IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2014-485-11211
[2015] NZHC 2991

UNDER	the Judicature Amendment Act 1972
IN THE MATTER	of an application for judicial review of decisions under s 185 and s 188 of the Criminal Procedure Act 2011 and s 68 of the Summary Proceedings Act 1957
BETWEEN	ANNA ELIZABETH OSBORNE First Applicant
AND	SONYA LYNNE ROCKHOUSE Second Applicant
AND	WORKSAFE NEW ZEALAND First Respondent
AND	DISTRICT COURT AT WELLINGTON Second Respondent

Hearing: 25-26 May 2015

Counsel: N Hampton QC and S Meikle for Applicants
J Holden and M Conway for First Respondent
No Appearance for Second Respondent

Judgment: 27 November 2015

JUDGMENT OF BROWN J

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Introduction

[1] The tragic events at the Pike River Mine on 19 November 2010 are well known.[1] Twenty-nine workers perished in the explosion. The first applicant, Ms Osborne, lost her husband; the second applicant, Ms Rockhouse, lost a son.

[2] On 10 November 2011 Keith Stewart, a health and safety inspector of the first respondent (Worksafe, formerly the Department of Labour),[2] filed in the District Court at Greymouth informations against Pike River Coal Ltd (in receivership) (PRCL), VLI Drilling Pty Ltd and Peter William Whittall, an employee and officer of PRCL (Mr Whittall) alleging breaches of various sections of the Health and Safety in Employment Act 1992 (the Act).

[3] On 26 October 2012 in the District Court at Greymouth before Judge J A Farish VLI Drilling Pty Ltd pleaded guilty to the three charges and was fined a total of $46,800.

[4] PRCL did not defend the charges against it and on 18 April 2013 convictions were entered by Judge Farish on nine offences under the Act after a formal proof hearing on 14–15 March 2013 in which the receivers of PRCL did not participate. At a sentencing hearing on 5 July 2013 Judge Farish imposed fines of $760,000 and ordered PRCL to pay $3.41 million in reparations to the families of the 29 men killed and to the survivors of the explosion.

[5] Mr Whittall pleaded not guilty to the charges against him. On 4 December 2013 Worksafe decided that it would not offer any evidence in support of the charges against Mr Whittall on the basis that it was not in the public interest to do so (the Prosecution Decision). On 12 December 2013 in the District Court at Christchurch Judge Farish dismissed all the charges against Mr Whittall (the District Court Decision).

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1 Royal Commission on the Pike River Coal Mine Tragedy (Wellington, 2012).

2 I refer throughout the judgment to Worksafe rather than to the Department of Labour or its contemporary the Ministry of Business, Innovation & Employment (MBIE). The functions of the Department were transferred to MBIE in 2012.

[6] The applicants challenge the legality of the Prosecution Decision and the District Court Decision contending that they were extraordinary decisions which struck at the heart and integrity of the criminal justice system in New Zealand. The second respondent having been granted leave to withdraw, there was no appearance on its behalf.

The issues

[7] Two causes of action are pleaded against Worksafe and three against the District Court. Both the Prosecution Decision and the District Court Decision are alleged to be statutory powers of decision. In an affirmative defence Worksafe contends that the Prosecution Decision is not amenable to judicial review because it was a decision made in the exercise of its prosecutorial discretion.

[8] The issues as reflected in the pleadings can be broadly stated as follows:

(a) Is the Prosecution Decision amenable to judicial review?[3]

(b) In deciding not to proceed with the prosecution against Mr Whittall, did the prosecutor:

(i) fail to comply with the Solicitor-General's Prosecution Guidelines ("the Guidelines"); or

(ii) fail to have regard to s 5(g) of the Act.

If so, did any such failure render the Prosecution Decision unlawful, invalid or unreasonable?[4]

(c) Did the applicants have a legitimate expectation that they would be consulted prior to the prosecutor making its decision and, if so, did the

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3 Worksafe's first affirmative defence.

4 First cause of action.

failure to so consult with them render the Prosecution Decision unlawful, invalid or unreasonable?[5]

(d) Was the District Court Decision unlawful by reason of:

(i) the process whereby the decision was made;

(ii) the alleged unlawfulness of the Prosecution Decision

(iii) because the District Court Judge had recused herself?[6]

(e) If the Prosecution Decision was unlawful, should the relief sought by the applicants be granted?[7]

Relevant factual background

[9] With the exception of two matters noted below,[8] there was no material dispute as to the sequence of events which gave rise to the applicants' claim.

