



**Supreme Court of New Zealand
Te Kōti Mana Nui**

23 NOVEMBER 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

***ANNA ELIZABETH OSBORNE AND SONYA LYNNE ROCKHOUSE v
WORKSAFE NEW ZEALAND AND THE DISTRICT COURT AT
WELLINGTON***

(SC 23/2017) [2017] NZSC 175

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

An arrangement that a prosecution will not be brought or maintained on the condition that a sum of money is paid is unlawful because it is contrary to the public interest. The question in issue on the appeal was whether WorkSafe New Zealand acted to give effect to an unlawful agreement of this nature when it offered no evidence on charges against Peter William Whittall for breaches of the Health and Safety in Employment Act 1992. In the High Court and Court of Appeal it was held that the decision to offer no evidence to the charges was not unlawful. The Supreme Court has unanimously allowed the appeal from the decision of the Court of Appeal. It has found that the decision to offer no evidence was made under an unlawful agreement to stifle prosecution. It has granted a declaration to that effect.

The case arises out of the Pike River mining disaster of 19 November 2010 in which 29 men died and two others were injured. The disaster was later described by WorkSafe as “the employment related disaster of a generation”.

The Government appointed a Royal Commission to investigate the causes of the explosions at the mine. The police and the Department of

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Labour (now WorkSafe) undertook their own investigations to determine whether there had been any criminal offending or breaches of the legislation governing health and safety in employment. The police investigation was concluded without charges being laid. The police concluded that there was “insufficient evidence to prove a causal link between the actions of any individual and the specific events which led to the explosion” (as was required for a charge of manslaughter), and that, although there was “enough evidence to support a charge of criminal nuisance”, a prosecution for criminal nuisance would not be in the public interest “given the ongoing prosecutions led by [WorkSafe] under the Health and Safety in Employment Act”.

Prosecutions by WorkSafe under the Health and Safety in Employment Act were brought against Pike River Coal Ltd and VLI Drilling Ltd, a contractor engaged by Pike River Coal. At the same time, WorkSafe also laid 12 charges against Mr Whittall, a director and the chief executive officer of Pike River Coal. The charges against Mr Whittall were laid both on the basis that he had “directed, authorised, assented to, acquiesced in or participated in” the breaches of the Act by Pike River Coal and on the basis of his own alleged breaches of duty as an employee. The charges laid against Pike River Coal and Mr Whittall were principally in relation to the management of the risk of methane gas explosion at the mine and inadequacies in ventilation.

VLI Drilling pleaded guilty to the charges it faced and was fined.

Pike River Coal, which was then in receivership, pleaded not guilty to the charges laid against it but took no further part in the hearing of the charges. They proceeded by way of formal proof and resulted in the company’s convictions on nine charges in April 2013. The trial Judge, Judge Farish, found that the company’s failure to ventilate the mine sufficiently and to manage the risks associated with methane gas had been causative of the explosions. This meant that it was open for the Judge to sentence the company to pay reparations to the families of the men who died and to the two injured survivors. The company was fined \$760,000 and was ordered to pay \$3.41 million in reparations to the two survivors of the explosions and the families of the men who died. Pike River Coal was later wound up and no reparations were ever paid by it.

Preparation for the trial of the 12 charges faced by Mr Whittall continued after Pike River Coal was sentenced. In mid-2013, the prosecutor sought discussions with Mr Whittall’s counsel about the possibility of a plea arrangement. Mr Whittall’s counsel made it clear that there was no question of Mr Whittall pleading guilty to any of the charges. Instead, he proposed on Mr Whittall’s behalf that a payment of the amount ordered to be provided in reparations by Pike River Coal would be made on condition that all charges against Mr Whittall be dropped. The payment was to be funded by the insurer which was liable to pay Mr Whittall’s defence costs.

The suggested payment was not rejected by WorkSafe and further discussions took place, leading to a written proposal being put forward in

October 2013. The central aspect of the proposal was that Mr Whittall would arrange for the payment of the reparations imposed on Pike River Coal, conditional on the prosecution against him being discontinued.

In December 2013, following a review of the charges, WorkSafe decided not to continue the prosecution against Mr Whittall on the basis that, although it considered there was enough evidence to proceed to trial, continuing the prosecution was not in the public interest. The considerations which led WorkSafe to that conclusion included the conditional offer to pay the reparations of \$3.41 million. On the indication to the Court that no evidence would be led, the informations against Mr Whittall were dismissed and the Judge ordered that the payment which had been made into Court be used to meet the company's obligation of reparation to the families and the victims.

The appellants, Anna Osborne and Sonya Rockhouse, both lost family members in the explosions. They sought judicial review of WorkSafe's decision to offer no evidence and of the dismissal in the District Court of the charges against Mr Whittall. Various grounds were put forward in the High Court and Court of Appeal. They included the ground that WorkSafe's decision was taken under an unlawful bargain to stifle the prosecution against Mr Whittall.

WorkSafe accepted that an agreement to discontinue a prosecution in exchange for payment is unlawful. It maintained, however, that its decision that the prosecution was not in the public interest was justified by a number of considerations it was open to it to take into account, among them the payment.

WorkSafe's position was accepted by the High Court and the Court of Appeal. Those Courts held that it was not unlawful for WorkSafe to take into account the conditional offer to make payments to the victims. The appellants were granted leave to appeal to the Supreme Court on the question whether the Court of Appeal was correct to dismiss their appeal to that Court. They sought a declaration that WorkSafe's decision to discontinue the prosecution was unlawful. It was accepted that no other relief is now appropriate, given the passage of time.

The Supreme Court has unanimously allowed the appeal. The Court has found that the arrangement to offer no evidence was in exchange for the payment and constituted an arrangement to stifle prosecution. It was irrelevant that WorkSafe considered other factors in reaching the decision to offer no evidence. The payment was in exchange for the withdrawal of the prosecution and was unlawful.

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