIN:
Well here what I am submitting is that it is essentially, it is acceptable for a prosecuting body to engage with the question of reparation. In fact, there's a public interest, a significant public interest in prosecutors doing so, which is as we'll come to, supported by the Prosecution Guidelines. So that's in essence what I am saying there, is that there is a public, called a public function in achieving reparation or to make amends.

ELIAS CJ:

So to allow people to buy themselves out of prosecutions is in public interest but it wouldn't be in the public interest if it was a private person being bought out, even if they have a direct interest in getting money back that's been stolen from them, for example. It's quite an odd submission isn't it?

MR MARTIN:

Well with respect Ma'am, I'm not sure I would put it quite in that way.

WILLIAM YOUNG J:

Well here's a hypothetical, man is charged with rape, his counsel says to the prosecutor, "With complete denial of liability my client is prepared to pay $200,000 reparation on condition that the charge is dismissed." The prosecutor says, "There will be no other way the victim is going to get anything out of this, so charge dismissed, money paid." Now would that be a legal bargain or an illegal bargain?

MR MARTIN:

Well I think at that point where it is being again reduced down to what would not be, if a Court were to look at it, would not have the same factors of proper consideration by the prosecutor.

WILLIAM YOUNG J:

Well wouldn't it be better if the prosecutor was able to say, "Well gee, it's going to be a hard fought case and I might lose?"

MR MARTIN:

Well I think at that point you are starting to fold some of the additional, the additional elements that do make this case quite a difficult prosecution decision, but there was some care and a number of different factors, with reparation being just one of them, here and so to answer your question on these facts we move a long way from, "If you give us money this won't proceed." There's consideration of evidential sufficiency, consideration of the

other public interest factors we'll come to, one of which is that there is reparation, there is the conditional payment here for the victims.

ELIAS CJ:

But I'm concerned that you're sliding from concept to concept here, because reparation – first of all, you'll have to convince us that reparation is the right lens to look at this through when there isn't an acknowledgement of responsibility – and then you will have to convince us that that undermines the law that we're dealing with here, where I think, again the concepts are bleeding into each other, I think it's not helpful to talk about an illegal bargain because it suggests there's the sort of overlay you're urging on us of additional impropriety. As I understand it, the law is simply that, if you have a bargain that prosecution will not proceed on the basis of a payment that's made, that is an illegal bargain. You know, that's the only issue, was there a bargain here that no evidence would be offered if money was paid?

MR MARTIN:

And I think if I may Your Honour, perhaps I do need to go through the Prosecution Guidelines and explain where various elements fitted into this decision, because there are a number of different aspects to this decision.

GLAZEBROOK J:

Well are you trying to say that this was not – well that it wasn't taken into account at all, because that can't be right because it was?

MR MARTIN:

It was, it was one of the factors.

GLAZEBROOK J:

Well so if it's taken into account, 1% or 100%, what's the difference?

MR MARTIN:

Well the difference is that what you have is a reparation arrangement that in my submission is a legitimate consideration as part of the overall prosecution decision, the public interest assessment.

GLAZEBROOK J:

Well I'd agree totally if he'd said, "I'm putting in $3.4 million without admission of liability and whether or not the prosecution goes ahead, that's what I'm doing. I'm doing it because I think that is the right thing to do even though I don't think that I have a liability to do so and I don't accept the charges." But it's not conditional, it's an offer made in good faith, of course the prosecution can take that into account. It's not a conditional offer, it's just an offer on the table.

WILLIAM YOUNG J:

Well it's a payment.

GLAZEBROOK J:

Well it's a payment, effectively, yes.

MR MARTIN:

In my submission, all that has occurred here is that there has been a discussion about one element, in order to get the details established.

WILLIAM YOUNG J:

But had there not been mutual understandings? Has there not – did those not get to the point where there was a clear understanding that if the charges were withdrawn, the money would be paid or alternatively depending on the sequence, that if the money was paid the charges would be withdrawn?

MR MARTIN:

No, there was as –

WILLIAM YOUNG J:

Well you see, that's why I asked you the questions of how Mr Grieve and –

MR MARTIN:

There was an understanding that the payment, there was an understanding that if the charges were not pursued then this money would be paid, but that doesn't mean there has been a deal that in turn for money that simply there will be no prosecution.

WILLIAM YOUNG J:

Well the police say upon receiving information that leads to the conviction of the offender in a certain murder we will pay $100,000 reward. They get information, conviction results, they pay $100,000, that's a contract isn't it?

MR MARTIN:

There's nothing else in play here except if this then that here –

WILLIAM YOUNG J:

But if there's an offer that crystallises if an event happens, if the offeree brings about a certain event and the offeree does bring about that event, isn't that just a bargain? Isn't that a contract on any analysis?

MR MARTIN:

But what's then being superimposed on the discussion that Your Honour is referring to is this idea that that is all there was in the decision to not offer any evidence and there are a number of other factors that have been – that are significant factors. We're talking about the prospect of a 16 to 20 week trial with a number of witnesses who were not available, expert witness contests –

GLAZEBROOK J:

So what, if this was taken into account and it shouldn't have been, does it matter that there were five other considerations or no other considerations? When does the line get drawn in your analysis between ability to take

something into account are not – if there's one other consideration that isn't terribly important, is that okay?

MR MARTIN:

Well and you know, obviously it comes to the nub of this particular issue. But the situation where, which His Honour Justice Young was referring to, where you've just got to have a straight agreement without any proper consideration of the other factors, in my submission that would be on the wrong side of the line. You need, the prosecutor you would expect to be exercising the discretion and not abdicating it to one factor if you like. And then Your Honour invites me to look at other graduations of that –

GLAZEBROOK J:

Well where do you draw the line? What is the magic that draws the line in your submission?

MR MARTIN:

Well if the Guidelines, as I submit in this case occurred, are applied properly and so the factors that need to be taken into account are taken into account and you can then have the reparation offer as one of those.

GLAZEBROOK J:

Despite – because on our assumption it's an unlawful bargain isn't it? So you can take into account an unlawful bargain.

MR MARTIN:

Well and in my submission it's not an unlawful bargain because the –

GLAZEBROOK J:

Well if it were an unlawful bargain you couldn't take it into account then.

MR MARTIN:

To be an unlawful bargain, in my submission, presupposes the situation that His Honour Justice Young is putting up that you've reduced the matter to,

"We'll pay you money if you don't progress the charges." Not various reparation that will be paid if that's what the decision ends up being and here there are a number of other considerations that went into that decision making.

WILLIAM YOUNG J:
Was there any consideration given to abandoning the prosecution prior to the offer of money being made?

MR MARTIN:
I'm sorry Sir?

WILLIAM YOUNG J:
Is there any evidence that the prosecutor had it in mind to abandon the proceedings prior to the offer of money being made?

MR MARTIN:
No. That he was preparing to, there was a consideration of –

WILLIAM YOUNG J:
It's not one of 10 considerations, it's really the initiator of the whole thing isn't it?

MR MARTIN:
No, not an initiator. So the review is provided for in the Prosecution Guidelines, so the review of the charges is provided for, and the review took place in terms of the evidential sufficiency, so the two parts of the case, and perhaps I should take Your Honours to them.

ELIAS CJ:
Sorry, what are you taking us to?

MR MARTIN:
I'm taking you to the bundle of authorities and we're at tab 21. These are the Solicitor-General's Prosecution Guidelines. Perhaps just by way of

introduction as we come through reasonably quickly to the test, but if you go to the, page 4 of those Guidelines, which is the first few clauses, they deal with the purpose and the principles of the Guidelines and indicate what they're intended to assist with in terms of determining matters of – these matters, and at 2 you get the guidance that they should be conducted in accordance with the Guidelines. Prosecution should – and at 2.3 the Guidelines are not an instruction manual nor do they cover every decision that must be made. However, they reflect aspirations and practices of prosecutors. Then if you –

ELIAS CJ:
What's your position on the application of section 188 of the Criminal Procedure Act 2011 in this context?

MR MARTIN:
Section 185, the provision in terms of, effectively the statutory basis now for the Guidelines?

ELIAS CJ:
No, yes, the statutory basis but also section 188 which imposes duties on all Crown prosecutors.

MR MARTIN:
The submission, Ma'am, is that the CPA didn't in any significant way alter the expectations or the law previously. So – and that is the submission in relation to these Guidelines, that they remain something that is, that the Solicitor-General may promulgate and that they are guidance rather than a mandatory code.

ELIAS CJ:
Yes, no, I accept that. But surely the statutory recognition of their significance does change their status. It doesn't turn them into a prescription because they remain guidelines, but they surely, surely there would have to be some justification for departing from them.

MR MARTIN:

And I mean I don't, I think the point Your Honour is making must have been right previously in the sense that they always had some weight, and to have that –

ELIAS CJ:

Well they'd have got there in terms of legitimate expectation and that sort of doctrine, common law doctrine, but now there is a statutory foundation for that. So they could not be said to not be a mandatory consideration I would have thought today.

MR MARTIN:

But the individual clauses, if you like, they form part of, they're guidance and they form part of the overall assessment that is ultimately to be with the prosecutor.

ELIAS CJ:

Yes, I understand that.