[10] Mr Whittall sought a transfer of the charges against him to the District Court at Wellington for a defended summary hearing. That application was granted on 13 June 2013. In response to Judge Farish's inquiry whether there was any objection to her conducting that hearing, Mr Grieve QC for Mr Whittall indicated that his instructions were to object to Judge Farish sitting on the hearing because of the findings which she had made with regard to PRCL on the formal proof hearing.[9] However there was no objection by either party to Judge Farish continuing to maintain administrative supervision of the file until another Judge was allocated to hear the matter in Wellington.

[11] On 17 July 2013 the police announced that they had concluded their investigation into the explosion and had decided that no criminal charges would be laid against any individual involved in the management of PRCL.

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5 Second cause of action.
6 Third, fourth and fifth causes of action.
7 Worksafe's second affirmative defence.
8 At [30].
9 At [4] above.

The proposal

[12] On 2 August 2013 a meeting took place on a without prejudice, counsel to counsel basis between counsel for Worksafe and Mr Whittall. Following that meeting Mr Grieve sent a letter to Mr Stanaway (the Crown solicitor for Canterbury and Westland at the time) dated 7 August 2013 which included:

> Thank you for agreeing to meet with me and Ms Shortall last Friday to discuss, on a without prejudice counsel to counsel basis, possible ways to conclude the [Worksafe] prosecutions without the need for a very lengthy and expensive trial at which the various allegations would be the subject of detailed challenge.
>
> 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.

Mr Grieve went on to explain that the defence team did not wish to waste valuable time taking detailed instructions and preparing a comprehensive proposal if the essential feature from the defence's perspective, namely the dropping of all charges, would in reality be destined for rejection from the outset.

[13] In his without prejudice response of 20 August 2013 Mr Stanaway stated:

> 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 [Worksafe] electing not to proceed with any of the charges against Mr Whittall.
>
> 3. I have had discussions with a number of [Worksafe] staff and it is fair to say that the proposal is not dismissed out of hand and that it is worthy 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.
>
> …
>
> 5. Additionally, I doubt that a withdrawal of the charges alone in return for a substantial voluntary reparation payment would suffice. In my view and as discussed, there could appropriately be other steps involved including, for instance, exploring restorative justice processes and/or a statement of regret or apology.

[14] The proposal on behalf of Mr Whittall was elaborated upon in Mr Grieve's letter of 16 October 2013, three versions of which were in evidence. The following extracts are taken from the third and final version of the letter:

> 2. It is understood that you have been reviewing the issues of evidential sufficiency and public interest as they apply to this case in the context of the Solicitor-General's 2013 Prosecution Guidelines. The proposal which follows is made on the basis that we consider that it should be taken into account in the course of your review as a relevant and appropriate public interest consideration.
>
> 3. In short, the proposal is that a voluntary payment of $3.41 million be made available to the families of the 29 men who tragically lost their lives in Pike River's coal mine and the two men who survived the 19 November 2010 explosion.
>
> **Proposed $3.41 million payment**
>
> 4. While it is acknowledged that nothing can replace their loss, it is envisaged that a voluntary payment to the families could go some way towards alleviating the financial pressures on the families and serve as a meaningful recognition of such loss.
>
> 5. It is proposed that the voluntary payment:
>
> (a) Will be made on behalf of the directors and officers of Pike River Coal Limited (in receivership) (the Company) at the time of the explosion for the families of the 29 men who died and the two survivors, and
>
> (b) Will comprise allocations of $110,000 for each of those families and survivors in the amount calculated by Judge Farish when ordering that they be compensated for the significant loss and ongoing trauma that she found had been caused by the actions of the Company.
>
> (c) Will be paid into Court for it to distribute to the families of the 29 men who died and the two survivors.
>
> 6. In advance of the $3.41 million being made available, it is proposed (with precise terms to be agreed) that:
>
> (a) [Worksafe] will not proceed with the charges laid against Mr Whittall by advising the Court that no evidence will be offered in support of any of the charges.
>
> (b) A private meeting will be arranged at which Mr Whittall will express sympathy on behalf of the Company to the families and survivors and will convey his personal empathy and condolences.
>
> (c) Each of the Company directors at the time of the explosion will be asked by Mr Whittall to attend this meeting.

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

...

Proposal benefits

...

13. In terms of further expense, costly pre-trial applications pursuant to the Criminal Procedure Act 2011 will likely be required to determine issues such as the admissibility of evidence and the application of the statutory time bar in section 54B of the Health and Safety in Employment Act 1992.

14. By withdrawing the charges, not only will all these costs and burdens be avoided, but the extensive judicial and prosecution resources required for a defended hearing of up to 16–20 weeks in length could instead be utilised elsewhere.

Conclusion

15. 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.

The decision-making phase

[15] Although Mr Stewart was aware discussions were taking place, the investigation team continued to review the evidence and prepare the prosecution of the charges against Mr Whittall both prior to and after receipt of the 16 October 2013 letter. Criminal disclosure and the briefing process were both substantially completed by 30 October 2013. In total 92 witness briefs (signed and unsigned) were prepared and approximately 600,000 documents were reviewed for disclosure.

[16] Following completion of the briefing and disclosure process the Crown Solicitor commenced his review of the charges against Mr Whittall as required by para 9.2 of the Solicitor-General's Prosecution Guidelines.[10]

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[10] See [49] below.

[17] On 15 November 2013 the Crown Solicitor provided to Worksafe his review of the charges. At Worksafe a panel was appointed to advise on and assist with the decision-making process, which process was considered at a number of meetings. The Solicitor-General and the chief executive of Worksafe were informed of the proposed decision-making process. It was agreed that Crown counsel would attend the initial meeting to provide oversight of the decision-making process on behalf of the Solicitor-General.

[18] At a meeting on 26 November 2013 Mr Stanaway's advice as to evidential matters and public interest considerations was considered. In his first affidavit Mr Stewart outlined the position at that meeting:

> 54. It was by then apparent that, while there was sufficient evidence to justify the prosecution, the likelihood of a successful prosecution was low for several reasons including:
>
> 54.1 The unavailability of at least 14 notified prosecution witnesses and other reluctant witnesses;
>
> 54.2 The likelihood that briefs or statements of unavailable witnesses could not be admissible as evidence at trial;
>
> 54.3 The likely contests between expert witnesses for both parties coupled with the burden of proof on [Worksafe];
>
> 54.4 The indications from the defence that lengthy and complex pre-trial arguments would be raised.
>
> 55. In addition, several reasons that indicated a trial was not in the public interest were by that time apparent:
>
> 55.1 The offences with which Mr Whittall was charged were punishable by a fine only (and in the circumstances, a low sentence was likely to be imposed in the event of a conviction) and a reparation order was unlikely;
>
> 55.2 Mr Whittall was charged as a secondary party to the offending of PRCL;
>
> 55.3 PRCL had been convicted with record fines imposed and a substantial reparation order made;
>
> 55.4 The Royal Commission on the Pike River Coal Mine Tragedy had taken place, with a comprehensive report produced;

> 55.5 A prosecution requiring a 16–20 week trial in Wellington would be very costly both financially and in terms of use of [Worksafe's] resources.
>
> 56. 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.
>
> 57. 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 of the prosecution decision. No conclusion on this issue was reached at that meeting but we were all conscious of the importance of ensuring the offer was dealt with in a proper manner and only taken into consideration if it was appropriate to do so. No decision was made as to whether to proceed with the prosecution or not.

[19] A further meeting was held on 28 November 2013 in which Mr Stanaway participated by telephone. Mr Stewart explained:

> 59. At that meeting a number of matters concerning the decision-making process were discussed, together with the outstanding question of the legality and propriety of considering an offer of voluntary payment. Although it was potentially only one of several matters that had to be considered before determining to proceed with the prosecution, we considered it important to know whether it could be given any weight or had to be disregarded. This was because, on the one hand, we were acutely aware of the probable perception that this was "chequebook justice" while, on the other hand, we considered this was the only prospect of securing the payment to the families of the reparation order made against PRCL.
>
> 60. No decision was made at that meeting as to whether it was lawful or appropriate to consider the offer of voluntary payment. However, we agreed we were uncomfortable with the without prejudice offer being in confidential correspondence and discussed a possible exchange of open correspondence if the offer were to be considered. This was because we recognised there would be public interest in understanding the terms of the proposal made on behalf of Mr Whittall.
>
> 61. Nor was any decision made at that meeting as to whether to proceed with the prosecution or not. However, in terms of the decision-making process, it was determined that ultimately any decision would be made by me, as Chief Inspector, Response and Investigations, on behalf of [Worksafe], and with the approval of Mr Podger as the Deputy Chief Executive, Health and Safety Group.
>
> ...