MR MARTIN:

So I don't think I'm disagreeing with Your Honour. But when you come to apply the Guidelines, as is set out at 2.3 and in the beginning of those, they're not a code, if you like. They're not, as it says down there, they do not purport to lay down any rule of law. If you, and we've probably therefore dealt with the point I was going to make as we go over the page, which is the supervision of prosecutions where, at 3.1, section 185 is referred to, and it's suggested there that that section simply codifies the Solicitor-General's long-standing responsibility to maintain general oversight of prosecutions.

We come on now to the next page, which is page 6, the independence of the prosecutor is noted there, and then we come to the test, which was the one I was referring to in answer to Justice Young's question.

WILLIAM YOUNG J:

But it's not claimed that the evidential test was not satisfied, is it?

MR MARTIN:

No the evidential test was, so there are two elements to it, there is the evidential test and there's the public interest test and so the evidential test was satisfied but all that requires is that there be a reasonable prospect of conviction which if you see in 5.3, there is credible evidence which the prosecution can adduce. So here we are talking about a very large prosecution case potentially and a great deal of complexity and an active defence of that case, raising various matters going to admissibility, there was pre-trial applications in relation to disclosure and so forth and there were questions about availability of witnesses.

ELIAS CJ:

But if you look at the Guidelines, for example 5.7, which is really what I think you are invoking here isn't it? The "resources aren't limitless" et cetera. You'd have to, given the way this is expressed, you'd have to assess that in the context of things such as the seriousness and the public interest in that is like that. This is not the sort of case where you're talking about diversionary options for youth or, you know, other things like that. And there doesn't seem to be any grappling with that in the decision that was made. It said it is going to be difficult and it's going to be costly, but where do they look at the public interest in ensuring matters are laid out for a determination by a court in this particular case?

MR MARTIN:

In my respectful submission Ma'am that is present in both the decision paper but also as it is explained in Mr Stewart's affidavit –

ELIAS CJ:

Well, you are going to take us to those. But I must say, reading through them, I haven't – that hadn't struck me. There was indication that it was going to be costly and difficult because of the problems with witnesses but I don't recall

seeing in that that there was an acknowledgement of this particular case and it's, you know whether it was serious enough to warrant that in any event.

MR MARTIN:

Well, for example Ma'am I recall from near the end of Mr Stewart's affidavit and I will come back to it but he refers to the anticipated disappointment of the families. There's a real understanding of the significance, obviously of the tragic circumstances and of the various complex safety issues that the case throws up so that is being grappled with in some details in both parts of the test actually, the evidential sufficiency test, but also the public interest test as Your Honour has indicated.

ELIAS CJ:

Well, we are really only into the public interest dimension here aren't we?

MR MARTIN:

That is what it turns on in the end because there was evidential sufficiency to go forward. It wasn't a strong case, it had a number of problems but then it was –

GLAZEBROOK J:

The flavour of these Guidelines are that with very serious offending you prosecute isn't it? It's a very strong factor, it says, in terms of prosecution and we're assuming the evidential test is met because it has been conceded.

MR MARTIN:

The evidential test was met.

GLAZEBROOK J:

And this must be one of the most serious types of prosecutions you could get, in terms at least of the Health and Safety Act.

MR MARTIN:

If you look at what the objects of that legislation are and you have a public body that is charged with those responsibilities, one factor that's in that and it's not by any means the only factor, is how those resources are deployed in the particular case and here you had Pike River Coal Limited having been convicted – on an uncontested basis but it had been convicted – record fines had been imposed. The reparation order had been made, albeit there appeared to be no real prospect of that being actually paid, but the order had been made so that principal offender had been put through the Court system, then you had –

WILLIAM YOUNG J:

No practical sanctions.

ELIAS CJ:

And also, it was the corporation – it was the – it was diffused by collective responsibility. I'm just looking at these Guidelines, 5.8, the matters that are significant, 5.8.7, where the defendant, ringleader is not the right word here, but where the defendant was an organiser of the offence. That sort of thing suggests – and has created a serious risk of harm – those sort of matters.

MR MARTIN:

But the difficulty, if I may make this submission Ma'am, is that we now embark, if we're not careful, on what is really a very large body of material that's not before this –

ELIAS CJ:

No, no and it's not the sort of thing that this Court can embark upon, but if we don't have confidence that the prosecutor has actually grappled with the relevant considerations, then that's a matter of concern for us.

MR MARTIN:

In my submission Mr Stewart's affidavit should provide the Court with some –

ELIAS CJ:

We are going to go to that.

MR MARTIN:

And I can take you through that because that because that, in my submission, evidence demonstrates – and Mr Stanaway's evidence as well – they demonstrate that real consideration was given to a range of factors and including the, and Your Honour will imagine, the vast amount of material we're talking about, I think it is some 600,000 pages of disclosure and there's potentially 90 witnesses, I think, so a vast amount of material that has had to be considered in order to make this decision and Your Honour was making the point before about whether Mr Whittall might be involved and you referred to some of those provisions which, in my submission perhaps are more directed at sort of organised crime, but regardless one of the questions that needed to be established in relation to Mr Whittall was whether, what the level of control he may have had, what knowledge he may have had. So there's a very large amount of work that sits behind that and clearly he was denying that. So where I end up with is the submission that those sorts of fine-grained assessments and decisions are in my submission not matters that are properly amenable to review in the sense that they do require, in this case, a great deal of assessment of what actually the evidence that could have been brought against Mr Whittall might be.

GLAZEBROOK J:

But that's not dealing with the point of whether they grappled with the seriousness of the offence. Nobody is suggesting that they hadn't grappled with some of the difficulties of – and least of all Mr Hampton as I understand – and it's difficult to do so because they did seem to have taken that into account – the difficulties that might be in the prosecution and the cost. What you are being asked about is: did they grapple with the seriousness of the offence and the responsibilities under the Act and the purpose of the Act which is actually indicated at 5.10, if you can put it into regulatory prosecutions, which I think you probably can?

MR MARTIN:

Yes, yes Your Honour is right, that 5.10 talks about the statutory objectives and enforcement priorities, which in my submission were clearly in the mix here where you have such a significant health and safety –

GLAZEBROOK J:

Well, they just didn't say so, I think that's Mr Hampton's point, yes they are clearly in the mix but they didn't seem to have been taken into account.

MR MARTIN:

In my submission, in terms of – and I will take you to Mr Stewart's affidavit now perhaps –

ELIAS CJ:

Well, hang on, perhaps just to be orderly we should ask you whether there's other things in the Prosecution Guidelines while we've got them up that you want to draw our attention to or make any submission on.

MR MARTIN:

Well, perhaps if I can – and this was probably the main framework for the submissions around the decision, it was simply to take you through these Guidelines and have this discussion as we go.

ELIAS CJ:

I can't remember, which provision it is that says, that echoes, that you can't withdraw charges simply for payment, where's that – you can take into account reparation, we should look at that.

MR MARTIN:

5.9.10, so 5.9.10 says, "Where the victim accepts that the defendant has rectified the loss or harm that was caused," that that is a factor in terms of the public interest –

GLAZEBROOK J:

Which is my example I was giving where somebody says "I'm giving you this money, I'm not accepting responsibility but I'm doing it because you have been harmed" but there's no, it's not conditional on withdrawing the prosecution.

MR MARTIN:

Well 5.9.10 I think maybe concerned with something different, which is where the victim accepts that the defendant has rectified the loss that has been caused, then it has the rider on it that the defendant should not be able to avoid prosecution simply because they paid compensation. So that is a factor that is here that is directed, in my submission, at what the victim accepts.

WILLIAM YOUNG J:

It doesn't really help you here.

MR MARTIN:

It doesn't, it's not, I'm not –

WILLIAM YOUNG J:

Is there anything in here that helps you?

MR MARTIN:

Well the –

WILLIAM YOUNG J:

On money I mean, I mean –

ELIAS CJ:

It may not help but it may actually not be very helpful to you because the fact that the Guidelines acknowledge you can't pay your way out of liability must also be an acknowledgement which bears on the prosecutorial discretion. I mean you probably don't need it because we've got the law on that, but –

MR MARTIN:

That guideline, the rider to that guideline, as I would submit, simply coming back to Justice Young's point, that if you have, if you reduce this down to "I will pay you this money, if the prosecution doesn't proceed" with nothing else, then you perhaps have moved a public prosecution position into essentially the same sort of problems that you see in the private bargain cases like *Jones* and *Polymer* but –

WILLIAM YOUNG J:

When you say it doesn't just involve a bargain, and I agree with that, but why does that matter, that there are other factors involved, if the whole picture includes a bargain? If, as a central part of what happened, there were mutual understandings that if one thing happened another thing would happen.

MR MARTIN:

Because the decision – what you don't have is the part of it that says, if you pay this money there will be no prosecution. What you have is, there's going to be a decision –

WILLIAM YOUNG J:

Myself, I think there is that.

MR MARTIN:

But if you, what you have here –

WILLIAM YOUNG J:

I think there was other, I kind of agree there were other things as well, but I do think there is, at the heart of it a set of understandings under which money would be paid and the prosecution abandoned, and I don't see how that's helped by saying, well yes, but it's only one part of a picture because it is one part of the picture.

MR MARTIN:

In my submission, and perhaps to be clear on this point, it's certainly not accepted that you have, you clearly have an intention on the part of the defendant to say we're paying this money, we want the prosecution to go away, but you don't have acceptance or agreement on the part of the –

WILLIAM YOUNG J:

I don't agree with that. As I said to you, if the prosecution had been abandoned but the money hadn't been paid, wouldn't Mr Stanaway be entitled to be cross, because there had been an understanding that the money would be paid?