[20] Consideration by Worksafe officials of the issues and process continued for a number of days. Ultimately it was decided that the offer of voluntary payment could be considered as one of the factors to be taken into account.

[21] Consideration was also given to the question of consultation with the families of the workers who had died in the explosion. Mr Stewart explained:

> 64. We considered whether it was necessary or feasible to consult with the families of the deceased before making a final decision. To do so would have been unusual. Victims are routinely kept informed of significant developments in relation to an investigation or prosecution but it is not usual to consult with them prior to making a decision not to proceed with a prosecution. In this instance, we concluded that any such consultation would be fraught with difficulty given the large number of families involved and the difficulty in achieving consensus. In circumstances where one factor in the decision-making was an offer made on a without prejudice basis, there was also a very high risk with such a large group that confidentiality would be compromised and the offer withdrawn.

The Prosecution Decision

[22] On the morning of 4 December 2013 Mr Stewart made the decision on behalf of Worksafe not to proceed with the prosecution, to offer no evidence and to request that Judge Farish dismiss the charges. That decision was subsequently approved by Mr Podger. It was decided that offering no evidence was the appropriate course in order to achieve finality rather than the alternative of offering no evidence and seeking leave to dismiss the charges without prejudice to the charges being laid again.

[23] The decision was recorded in a five page document dated 5 December 2013. After sections headed Summary, Background, Legal Advice from Crown Solicitor and Process for Decision Making, the document stated:

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

i. Witness unavailability;

ii. Contests between expert witnesses;

iii. Indicated and anticipated procedural/pre-trial issues;

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

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

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

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

f. The unlikelihood of court-ordered reparation being received from PRCL by the victims; and

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

Steps prior to the District Court Decision

[24] Following the Prosecution Decision Mr Stanaway was instructed to seek to discontinue the prosecution on the basis that no evidence would be offered. The proceeding had a scheduled telephone conference with Judge Farish for Thursday, 12 December 2013. On 6 December 2013 Mr Stanaway sent an email to the District Court recording a request on his and Mr Grieve's behalf that Judge Farish sit in open court in Christchurch at 10.00 am on 12 December in respect of the proceeding.

[25] On Monday, 9 December Worksafe decided to provide the families with a confidential letter from Mr Podger setting out the decision and the reasons for it. It also decided that Mr Stanaway would seek a suppression order in relation to the hearing scheduled for 12 December 2013 until such time as the matter could be heard in open court. This was to enable Worksafe to properly inform the families of the decision before the matter became public.

[26] On 10 December 2013 Mr Grieve and Mr Stanaway appeared in the District Court at Christchurch where an application was made to Judge Farish for a suppression order prohibiting publication of any information concerning the forthcoming hearing on 12 December 2013. Mr Stanaway explained in his affidavit that the reason why the order was sought was to ensure that there was no ill-informed or misinformed comment in the media and otherwise about the decision until such time as the extensive memoranda prepared by both the prosecution and the defence had been filed and read in open court on 12 December and any comments had been made by Judge Farish.

[27] In advance of the hearing on 12 December 2013 Mr Stanaway filed a detailed memorandum for the informant explaining the reasons for the decision to offer no evidence. In the context of the discussion of the public interest test, with reference to the proposed payment the memorandum stated:

> 38. The proposed payment of $3.41 million reparation made by Judge Farish (as above) of the directors and officers of PRCL is not simply a payment made to avoid continued prosecution.
>
> 39. The informant has considered the proposed voluntary $3.41 million payment on a principled and conventional basis in accordance with the Prosecution Guidelines.
>
> 40. The proposal outlined above has been treated as only one of the relevant public interest factors for a continued prosecution looked at in the context overall of the Prosecution Guidelines.

[28] A substantial memorandum dated 11 December 2013 was also filed on behalf of Mr Whittall which among other things addressed alleged fundamental deficiencies and flaws in the informant's case. With reference to the proposed voluntary payment it stated:

> **The $3.41 million voluntary payment**
>
> 20. As a consequence of the Informant's decision not to proceed, funds which would otherwise have been used for the costs of the hearing have become available to enable a voluntary payment to be made to the families of the 29 men who died and the two survivors.
>
> 21. As has been mentioned by the informant the voluntary payment will be made on behalf of the directors and officers of the Company at the time of the 19 November 2010 explosion.

22. For the purpose of ensuring a clear record of the basis on which the payment is being received by the Court counsel suggests that Your Honour might consider it appropriate to stipulate that the $3.41 million comprises allocations of $110,000 for each of the families of the 29 men who died and the two survivors in the amount calculated by Your Honour when ordering that they be compensated with a reparations order for the significant loss and ongoing trauma that Your Honour found had been caused by the actions of the Company.

The District Court Decision

[29] At the hearing on 12 December 2013, after hearing from Mr Stanaway and Mr Grieve, Judge Farish delivered an oral ruling which I record in its entirety, save for the final two paragraphs which explained the reason why the suppression order had earlier been made:

> [1] I think it is very important to understand that the decisions that have been reached today have been reached by two discrete processes. They are the decision in relation to whether or not the prosecution should proceed against Mr Whittal and quite discrete and separate from that, there has clearly been another process which Mr Whittal and the other directors and their advisors have been having once I made the reparation orders in July of this year.
>
> [2] In March of this year I transferred Mr Whittal's prosecution to Wellington and I did that because of the complexity, the length of the trial and the difficulties that were going to be envisaged and at that stage the parties were only partway through the disclosure process, briefs of evidence had not even been compiled at that stage and as it has turned out that process has proved quite difficult and fraught.
>
> [3] I was not going to be the trial Judge for this trial and that was because I had recused myself, at the request of Mr Whittal, and I thoroughly understood that and appreciated why but with the consent of all parties I have continued to manage the file and I have had two telephone conferences during the year. The purpose of that management was to make sure that all parties were heading towards a hearing in a timely fashion and because of the complexity and the nature of the disclosure process, it was important that a Judge kept a handle on what was actually occurring and occurring at the appropriate times.
>
> [4] Both counsel have kept me fully informed as to the process that has been ongoing. But as Mr Grieve has advised, through his memorandum, I have been advised, as time has gone on, as to the difficulties that have occurred as the disclosure process has unfolded.
>
> [5] Disclosure was completed at the end of August and the prosecution agreed that they would have the briefs of evidence compiled by the end of October, which they were able to meet but as you have heard today, of those 91 briefs of evidence, 31 of them are unsigned and as such they are not

admissible as evidence before the Court and for various reasons, as Mr Zarifeh has outlined, some of those people do not want to participate in this prosecution and at least 14 of those are not compellable, that is that they cannot be made to come to Court because they live outside of the jurisdiction.

[6] So by early November, and I can tell you I am completely unaware of this, (I only found out about this decision and the need to have the matter called two days ago on Tuesday morning). As a result, by early November, there was (sic) clearly quite in-depth discussions going on between the prosecution and the defence as to whether or not these charges were ever likely to be proved against Mr Whittal and as Mr Zarifeh has outlined in his memorandum, the case against Mr Whittal is largely that he was a party to the principal offender and to put it in colloquial terms, to be a party you have to do an act or do something to aid or assist the principal offender but you also, at the time that you do the act, have to have the intention to aid or assist the offender and you also have to know that what you are doing is aiding and assisting the principal offender in terms of the commission of an offence and in relation to this prosecution, at the very outset that was always going to be very difficult. That is principally why, when the prosecution have looked at the prosecution guidelines for the basis and on the basis that Mr Zarifeh has outlined, the likelihood of a prosecution here is extremely low. This case may not have even got to that stage, given the amount of pre-trials that were going to be required to determine admissibility issues before a hearing and whether or not any of those witnesses that were unable to sign or unwilling to sign their briefs of evidence that could be admitted into evidence. So that is one discussion that is going on.

[7] On 5 July I made a reparation order in a substantial amount and there has (sic) been countless discussions as to who or what or how that was ever going to be honoured by the company, its directors, its shareholders, political parties and I do not know who else. But some of you may recall that immediately after I gave that judgment, that one of the directors made a statement that he and some of the other directors may be willing to participate in some way in honouring that reparation order and some of you may remember from the hearing that I said that I was satisfied that at that time, that is in July, that by some means that the company, its shareholders or directors could be able to meet this payment because I was aware that there was insurance money available for some purposes. I did not envisage that this was going to occur though.