MR MARTIN:

Well no, what Mr Stanaway had been, had put in place was a process, if you like, by which the money would be paid before the charges were –

WILLIAM YOUNG J:

I know but say –

GLAZEBROOK J:

Well then he was making sure that the bargain was actually met wasn't he?

WILLIAM YOUNG J:

Well put it the other way, because I did put it the other way, and it's – if the money had been paid but then Mr Stanaway had not withdrawn the charges Mr Whittall would have been cross because his understanding would have been, pay the money the charges are dropped. And, I mean, is there any answer to that?

MR MARTIN:

There's a difficulty between being cross and –

WILLIAM YOUNG J:

But why would –

MR MARTIN:

– being able to try and enforce it –

WILLIAM YOUNG J:

No, I accept you can't enforce it, but won't he be cross because there was an understanding? Can you really get past that? That there were understandings that money would be paid and the charges would be dropped.

MR MARTIN:

But there's only –

WILLIAM YOUNG J:

Can you just answer that question? Can you get past the proposition that there are understandings each way?

MR MARTIN:

It's conditional, the understanding is a conditional understanding that if there is, if the prosecution does not proceed –

WILLIAM YOUNG J:

That's what I mean; that's what I mean. It is a conditionality that means there are understandings each way.

MR MARTIN:

There is not a bargain that the prosecution will not proceed.

WILLIAM YOUNG J:

You're changing the language. Do you accept there are understandings each way?

MR MARTIN:

It's in the nature of that conditional payment. There must be an understanding that if there is no prosecution the amount of money will be paid. But there is no understanding that there will be no prosecution, because with respect –

O'REGAN J:

Mr Stanaway called it the central arrangement when he was writing to Mr Grieve, he said, "The central arrangement is the payment." And that was in response to I think Mr Grieve calling it the "essential feature" of the transaction.

MR MARTIN:

And I think that he needs to be read in the context of the exchanges they are having and that Mr Stanaway, and I'm not diminishing his role overall, he's an advisor and a representative in this, but he is not the decision-maker and the prosecutor who made the decision, Mr Stewart and there was – and Mr Podger was the deputy chief executive who also approved that decision. They are removed from those discussions that are occurring, which in the end did boil down to the payment despite Mr Stanaway's efforts.

O'REGAN J:

But Mr Stanaway is representing them in negotiations with Mr Grieve, isn't he?

MR MARTIN:

Well he's having the discussions that started off as plea arrangement discussions and ended up reducing down to what Your Honour has said as sort of the centrality of a payment. It wasn't where Mr Stanaway started off. As you've heard he was endeavouring to reach a clear arrangement that involved some acceptance of responsibility on Mr Whittall's part. But what ended up becoming central to that was the reparation element and this is where I do sort of come back to Justice Young's point. So yes, there was an understanding that if there was no prosecution, then money would be paid –

WILLIAM YOUNG J:

Were there not understandings? I mean we don't even know whether the money was paid before or after the charges were dismissed. The fact that, as it were, we don't know, suggests that there was never any question but that: (a) the charges would be dismissed and (b) the money would be paid and I

know you don't like my language, but I can't see how you can resist the view that there were understandings each way.

MR MARTIN:

Well if I can pick up a point that Justice Glazebrook raised before, the idea that Mr Stanaway – and they put in arrangements in order for the money to be paid into Court, was it in fact because there wasn't a, if you like, a bargain as such. There needed to be a way to ensure that if the charges were withdrawn or if no evidence was offered, the money was already paid into Court. So in other words they're separate things, you're not going to be able to enforce the other.

WILLIAM YOUNG J:

So what would Mr Whittall have said if the charges weren't dismissed?

MR MARTIN:

I'm sorry Sir.

WILLIAM YOUNG J:

What would Mr Whittall have said, what would Mr Grieve have said if the charges were not dismissed? Would they not have said, "But that isn't the deal we made."

MR MARTIN:

All they have said is that they would pay money in the event that the charges don't proceed, so they haven't said they will pay it in any event.

WILLIAM YOUNG J:

No, of course they haven't. Look, I'm sorry, I really think you haven't engaged with the point I have put to you, but you simply don't accept that there was an understanding on the part of Mr Whittall that if the money was paid the charges would be dropped in understanding on the part of the prosecution that the charges would be dropped once the money was paid, you just don't accept there was any understanding?

MR MARTIN:

I accept that there is an understanding that if the charges are –

WILLIAM YOUNG J:

No, I'm sorry, you've said that about a dozen times.

ELIAS CJ:

Your point is that the prosecution maintained the right to go ahead and so that means that the understandings weren't acted on because the decision was made partly on the basis of the understandings but not – but the prosecutor still had the discretion is that what you mean?

MR MARTIN:

Yes, and the discretion in my submission was still properly exercised.

WILLIAM YOUNG J:

Well can you point to anything where Mr Stanaway reserved the right to go on with the prosecution if the money was paid?

MR MARTIN:

If the money was paid.

WILLIAM YOUNG J:

Well you can't, it's nonsense. It's just nonsense.

ELIAS CJ:

Can I – because I think that's probably exhausted now is it?

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

Can I just say that I, and perhaps some other members of the Bench, am still hung up on this contractual language, and I do find this Prosecution Guideline helpful because I think it is an articulation of a general public law principle

which lies behind the bargain to withdraw or not to proceed with prosecution cases, and that is defendants should not be able to avoid prosecution simply because they paid compensation. Now I understand your argument, and you're going to elaborate on it by reference to what Mr Stewarts says, that this wasn't "simply because" compensation was paid, but if there was an avoidance of prosecution because compensation was paid, if the prosecution, if that was central to the decision not to prosecute, why isn't that contrary to public policy in New Zealand?

MR MARTIN:
So I think Your Honour is asking even if you had a payment that accorded more closely with 5.9.10, where the victim had agreed with it –

ELIAS CJ:
Well I'm just saying that's indicating a general policy which gets applied in the context where the victim says, look, everything's been made good by me, but the prosecution still has to consider the matter. Why isn't that policy also relevant to the prosecutorial decision generally that defendants should not be able to avoid prosecution simply because they paid compensation?

MR MARTIN:
If I'm understanding Your Honour correctly I think the answer lies in the place of reparation in the criminal justice system, and that's section 12 of the Sentencing Act 2002 and section 32.

ELIAS CJ:
Not really, I just meant it as a more general proposition. That people can't buy their way out of prosecutions, as Mr Hampton put it, that is a policy and, you know, whether you have to show that there was a meeting of minds, or nudges and winks, if the effect of the arrangements that have been made is that the prosecution didn't go ahead because of the payment of compensation, why isn't that something that the law sets itself against? Why isn't it contrary to public policy? Sorry, too many negatives in that.

MR MARTIN:

I think the submission, Ma'am, is that because there is a countervailing, or it may not be countervailing, there is another public interest, significant public interest, in there being reparation being made available for victims of offences through this, through the criminal justice system and –

ELIAS CJ:

Well it's not enough in 5.9.10, when the victim accepts that they've already received reparation, if you want to call it reparation.

MR MARTIN:

Well they're both sitting in there though and so to some extent you could say there is a tension in that clause because on one hand you have a situation, which I accept is not the situation we're dealing with here, but a situation where the victim has accepted that loss has been rectified, so reparation has been made, so that is a factor that counts against prosecution, although defendants shouldn't be able to buy their way out of prosecutions. So there's a judgment to be made even in 5.9.10.

ELIAS CJ:

I don't disagree with that. But I'm saying if you make that judgment, that this prosecution would have proceeded but for the payment, why isn't that something that the Court should be concerned about?

MR MARTIN:

Well there is a point where if it has been reduced to a bargain where that is all there is, so the payment has been made, either to a private person or, in circumstances where a public officer has not properly applied the Prosecution Guidelines, and has not, and has therefore allowed it to dominate in a way that isn't exercising that discretion properly, then it shouldn't occur. But that's not to say there isn't a place for considering the offer to make amends, the offer to provide reparation to a victim in the course of a prosecution decision.

ELIAS CJ:

Well, if the prosecution would have gone ahead but for the payment, what do you say to that, isn't that contrary to the policy in parenthesis in 5.9.10 and isn't it also something that is contrary to the policy of the law more generally?

MR MARTIN:

It would be very difficult to justify a situation where you had a strong case, strong prosecution case and there weren't countervailing public interest factors except the payment of money.

ELIAS CJ:

Okay so it really does turn on the extent to which there are other countervailing factors in this case?

MR MARTIN:

Yes and there are a number of them, including that it isn't a strong case except that it has reached the evidential sufficiency threshold but it is not a strong case, it's a large and difficult case. So the outcome cannot be safety predicted, that's the litigation risk here, and so then what is being considered, in my submission properly, is a factor that is: there is significant public interest in achieving reparation for the victims here.

ELIAS CJ:

And you're going to tell us, you're going to talk about reparation under the Criminal Justice Act are you, did you say?

MR MARTIN:

I wasn't going to go a lot more into it.

ELIAS CJ:

Is it tied to, can you have reparation without an acknowledgement of responsibility under the scheme of the legislation?

MR MARTIN:

In terms of the Sentencing Act provisions, I mean by their nature they are looking at reparation in the context of a sentencing, so clearly in that context you do have either an admission or a finding of guilt.