[8] So after I made that decision as to the reparation, the directors did start having discussions as to how they could honour that payment. They could not honour that payment whilst there were outstanding charges before the Court, that could not occur, it would be inappropriate, quite inappropriate but as soon as a decision was made that the prosecution here was not going to proceed, then the directors, in discussions with the people that they need to discuss matters with, have made this voluntary payment and it is in recognition of the reparation order that I made in July and it is paid into Court on that basis.

[9] Now some of you I know will say and think and believe that this is Mr Whittal buying his way out of a prosecution and I can tell you it is not. The decision not to prosecute or to continue with the prosecution has been taken at a very high level and the voluntary payment is really a side issue in

> terms of that determination, it is quite a side issue and I am quite satisfied of that. Mr Whittal and the directors and senior officers of the company have no obligation to honour that payment. Once these proceedings are at an end they had no obligation to honour that payment because it is quite separate and discrete from these proceedings.
>
> [10] So I see this outcome as being a good outcome. One, because the time and the length of the hearing and the resources for a fineable only offence, with very small chance of successful prosecution is not in the best interests of your community or indeed the wider community.
>
> [11] The order that I made as to reparation was to recognise the ongoing trauma caused by the company in relation to the 29 families and the two men that survived. Having this offer, this voluntary payment honouring that reparation order is an acknowledgement from the directors that the company failed the 29 men and the two men that survived and therefore I am prepared to accept it on the basis that it is given and I am prepared to formally discharge Mr Whittal in relation to all 12 charges before the Court.
>
> [12] Mr Grieve has asked me to do my best to ensure that that money is provided to the families and the two survivors as expeditiously as possible. I understand through my registry staff that payments are centralised out of Wellington. The prosecution have provided to the Court all the names of the family members and all of their bank details. So I will do what I can to encourage the Ministry staff to expedite those payments but I cannot promise that those payments would be made before Christmas.
>
> [13] So Mr Zarifeh and Mr Grieve, the informations are now formally dismissed and I will direct the registry to receipt that money in as payment of the reparation made in relation to the Pike River Coal sentencing.

Two matters in dispute

[30] The applicants' synopsis of submissions characterises Worksafe's decision not to call evidence as "the result of an agreement which it made with Mr Whittall to drop all of the charges in return for a payment of $3.41 million to be made by an insurer". Worksafe contends that the evidence before the Court does not establish such an agreement. Worksafe also disputes the applicants' contention that Judge Farish was recused from exercising the District Court's jurisdiction to dismiss the charges against Mr Whittall. I address and determine those two points of dispute in the context of the consideration of the first and fifth causes of action respectively.

Is the Prosecution Decision amenable to judicial review?

[31] In its first affirmative defence, after stating that there was no failure to exercise the prosecutorial discretion and noting that, while the test for evidential

sufficiency was met, the likelihood of a successful prosecution was low, Worksafe pleaded:

> 58. The test for evidential sufficiency being met, the first respondent's decision not to proceed with the prosecution was on the grounds that it was not in the public interest to do so.
>
> 59. The first respondent's decision is not amenable to judicial review because it was a decision made after taking into account specific factors in the exercise of its prosecutorial discretion. Such factors included the weighing of policy and public interest factors with which it is inappropriate for the Courts to interfere.

[32] Confronted with that apparently absolute stance, the applicants' written submissions contained a careful review the English authorities in particular, contending that, while judicial review of prosecutorial discretion is exercised sparingly, the Courts do not shy away from its use in appropriate cases.[11]

[33] They drew attention in particular to two modern examples:

(a) *R v DPP ex parte C*,[12] a sexual offending case; and

(b) *R v DPP ex parte Manning*,[13] a death in custody case.

They further noted that the reasoning in *Manning*, that the threshold for review will be lower in the context of decisions not to prosecute, had been approved in subsequent cases.[14]

[34] It transpired however that Worksafe's stance was not as unqualified as the affirmative defence suggested. Worksafe accepted that review was possible but submitted that the established New Zealand position is that courts should only interfere in prosecutorial decisions in "exceptional circumstances".[15] It drew attention to the dictum in *R (on the application of Corner House Research and*

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11 *R v Commissioner of Police Metropolis ex parte Blackburn* [1968] 2 QB 118, [1968] 2 WLR 893 (CA).