ELIAS CJ:

Well, then you can't argue, can you, that a policy of the law, if you're reading statute sideways supports a payment in these circumstances?

MR MARTIN:

I hear your point in terms of the sentencing aspect of it but what it does mean is that a prosecutor who is turning their mind to the outcome of the prosecution and weighing in that uncertainty around prospects of success, costs and the objective of the criminal justice system to achieve reparation, or an objective to achieve reparation for victims, in my submission it can't be said that you can't have prosecutors engaging in these questions. To take an extreme example and I realise it is not what Your Honours are saying, but to take an extreme view, you can't have the outcome of a case being that a prosecutor must never in any way entertain a discussion about reparation because reparation is one of the objectives of the system, restorative –

ELIAS CJ:

In deciding whether to prosecute?

MR MARTIN:

Well, it must be part of the considerations that a prosecutor is entitled to take into account because it is one of the legitimate objectives of the criminal system. So in that sense it is, in my submission, a legitimate consideration. Yes, if it dominates, that could become improper.

GLAZEBROOK J:

See I just have difficulty with the dominating and I must say I had difficulty with the but-for test as well, because if it is one of the considerations, then it is a consideration of an unlawful bargain, in terms of the policy behind that.

So unless it is not an unlawful bargain for a prosecutor to say, I won't prosecute if you pay money to the victims, then even if it is at 5% consideration, it would seem to me to be a consideration of something unlawful.

MR MARTIN:
And the sticking point I have got to on that it seems, it is submitted that here you don't have a bargain in the sense that you have an agreement if you want to call it that if there's a decision not to prosecute then there will be a payment.

GLAZEBROOK J:
And if that's taken into account, if I don't prosecute I get, the victims will get some money, then that's against public policy isn't it? If that's a consideration that's taken into account, aren't you taking into account what is already against public policy, to accept money for not prosecuting, whether for the victims or for yourself?

MR MARTIN:
In my submission, it is not, it is not public policy that every offence must be prosecuted and in my submission it is a legitimate consideration that the victims will receive reparation or –

ELIAS CJ:
Will receive payment.

MR MARTIN:
Will receive a payment of money for harm they may have suffered. So those things can sit and in my submission do sit in the –

ELIAS CJ:
But they'll only receive it if I don't prosecute and I can take – so the prosecutor can take that into account legitimately as a consideration on your submission in deciding not to prosecute.

MR MARTIN:

Yes, but there's no –

ELIAS CJ:

So that they can allow the offender to buy their way out of prosecution as long as they have other considerations they're taking into account as well, is that the understanding of the argument?

MR MARTIN:

And the reason I take the point about the buying out of justice if you like is that the public prosecutor must still exercise the discretion and weigh the various factors and here there are a number of them that are in play. So you can't be in a situation where you have actually got a bargain that you pay this, we will not offer any evidence and in my submission that is not what the facts show here. The facts don't show a bargain simpliciter that, "Pay us this money and there be no evidence offered." Yes, the conditional payment was taken into account in terms of the public interest assessment overall, but so were a number of other, in my submission, weighty factors, such as the potentially very protracted trial with a number of difficulties that lay ahead, evidentially and otherwise and also – sorry, and the attendant costs and therefore use of resources in terms of Health and Safety enforcement in that area. We've already got a principal offender that has been through the criminal justice system and you've had the Royal Commission. So those are weighty factors in my submission.

ELLEN FRANCE J:

So where you have no acceptance of liability, how is it that you say that you can characterise the payment as reparation?

MR MARTIN:

In my submission it is not reparation under the Sentencing Act, because you're not going to get to that point, but in my submission it is still apt to see it as analogous or in the nature of reparations. Perhaps I'm shorthanding it too much Ma'am. It's described in the documents as –

ELLEN FRANCE J:

Well why is it analogous to see it in that way?

MR MARTIN:

Because it is serving the same broad purpose which is financially to make amends to the victims. So in the technical sense it's not reparation but it – and it's described in the documents as a payment in the nature I think of reparation. That may be from memory Judge Farish's description.

ELLEN FRANCE J:

Well for example in Mr Stanaway's memorandum to the District Court, he says, "Mr Whittall has proposed that (in the event that the charges against him are not proceeded with) a voluntary payment be made," and you're saying that can be construed as akin to reparation?

MR MARTIN:

I don't think the terminology changes what is occurring, which is there isn't a making of amends to the victims here and it is not a – it was by no means, it was by no means certain, in fact the prosecutor doubted that there would be reparation ordered against Mr Whittall and at this point we're well outside, you know, matters which in my submission the Court is going to be able to resolve on the evidence before it.

ELIAS CJ:

Does that make it better or worse that the prosecutor had the view that reparation ultimately wouldn't be ordered?

MR MARTIN:

Well I was offering that into context in terms of the question. I'm not sure it makes it either better or worse. It's making amends to victims.

WILLIAM YOUNG J:

Well there is a policy – I mean, one of the policies for the rule against stifling prosecutions is that criminal cases should be prosecuted criminally; another

reason for the rule is that people not be blackmailed. In cases where there are civil disputes they shouldn't be dressed up as criminal so that someone can be bullied into paying money to avoid a bad prosecution. So in a way I think that's the point the Chief Justice is making, you know, it's probably not that helpful to say, well poor old Mr Whittall wouldn't have had to pay the reparation of that amount anyway.

MR MARTIN:

I take your point, and my answer to the idea that it might operate in that other way, would be essentially the same, which is here you have an overall prosecuting decision applying the Guidelines and so you're not in a situation where, in my submission, Mr Whittall or anyone else is being extorted, I think that was Your Honour's term. So you've got the protection against that in terms of the public official who is, in my submission, in good faith exercising the, or as the Court of Appeal put it, bringing a fair and honest mind to bear on the question of whether the prosecution should proceed in the public interest, and there one of those factors is the conditional payment, which in my submission is in the nature of reparation, but it's only in that sense of making amends. But it is only one of a number of weighty factors in this particularly difficult prosecution decision.

ELIAS CJ:

So do you want to now take us to the decision documents, is that what you were going to do? So the 4 December memo and then Mr Stewart's evidence?

MR MARTIN:

If I can, yes Ma'am, if I can do that. There is a –

GLAZEBROOK J:

Can I just go back to the public interest test? What it looks to me is though the evidential test is the one where you look at the difficulties of prosecution and the likelihood of success rather than public interest, isn't it? I mean I can understand that if you've got a case that's marginal under the evidential test,

the public interest factors might outweigh taking it, but I'm not certain that those factors come into the – cost certainly does, under 5.11, but it's almost after you'd taken these other factors into account with the seriousness of the offending being one of the major factors. I suppose there could be an argument in terms of 5.9.1 that in terms of Mr Whittall, because it would be a small or nominal penalty, that although the offending was serious in the sense of effects of it, his role in it was not as serious because that would be the outcome for him. But I'm just not totally convinced where you look at these factors that talk about, that – apart from cost – the type of defences that might be available or the iffiness if the evidence is actually one of the factors that does weigh under public interest.

MR MARTIN:
And broadly when we come to see Mr Stewart's evidence, the evidential matters are really in the evidential sufficiency part of the decision.

GLAZEBROOK J:
All right.

MR MARTIN:
But, yes, it does –

GLAZEBROOK J:
Those other factors that you're talking about, most of them come under the evidential sufficiency test, which has been said to be met, so under public interest I'm just asking you whether in fact the issue of reparation was actually one of the major or significant factors that was taken into account, against the background of it being a difficult prosecution.

MR MARTIN:
As Your Honour has acknowledged, they impact strongly on cost, and they do also – you then under the public interest assessment still have to ask whether the cost and the resources and the, I guess the protracted nature of the matter, which will be brought about by those matters considered under the

evidential test, is in the public interest when you weigh in those other factors. So it comes in that way, and it's not all about cost but I accept that cost is one of the, that's one of the significant aspects of that. That you're weighing against a, if you like, an arguable prosecution case, the fact that it's going to be a very long trial.

GLAZEBROOK J:
Well, if it was a straight murder charge, would the prosecution say well, it's going to be a really difficult long trial and I think I've decided I won't prosecute?

MR MARTIN:
Well, in my respectful submission, it would be an entirely different application of the Guidelines because you'd be looking at, this is a fineable, a fine only offence and –

GLAZEBROOK J:
But in terms of seriousness, so when does it get not serious enough that you'd say, well, cost, once you get over the evidential threshold?

MR MARTIN:
Ma'am, I mean it will obviously vary very much on the particular case, here you have got the factor that, the key ones that are in play here are the fact that you have a secondary party in the respondent's submission where the principal has been put through the system and where the, you have a fine only offence, you have a fine only penalty potentially and you're looking at a 16 to 20 week trial and all the difficulties that you've heard about, so –

ELIAS CJ:
Can I just say, just that assumption that the principal offender has been dealt with – I, and I don't know the Act well enough, but I thought one of the things about the Health and Safety Act was to take it to humans, rather than – human responsibility rather than simply corporate, you're saying the corporation is the principal offender, I'm just wondering whether there is a

basis for saying that in the Act. Don't worry about it now, but just a question I have.

MR MARTIN:

No, I understand. This is one of the areas that has been reformed through the new legislation Your Honour, because of these difficulties, really, the broad difficulties with this sort of secondary participation. Section 56 is the provision we're talking about. Mr Whittall would have been acquiescing or participating in the failures of the company. So in that sense, in my submission, would have been a secondary party and what you would need to demonstrate is that he knew of, I'm speaking generally here, knew of the failures, knew of the company's failures, and could have done something about those. So he's acquiescing or participating –

ELIAS CJ:

Well actually 56(1) is helpful because it does deal with it. It's "whether or not the body corporate has been prosecuted or convicted," so it doesn't suggest secondary status as a party, it just makes you a party. It doesn't – anyway, that's probably as far as you need to take it. It was just a question.

MR MARTIN:

There's no question he could be prosecuted, and it was obviously prosecuted at the same time, but in terms of the public interest assessment, and we'll come to this when we look at Mr Stewart's affidavit, but one of the factors taken into account was the fact that the principal offender, which he would have been alleged to have acquiesced or participated in the failings of, had been fined record amounts and a reparation order made and so on.

ELIAS CJ:

It was in receivership.

MR MARTIN:

Yes, I accept that, and it's –

GLAZEBROOK J:

It's not like a principal offender who murdered and you might have assisted in a relatively minor way in that murder, is it? I mean this is direct participation, isn't it, that's alleged at least?

MR MARTIN:

Well at that point we –

GLAZEBROOK J:

Because the corporation can't act, a body corporate has to act through humans, so it has to be actually direct participation of some human, because it can't do it by itself.

MR MARTIN:

But there was more than one person, more than Mr Whittall, potentially involved.

GLAZEBROOK J:

I understand that, but to say it's secondary participation is assuming that you have someone else that's doing the acting, you're suggesting that's the corporate, but it can't be because the corporate can only act through humans.

MR MARTIN:

Yes, but from the prosecution's point of view you still have to be able to establish that additional link to, in terms of to make out the charge, to make out the responsibility, so it's not a direct situation where – I mean Mr Whittall was not the employer, or the principal, so you're not in a position – you've got to demonstrate the acquiescence and the participation in the failures by the company, and I accept that –

ELIAS CJ:

Or the direction, who directed, authorised, assented to, et cetera, et cetera. I would have thought myself that section 56 was an attempt to sheet home responsibility to individuals and that the submission that the principal party

has been dealt with and fined a record amount of money, is not, you know, it's not a very cogent view here. That this is subsidiary liability because it doesn't look like subsidiary liability to me. Anyway.

MR MARTIN:
There may be a limit to how far I can take that. It was a factor, one of a number, a factor that was in that decision.

ELIAS CJ:
Sorry, it's one o'clock and we'll try not to interrupt you so much after lunch, but you'll take us to the 4 December decision and the evidence that was given in the judicial review?

MR MARTIN:
I will Ma'am. Just before the Court rises, there's a point that's come to my attention that completes an answer on reparation. Reparation can be ordered after a discharge without conviction under section 106 of the Sentencing Act. It's called "compensation" I understand. I think it was Justice France's question, so where someone has been discharged without conviction under section 106 of the Sentencing Act there's still –

ELIAS CJ:
But that's after a guilty plea, is it?

MR MARTIN:
Except that Ma'am. Just completing that answer.

ELIAS CJ:
I see, I understand that. Thank you, that's helpful.

COURT ADJOURNS: 1.02 PM
COURT RESUMES: 2.18 PM

ELIAS CJ:
Yes thank you Mr Martin.

MR MARTIN:
Thank you Ma'am. I propose now Your Honours to go to Mr Stewart's affidavit, which is at tab 12 of volume 2 on the case on appeal and my purpose here is really just to take the Courts through that evidence to indicate the scope of what was taken into account in various considerations as it appears from his evidence. I will start at page 3 of his affidavit if I may, which is paragraph 12. It sets out there a list of people who were involved in various aspects of the investigation and the subsequent decision making process, noting senior members of the Health and Safety Group and a number of experienced advisors.

Coming over to the next page, at paragraph 15, Mr Stewart notes that this investigation was and remained the largest investigation of its type that had been undertaken by the Department of Labour and he notes some of the complexities that were involved and the fact that there was a team of 15 investigating during this period and he notes at paragraph 16 that it was conducted over a longer, the investigation was conducted over a longer than normal period because of the complexity of the issues involved.

There is a, before I leave that point, there is a very large body of information that, I think indicated earlier, sits outside the scope of this judicial review and that is what's – that's really the point that I'm making here is that this group of people have engaged through the process that Mr Stewart summarises in that complexity and in my submission have taken into account in a detailed way, the matters of health and safety this case presented which were clearly important and complex and while they're not gone into in detail in this affidavit, and in my respectful submission that's because of the purpose of this affidavit which is in response to a judicial review application. It's clear that there was a great deal of work and consideration that went on at various points, both in relation to prosecuting Mr Whittall and the companies involved and in terms of considering the strength of that case and how it might be advanced.

If I may just pause at 18 through to 21 of the affidavit. This is in relation to the prosecution of the VLI Drilling Limited. You will see that this is a company that pleaded guilty to three offences and it was an employer or a principal in relation to three of the men who were involved in the tragedy.

At 21 the outcome of the sentencing is noted by Mr Stewart and the point that is I think most important for present purpose is the fine that was imposed and I acknowledge there is a 25% discount for the guilty plea in that instance, but also in that instance no order for reparation was made. They're in a different factual position to Mr Whittall but there was no proof of the cause or connection with harm in that instance and so while a different case, it does indicate that –

ELIAS CJ:
Is that what the Judge said in – I haven't read her sentencing, I don't know whether it's before us, whether we've got KAS-2 –

MR MARTIN:
So what, when we come to the prosecution of Pike River, what we had there is findings, expressed findings of Judge Farish that there was that cause or nexus that –

ELIAS CJ:
No there was there, you just said there was no cause or nexus. I'm just saying is that what Judge Farish found when she sentenced?

MR MARTIN:
If I may, I will come back to you on that point because she expressly mentioned that.

ELIAS CJ:
We don't have that with our material do we? We do? KAS-2?

MR MARTIN:
Tab 18.

ELIAS CJ:
That's all right, that's okay, don't take time to go to that.

MR MARTIN:
I'm sure I'll be able to provide you with an answer to that, but no reparation order was made or sought I believe in that instance in relation to that company and my point in touching on that is that there is a hurdle that was able to be surmounted in relation to the company, which was not a contested prosecution in relation to the reparation, but it was by no means certain or clear that that would have been achieved in relation to Mr Whittall, had a prosecution proceeded.

The prosecution with the company is considered by Mr Stewart at paragraph 22 and onwards in the affidavit and then he, well, and the point that I've just made is actually covered by him at paragraph 30 but it was relevant for the purposes of sentencing in that case that the failures of the company were causative or significant contributors to the explosion. Then Mr Stewart comes to the prosecution of Mr Whittall in the District Court and there are the charges which we have touched on this morning which have as part of their elements, the allegation of him acquiescing or participating in the failures of the company which was seen by the respondent as a principal, which is not to say that Mr Whittall could not be prosecuted, but that there was the need to prove the knowledge element in terms of the operation of the company, the failures of the company and that to prove beyond a reasonable doubt and that he was in a position to do something about that. So the approach to the prosecution was summarised there by Mr Stewart and Mr Stewart then comes on at 35 to a decision not to proceed with the charges against Mr Whittall.

Without going back into matters raised this morning, may I draw the Court's attention to paragraph 38 which is where the police announcement not to pursue manslaughter charges is noted and Mr Stewart notes at 39 that he

became aware that Mr Stanaway had some counsel to counsel discussions with Mr Grieve. However, and importantly at 40, the investigation team continued to review the evidence and prepare the prosecution of the charges against Mr Whittall. And so the preparation for a trial proceeded and –

GLAZEBROOK J:
What was the firm proposal that he was referring to?

MR MARTIN:
Sorry a firm proposal of the kind that is now before the Court in terms of the proposal of the voluntary payment or of something similar. At that stage earlier on it would have also been a question around plea arrangements, because that is what Mr Stanaway was discussing. Initially it was a plea arrangement but until they had something in the nature of a plea arrangement, as we know it didn't involve a plea in the end but there was some proposal that he was aware was being discussed and didn't know the detail of obviously at that stage. But what he ended up having or being aware of in the end was the proposal that you have in the 16 October letter.

At 44 he, Mr Stewart talks about the work that was going on in a little bit of detail. The 92 witness briefs signed and unsigned that were prepared, the 90 that were provided to the Court and to defence counsel and the approximately 600,000 documents that were reviewed for disclosure. And then at 45 Mr Stewart refers to the review of the charges as provided for and required by paragraph 9.2 of the Solicitor General's Prosecution Guidelines and this is where Mr Stanaway, as an experienced and well respected Crown solicitor had input into that process, consistent with the Guidelines. You will see that at 49 Mr Stewart talks about the panel that was agreed on to advise and assist the decision making and a number of various people, the different backgrounds who were involved in that.

It carries on over the page and there's the meeting on 26 November and then at 54 Mr Stewart comes to the factors that were taken into account in terms of this efficiency of evidence test which we looked at this morning. He says,

"The likelihood of a successful prosecution was low for several reasons, including," and he goes through the factors that are set out at 54, "The unavailability of at least 14 prosecution witnesses and other reluctant witnesses, the likelihood that briefs might be admissible, likely expert contests and the indications from the defence that a lengthy and complex pre-trial arguments would be raised." So all that under the efficiency of evidence test. In the end, a case that could be advanced but not a strong case.

At 55, Mr Stewart deposes of the several reasons that indicated a trial was not in the public interest and which were by that time apparent. And there is a number of these and he expands on them at 68 and so they are summarised there under that public interest head. What I propose to do is to take the Court now to 68 where those public interest factors are dealt with in a little more detail. But I do note, in terms of 55.4 and 55.5, there's the fact that the Royal Commission had taken place and a comprehensive report had been produced and there's the likelihood that the prosecution would require a 16 to 20 week trial in Wellington.

So at 67, Mr Stewart says in making the decision, which is the decision to offer no evidence, they concluded that the test for evidential sufficiency was met but the likelihood of obtaining a conviction was low and that continuing with the prosecution was not in the public interest. We've touched on already the points that are at 68.1 and 2 and 3, which are the matters about the unavailability of witnesses and expert contests in anticipated procedural issues. 68.4 –

ELIAS CJ:
Sorry, did you, you've jumped over the decision document to go to the evidence. I would like you to go back at some stage, I'm just reminding you.

MR MARTIN:
Happy to do that now Ma'am.

ELIAS CJ:

No, not it's fine. Carry on now that we've got this open. It's just that this is ex post facto and some of it is argument.

MR MARTIN:

And the decision document which, and I am happy to go back to it now, it's the document we had earlier on, it is consistent with these same points. What the evidence is doing at this stage is simply I guess, elaborating on the decision maker's reasoning.

ELIAS CJ:

Well, are you going to be inviting us to rely on this reasoning because I must say, I have queries, I wouldn't want you to think that I would accept at face value some of the matters that are referred to in subparagraphs 1 to 5 of 55.

MR MARTIN:

Where the respondent's submission ends up is that there is a limit to how far the Court with respect should go into the reweighing if you like of these various factors.

ELIAS CJ:

No, I'm not talking about reweighing, I'm talking about immateriality and relevance, so I would have thought some of these things were quite debateable.

MR MARTIN:

And that I think is where there will be a point beyond which it is going to be difficult for me to submit because the factors that he is setting out are clearly the factors that he seems to have taken into account in that process and it is the respondent's submission that they were matters going all to weight in the, and in – legitimate factors in terms of the Guidelines and so what this affidavit is doing is recording what was clearly quite a careful and comprehensive decision-making process. This was not a, as you would expect, given the scale of the tragedy and prosecution, this was not a simple one prosecutor

decision on its own, if you like, on a day in Court. This was quite a significant process and he has tried to capture the reasoning.

If I may Your Honour, I think it might be helpful for me to take you back to tab 27 of volume 3 which is the summary of the decision and so there is a discussion there in a similar vein talking about the process at page 343 of the volume and noting the people who were involved and then there are the factors considered in the decision making at page 345, paragraph 25 of that decision, although perhaps worded slightly differently in my submission, they are essentially the same points that are set out in the evidence and to some extent expanded upon and explained, but that is a summary of the decision that Mr Stewart is giving evidence about.

While we have perhaps both of those open, I note for example the seriousness of the offences as dealt with at 25(c) of the decision document and at paragraph 68.5 at page 164 of the affidavit. Just before I go into that, I wasn't proposing to go back into the perhaps difficult topic of the principal/ secondary offender approach. Clearly the way the respondent had conceived that was in those terms, but I think the germane points for present purposes are that need to prove beyond reasonable doubt the knowledge aspect, the acquiescing and participating in this case and the prosecution, it is submitted, faced real difficulties in doing so. At least that was the prosecutor's assessment, having looked at the very large amount of material and at a higher level, this was the catalyst and this issue was one of the catalysts for the changes to the legislation which we now see which to some extent if you like look behind the veil of corporate responsibility more than previous legislation had. But at that time, at the time that we're talking about, that was a real consideration that the prosecutor had to take into account because they were assessing the litigation risks that presented on this case.

Which brings me to the question of the seriousness of the offences and as I've touched on there, there are two elements really. There is the difficulty in being able to establish the allegations against Mr Whittall and then there's the question of what the outcome of doing so would be, and in particular would,

what would the fine have been? It's suggested in Mr Stewart's affidavit at 68.5 that a fine of tens of thousands of dollars. I think it's been described perhaps elsewhere as a modest fine. A fine in that sort of order was what they were expecting would have been the outcome, assuming that it was possible to have obtained a conviction, and, significantly, it was doubted that prosecution would be able to establish the necessary causative link that might have allowed an order for reparation to be made. In a –

ELLEN FRANCE J:

Could I just check, just in terms of the charges, am I right that you have eight charges, and then another four that are in the alternative, and were the requirements as to knowledge the same in relation to the alternative charges as they were for the other eight?

MR MARTIN:

I'll get the, so I get it correct, I'll get my notes in front of me, but the four alternative were essentially "as an employee". So they were his, they were, they considered him as an employee, so I think the answer to your question is that the test is different, there were different difficulties that presented themselves in relation to those other charges. So there were four –

ELIAS CJ:

Sorry, were the alternatives, because I haven't looked at these, the alternatives were in his capacity as employee, whereas the principal charges were in his capacity as director, is that right?

MR MARTIN:

Yes, as an officer of the company.

ELIAS CJ:

Yes, officer of the company.

MR MARTIN:

I think perhaps the easiest way into this, to get it correct, is if you don't mind going to volume 3, tab 31, this is Mr Stanaway's memorandum as counsel for the informant, and you go to paragraphs 3 to 5 of that. So this is the memorandum that's filed with the District Court and he sets out there, I think in a way that's reasonably accessible, the 12 different charges that he was facing.

GLAZEBROOK J:

And the view on reparation, was that related to causation or – the view that was taken as to no reparation being ordered, was that related in, or is there anywhere that says that's related to there being no allegation of causation, or is that a submission that you're making or –

MR MARTIN:

It's a submission based on Mr Stewart's evidence that that was how they assessed that –

GLAZEBROOK J:

So unlikely reparation because of no causation, is that –

MR MARTIN:

Because they would struggle to establish that causative nexus.

ELIAS CJ:

That was really the difficulty with the charges that was identified, was it, the causation element. Sorry, I've just –

GLAZEBROOK J:

You don't need causation for those charges and in fact probably –

ELIAS CJ:

No, no, you only need that –

GLAZEBROOK J:
– go back to the issue of –

ELIAS CJ:
– for reparation but the point is the way he's expressing it, I think it actually always was directed only at the problem with obtaining reparation.

MR MARTIN:
The causative – it's not necessary to make the charges out to show the causation of harm. It is, however, in order to support the – in terms of section 32 of the Sentencing Act, to support the penalty with the order of reparation in a sentencing context.

ELIAS CJ:
In that material you took us to I can't now remember whether it was the 4 December document or his evidence. There was a dash and a reference to the causation difficulty which rather suggested that that was the principal, I thought, legal impediment. Can you remember which that was?

MR MARTIN:
Yes, that's back to the decision document which is at tab 27.

ELIAS CJ:
Yes, it's 25(c) isn't it, on page 345, "The seriousness of the offence – there is no causative link alleged"?

MR MARTIN:
Yes and so it's not necessary to establish the charge that the there –

ELIAS CJ:
No, no I understand that.

MR MARTIN:
But yes, absolutely. That is a, it is a limiting factor in terms of the outcome that could have been hoped for.

ELIAS CJ:
Both as to sentence, it is being suggested here and you're saying, as also as to reparation?

MR MARTIN:
Yes.

ELIAS CJ:
Although I think he is dealing with it there in terms of seriousness of the offence and therefore likely to be reflected in the fine?

MR MARTIN:
Yes, it comes up in those two different ways but – so you are not in establishing these charges necessarily going to – you're not going to have to have proved the link to the harm that was suffered but nor, in a contested contest there would be significant litigation risk in terms of trying to obtain reparation.

ELIAS CJ:
Yes, which is adverted to again in (f), oh, that's, sorry that's the company.

MR MARTIN:
Just to close off the question of I think Her Honour Justice France asked, at tab 31, paragraph 5, this is Mr Stanaway's memorandum, so the "acquiescing and participating" was not an element of the four alternative charges but they faced their own hurdles because what was required there was a more direct test if you like, in the sense that they needed to show that he himself had failed to take all practicable steps. So they were alternative charges that were available but not and were obviously considered in the mix of this. But they were not charges that were going to be any easier if I can put it that way.

So if it assists the Court, I am back at the affidavit at page 164, 165, tab 12 of volume 2 and at the top of page 165 there's the question of the Royal Commission on the tragedy, which heard evidence and provided a

comprehensive report on it. It is submitted that the, and it is Mr Stewart's evidence there that the, inquiry served the purpose, often fulfilled by criminal proceedings, of enabling evidence of the circumstances surrounding the tragedy to be established in a public forum and this is an unusual situation in that that inquiry had been completed before the criminal charges against Mr Whittall had been determined.

Clearly at 68.7 Mr Stewart is acknowledging that the offer of the voluntary payment was one of the considerations that was taken into account in this decision. There was also, at paragraph 68.8, the offer to arrange the private meeting. Now that did not proceed and you'll see the evidence that there is about why that was at volume 3, tab 35. That's a media story that's in evidence and it gives you the fact that that meeting didn't proceed. However, it was a factor that –

GLAZEBROOK J:
What was the tab sorry?

MR MARTIN:
Tab 35.

GLAZEBROOK J:
35, thank you.

MR MARTIN:
It was something that was considered as part of the overall decision making here and because of the nature of it, not something that Mr Whittall could be compelled to go ahead with but the circumstances around that are in evidence to the extent that they are at tab 35, and then at paragraph 68.9 Mr Stewart talks about the unlikelihood of the Court ordered reparation being received from the company by the victims, taking into account the company's financial position and so this is where the proposal, the offer is being taken in terms of addressing reparation, if I can use that term, broadly. It's strictly not reparation in this context, but it is a payment in the nature of reparation that is

being offered and as Mr Stewart says there, they considered that such a payment would not otherwise have been possible and weight was given to the fact that securing such a payment would go some way towards addressing the emotional and financial loss suffered by the families of the deceased and the survivors.

As against this, at paragraph 68.10, were the high costs associated with continuing the prosecution, particularly in light of the procedural issues which the defence had indicated and intended to raise and if I can pause there, I don't want myself to be overweighting any of these factors here. High costs of prosecution wouldn't necessarily preclude a prosecutor from going ahead. A prosecutor might say, well we'll get the result one way or another, we'll obtain the reparation, we'll obtain an outcome, and if it costs resources then it does, however in making the assessment that in my submission is the broad evaluative assessment for the prosecutor here, there is a question about if you like an opportunity cost in terms of deployment of finite prosecution resources, in this case in a particular regulatory area in the health and safety domain.

How to apply that finite resource in order to achieve the ends of the legislation and the question is, how much of that resource was it appropriate to expend in pursuit of further litigation in a case where you would have the company convicted and orders made against it, including the order of reparation which it seemed was not going to be paid, but orders nonetheless made against that offending company and you had had the comprehensive Royal Commission report. The question is, how much further in terms of advancing the objectives of the legislation is to be achieved through putting more resource into this case and it was going to be a very considerable resource and having asked those questions I am then bound to submit that those are questions for the prosecutor. Those are questions that in my respectful submission are beyond the scope of judicial review, but they are difficult questions and questions that in my submission it is clear that the decision maker did take into account here.

This was not going to be a straightforward prosecution as you've heard. 16 to 20 weeks of trial is long by any standards –

GLAZEBROOK J:
Do we have anything here to counter Mr Hampton's point about what wasn't taken into account?

MR MARTIN:
About what wasn't?

GLAZEBROOK J:
Were you going to point to anything to counter the point that Mr Hampton made about the purposes of the legislation?

MR MARTIN:
The section 5(g) point. There's no expressed reference that I can take you to where the section 5(g) is named. The submission Ma'am is that the –

GLAZEBROOK J:
In a lot of the – a lot of what you've just said is not in here either in terms of weighing up finite resources for et cetera, some of it is but not all of it.

MR MARTIN:
Well some of it – some of what I may have submitted there is I guess a broad submission about the appropriateness of those sorts of assessments, but in terms of the evidence you have at section – paragraph 68.10 and 68.11 the consideration being given to the long and costly trial with low probability of success and so forth and I submit that's the evidential basis for the submission that a regulatory prosecutor is entitled to take into account.

GLAZEBROOK J:
How do they define success? Because it wasn't going to be successful in terms of getting reparation, so but there was clearly an evidential foundation

wasn't there, even though there was going to be some pre-trials and some difficulties?

MR MARTIN:
I think there was an evidential basis to proceed. The evidence is that it was assessed as being low prospects of success but there were –

GLAZEBROOK J:
But what does "low prospects", what do they mean by that?

MR MARTIN:
Well –

GLAZEBROOK J:
Certainly it wasn't going to have a prospect of getting reparation and any fine was likely to be small.

ELIAS CJ:
They meant a conviction, they must have meant conviction.

GLAZEBROOK J:
But I'm not sure they do is my, that's what I am actually asking.

MR MARTIN:
I think they must mean, it must mean conviction. There's two elements to it, one is conviction –

GLAZEBROOK J:
Well, they don't really say so.

MR MARTIN:
And then the other element which is separate and additional, is if you were successful would you then obtain reparation and so that's –

GLAZEBROOK J:
Or a large fine?

MR MARTIN:
Or a large fine. So there are two elements. Again, one of those elements is binary, I mean you have your trial and you'll either, there will either be convictions or there won't. Obviously not all the charges need to fail. You might be partially successful in that sense but conviction is the first element of success if you like here.

GLAZEBROOK J:
Yes, all I am really saying is I'm not actually sure they do say that they thought the prospect of conviction wasn't very high and in any event, wouldn't that be in the first part under an evidential assessment?

MR MARTIN:
Sorry, perhaps what Your Honour is looking for –

GLAZEBROOK J:
Because don't you have to have a high enough prospect of conviction to pass the evidential test?

MR MARTIN:
So at 67 there, there is the discussion there that the test for evidential sufficiency was met but the likelihood of obtaining a conviction was low and continuing the prosecution et cetera.

GLAZEBROOK J:
All right.

MR MARTIN:
So you have to have a reasonable prospect of obtaining a conviction. Here you're talking about a case that is very large and complex and so they are looking at it in terms of, do we have enough to take forward? Yes, but do

we consider on balance we're going to obtain conviction. It's being pitched as low which in the end will be crystallised obviously by the Court and if the conviction is not established then you've still expended the resources and you've still put everyone through that very lengthy trial. Potentially not assisted, arguably undermined the objects of the legislation by attempting to prosecute someone in this situation and failing to obtain a conviction. So there is real litigation risk for a regulator here and it would wrong for the prosecutor to reduce that to, we will just push on regardless and you don't see that obviously here.

But then you're quite right Your Honour that the reparation element is a separate and further aspect which is that even if you obtain a conviction, can you obtain reparation, would you get that order and the prosecutor doubted that that would be achieved. And I suppose the summary assessment from the public interest point of view

GLAZEBROOK J:
I suppose I should say when I say, can you see and point to anything in the decision document about low, there were certainly difficulties on prosecution, I suppose they say difficulties in obtaining a successful prosecution, but there's no indication that it is low necessarily, there are difficulties.

MR MARTIN:
Sorry, at paragraph 67 that the likelihood of obtaining a conviction was low.

GLAZEBROOK J:
Well I understand that, but that's ex post facto, not in the decision document.

MR MARTIN:
I'm sorry, I'm sorry Ma'am, yes, in the decision document. I'm not sure that low is used there, I'll check with –

GLAZEBROOK J:
Well there was certainly difficulties, which are legitimately taken into account.

MR MARTIN:
Yes, I think that's fair Ma'am. I can't see anything to add to that and before I leave Mr Stewart's affidavit, he summarises the position in relation to the public interest test at paragraph 68.11 and acknowledges that there are a weighing of interests here, including the interests of the families against other public interest factors that he outlined.

So there's a difficult decision made which is that in the prosecutor's assessment the public interest was better served by not proceeding with the prosecution and I know I was proposing at that point to leave Mr Stewart's affidavit and really touch on probably just a couple more points in concluding.

The first point is as capsulated at paragraph 84 of the Court of Appeal's decision, that's at page 123 and it's the submission that for the Court to form a view on the gravity of Mr Whittall's alleged offending perhaps by contrast with –

GLAZEBROOK J:
Can you just wait until we find it?

MR MARTIN:
Yes, certainly.

O'REGAN J:
What decision are you talking about?

MR MARTIN:
So this is the Court of Appeal's judgment, Sir, and it's volume 1 at tab 7, page 123, paragraph 84 and the submission for the respondent is that for the Court to form a view on the gravity of Mr Whittall's alleged offending, perhaps by contrast with the company's proven offending, would necessitate a close analysis of the weighting of the relevant factors and in my respectful submission that lies beyond the proper scope of judicial review of a prosecution decision. The final point I was just going to touch on, and –

ELIAS CJ:

Surely it's in part, just a matter of impression really. It's not weighing. It's not the decision that the prosecutor was undertaking. Again it was, was the importance of the matter taken into account? I don't quite understand what's being said here, that it would, there would have to be a close analysis of the waiting of relevant factors.

MR MARTIN:

I mean accepting that section 5(g) for example isn't mentioned specifically. What you're left with, is in my submission, a very large body of material that has been taken into account by the prosecutor here and it's very difficult to then – because what it boils down to is whether or not there should've been a prosecution.

ELIAS CJ:

But isn't it really, isn't the argument on 5(g) is just the hook to say you've got to look at the purposes of the Act and has the prosecutor sufficiently or – perhaps sufficiently is not the right word to import there. Has the prosecutor looked at the purposes of the Act?

MR MARTIN:

Yes, that's the question, but I suppose what I can point to in this is the evidence that's before you in terms of the volume of information that has been looked at.

GLAZEBROOK J:

But if the volume of information doesn't include the purposes of the Act, I mean are you suggesting there's a whole pile of volume of information that does include it and we can infer they did look at it? I mean they obviously looked at a volume of information in coming to the view that there were difficulties with the prosecution, and in coming to the view that it would be difficult to prove causation and therefore have reparation. But nobody is really suggesting that those were not legitimate considerations.

MR MARTIN:

No –

GLAZEBROOK J:

Or even that they were wrong. What's been put is that they weren't balanced properly, if that's the right word – I know the Chief Justice hates balance – but they weren't balanced properly against the purposes of the Act, in these particular factual circumstances, and what's the volume of material going to do about that?

MR MARTIN:

I suppose the respondent's submission there would be exactly that. What it comes down to is what you –

GLAZEBROOK J:

But if they didn't balance it, that they read through the volume of material and quite rightly or wrongly, and that's not up to us, come to the view that there were difficulties with the prosecution and that there wouldn't be reparation at the end of it, what's the volume of material going to do if they didn't balance that against the purposes of the Act and they should have done?

MR MARTIN:

But particularly when you're looking at 5(g) here, what you're really looking at is whether or not you should be prosecuting here or not.

GLAZEBROOK J:

Well so despite the difficulty in prosecution, and despite the cost, is there something in the purposes of the Act or the particular circumstances of this particular tragedy that should have meant that prosecution went ahead?

MR MARTIN:

Yes, and that's what I think the Court of Appeal is getting at when it says that this doesn't fetter the prosecutor's discretion.

GLAZEBROOK J:

Why, it's the purposes of the Act? Do you just ignore the purposes of the Act when you're making a decision about prosecution?

MR MARTIN:

But in my submission it can't be said to have been ignored here because they're looking at the very thing that the Act is contemplating here, they're looking at a prosecution. Whether or not, when they look at all of this evidence, they can achieve that, whether the costs, whether the resources they have at their disposal to achieve that should be deployed in that way. So no they haven't put section 5(g) and the likes in writing, but they have looked at the very thing that section 5(g) is contemplating, which is that they might use their prosecution function to raise health and safety issues, and so there is then a vast array of evidence and various factors that Mr Stewart's talked about, and they've reach the decision about which different prosecutors might reach a different view reasonably, but they've reached the view that they have and – so if, in my submission, the absence of a reference to section 5(g) is not, in my submission, germane. The answer, I think, to the substantive concern Your Honour is expressing is that they have looked at the prosecution and whether or not one should be brought under this legislation, and for a range of reasons have struck an assessment on that, and that's where I come to the submission that echoes, with respect, what the Court of Appeal is saying at 84, which is that in order to get into that, a Court on review needs to really get right into weighing a whole range of matters, and looking at the actual evidence.

ELIAS CJ:

Well look I really think it's much more broad brush than that. I would have expected to see some sort of assessment against the objectives of promotion of health and safety. It may be that inferentially it's there, that what they're saying about, well we have had a Royal Commission report into this, that there wouldn't be a public educative function, which would assist in the promotion of health and safety. I would have expected a bit more about the nature and gravity of the incident that happened here because that's

specifically referred to in (g). It's really that sort of grounding it on the particular statute really, whereas really the sort of considerations you've been referring us to is the sort of decisions that any prosecutor might look at in a prosecution. But firstly looking at the purposes of this legislation and in particular the significance of this event. I suppose that's really all it amounts to.

And you would say that they pointed to the fact that there has been a Royal Commission and that may well be a significant feature but it would've been good if they'd spelt it out.

MR MARTIN:
I do and I hear what you're saying about the sort of way that it's written. The – I'm sorry.

ELIAS CJ:
It's like laughter in Court.

MR MARTIN:
The – no I'm sorry it will come in a moment. The reason we have the decision we have though is because I guess the scale of the tragedy and the size of this matter. Any number of prosecution decisions in practice would not be documented even to this extent, if I am permitted to make this submission. What we are seeing here is a particular I suppose example of a significant process. There may be ways in which it could've been done differently in terms of the document of it. But you're right with respect where I get to with my submission is that there's been the Commission of Inquiry, there's been this volume of material, the people who are making this decision – and there are a number of them – are very focussed on what this is about and, as Mr Stewart says, are actually cognisant of the impact one way or another on the families of this outcome. So this is a difficult decision. And unpacking it now in a judicial review application is difficult given that you wouldn't expect the Court to have all of that evidence.

ELIAS CJ:

Yes, I understand that.

MR MARTIN:

And in saying that I have probably said just about as much as I was proposing to say on the Royal Commission itself, which was going to be my final point. The prosecutor considered the purpose, often fulfilled by criminal proceedings of having evidence of the circumstances of the tragedy established in a public forum and considered that that had been served by the Commission's inquiry. The Royal Commission was highly critical of the company and, by implication, its directors and officers which included Mr Whittall and so in my submission it was consistent with the Guidelines as well as reasonable and appropriate for the prosecutor to take the Royal Commission's Inquiry into account and applying that public interest test.

ELIAS CJ:

What do you say in answer to the point that was made to us that the Royal Commission didn't have evidence from Mr Whittall on matters going to fault and that the prosecution would have been directed at this issue, so that whether matters were sufficiently laid to rest in the public arena may not be entirely correct?

MR MARTIN:

But what I'm not in a position to say is whether the District Court would ever have had evidence of Mr Whittall either, so it's not possible to know what, how the defence would have run its case if the matter had proceeded to a hearing in the District Court and –

ELIAS CJ:

But there was an unresolved issue, I suppose. You can't say everything was done and dusted.

MR MARTIN:

There is certainly – I accept that, I accept what you're saying, that you still could have advanced a prosecution and the question is that weighing up of whether what is being achieved in the public interest beyond the inquiry and given the costs and given the litigation risk, the possibility that you might in fact not establish, not achieve a conviction. All of that is in the mix here, and in my submission is a matter that the prosecutor had to form a view on. Unless I can assist the Court, those were the submissions I was proposing to make.

ELIAS CJ:

Yes, thank you Mr Martin.

MR HAMPTON QC:

A very short reply if I may.

ELIAS CJ:

Yes Mr Hampton.

MR HAMPTON QC:

Just on some quite isolated points. First, adapting my learned friend's reason we have the decision we have. I suggest the reason we have the decision we have is because of the payment of the large sum of money which raises the "what if" and "but for" in my submission. What would have happened if the money hadn't been paid. The sort of questions that were being raised by Justice Young earlier.

The second point is talk of reparation. Now that's been dealt with, I don't want to relitigate what "reparation" means under the Sentencing Act and so on, but I do want to look at the prosecutorial guidelines at tab 21. That's just to wring out the point. So tab 21, page 10 of the Guidelines, so it's 5.9.10. There's been some discussion about the defendant should not be able to avoid prosecution simply because they pay compensation, that aspect of it, but I draw the attention of the Court to that first phrase, "Where the victim

accepts that the defendant has rectified the loss." The victims here, the families of the 29, and the other additional two, were never consulted about any of this. They had no say in what was going on at all.

WILLIAM YOUNG J:
Were they told the day before?

MR HAMPTON QC:
Some of them were, through counsel – well counsel was told the day before, but I'm not sure it disseminated much further than that, with respect, but they were not part of the process. The decision had already been made by then. So they were not part of the process at any stage.

ELLEN FRANCE J:
Would it make a difference, would it have made a difference to your argument if the families had accepted?

MR HAMPTON QC:
No, I'd still be saying it was an unlawful – it goes really, I suppose, to the alternative arguments, the claim to take account of the Guidelines.

O'REGAN J:
Is there any significance in the fact that there's only two claimants here, that the other families aren't claiming?

MR HAMPTON QC:
Others – there were two chosen as representative, in effect. There is – I've been –

O'REGAN J:
If the answer there is no significance that's all you have to say.

MR HAMPTON QC:
No, right, thank you. I detected in my friend's submissions before lunch a suggestion that Mr Stanaway was being distanced from the decision-making

process in some way, that Mr Stewart was the decision-maker. Nonetheless, Mr Stanaway was the instructed lawyer acting for the informant. He had the carriage of the prosecutions, all of the prosecutions, and he was the advisor indeed, just in the passage that my friend read out in Mr Stewart's affidavit earlier, I noted it was page 153, he was referred to –

ELIAS CJ:
He was also the reviewing senior counsel presumably, in terms of the Guidelines too?

MR HAMPTON QC:
Yes, well, he was referred to at page 153 of Mr Stewart's affidavit as Brent Stanaway, Crown solicitor, principal legal advisor. So he was and if there was a person to whom the Guidelines apply, it's to the prosecutor and that was Mr Stanaway who was the negotiator, whatever you might call it, one of the two negotiators here.

The fourth point that I wouldn't, well, I just draw your attention to that there is discussion in our submissions on the Prosecution Guidelines, page 16 of the submissions in following but I don't want to go through them but what I, the last point the prosecution's brought against Mr Whittall were under section 56 of the Health and Safety in Employment Act 1992, they are referred to in Mr Stewart's affidavit, page 157 in this way, "On the 10th of November I laid 12 informations, eight offences of the acquiescent participating in the failures of PRCL as principal." Now I'm not quite sure what that means. But he was certainly charged under section 56 and those charges as they were laid, carried potential penalty of up to $250,000 so that even accepting that four of the 12 were alternatives, still potential fines of up to $2 million, so significant penalties might well attach. And the charges were in relation to quite important features in terms of this mine, the geology, the methane drainage, the ventilation systems, so that they were significant matters that at least on the Royal Commission's findings, had some part to play in what ultimately occurred when the mine exploded.

Now they were the only matters I was going to raise in reply. Thank you.

ELIAS CJ:

Yes thank you counsel. We'll reserve our decision in this matter. Thank you for your assistance.

COURT ADJOURNS 3.23 PM