12 *R v DPP ex parte C* [1995] 1 Cr App R 136 (QB).

13 *R v DPP ex parte Manning* [2001] QB 330.

14 *Mohit v DPP of Mauritius* [2006] UKPC 20; *Marshall v DPP* [2007] UKPC 4.

15 Citing *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 at [19]; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at 62–72; *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [61]–[69].

Others) v Director of the Serious Fraud Office[16] that only in highly exceptional cases will the Court disturb the decision of an independent prosecutor. It also noted the approach of the highest courts in Canada[17] and Australia[18] that prosecutorial decisions are only subject to judicial review on the grounds of abuse of process.

[35] Worksafe maintained that that high level of restraint is required for constitutional and policy reasons:

(a) the discretion to prosecute is part of the function of the executive, not the courts;

(b) it is inappropriate for the court to interfere in prosecutorial decisions given its own function of responsibility for the conduct of criminal trials;

(c) prosecutorial decisions involve a high content of judgment and discretion;

(d) there is political accountability for prosecutorial decisions.

[36] In response to the applicants' submissions Worksafe first suggested that decisions in relation to the exercise of prosecutorial discretion in England and Wales should be viewed with caution in the New Zealand context because of the different statutory bases and operating context of the English Code for Crown Prosecutors and the New Zealand Prosecution Guidelines. It submitted that the distinction between decisions to prosecute or not to prosecute was not supported by the New Zealand authorities[19] and that the same constitutional and policy concerns arise in both scenarios.

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16 *R (on the application of Corner House Research and Others) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at [31] (per Lord Bingham).

17 *R v Anderson* 2014 SCC 41, [2014] 2 SCR 167.

18 *Maxwell v The Queen* (1996) 184 CLR 501 (HCA) at 534.

19 *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC); *Polynesian Spa Ltd v Osborne*, above n 15, at [69]. It was noted that *R (on an application of Corner House Research and Others) v Director of the Serious Fraud Office*, above n 16, which is the most recent House of Lords case on a decision not to prosecute does not refer to the distinction.

[37] Worksafe argued that particular caution is required where the decision not to prosecute is made on the grounds of public interest, noting the observation of Lord Bingham in *R (Corner House Research)*:[20]

> 31 The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*)
>
> > "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits."
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms.

Lord Bingham there noted that the House had not been referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.

[38] In the course of argument Mr Hampton QC advanced the proposition that review of a prosecutorial discretion may be available when the prosecutor has failed to have regard to a relevant consideration or has had regard to an irrelevant consideration.[21] There is conflicting High Court authority on that question.[22] In my view the observations of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecution (Fiji)* on this issue are in point:[23]

> There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings.

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20 *R (on the application of Corner House Research and Others) v Director of the Serious Fraud Office*, above n 16 at [31].

21 *Webster v CPS* [2014] EWHC 2516 (Admin) was cited in the written submissions as confirming that the doctrine of mandatory relevant considerations may be relied upon in appropriate cases of judicial review of prosecutional discretion.

22 *Polynesian Spa Ltd v Osborne*, above n 15 at [21]; *Hallett v Attorney-General* [1989] 2 NZLR 87 (HC) at 94.

23 *Matalulu v Director of Public Prosecution (Fiji)* [2004] NZAR 193 at 216 (SC Fiji).

[39] As Worksafe submits, such an approach is especially apt where the prosecutorial discretion is broad and does not expressly or impliedly identify extraneous matters. Attention was drawn to the following analysis of Duffy J in *Cooke v Valuers Registration Board*:[24]

> [15] When dealing with a broad discretionary statutory power, it is necessary to distinguish considerations that the decision-maker has treated as relevant to the exercise of the power from those that are made mandatory by statute. The distinction is made clear in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183 per Cooke J:
>
>> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on ... [that ground]. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision.
>
> [16] There are no express relevant considerations stipulated in s 32; nor do I consider that there is room to imply any requirement other than that the power be exercised reasonably. Accordingly, a challenge based on not taking relevant considerations into account cannot succeed. The same applies to the challenge based on taking irrelevant considerations into account. Unless the statutory power in question either expressly or impliedly identifies what is extraneous, this ground of review cannot succeed: see *CREEDNZ* at 197.

[40] Clearly there is no rule which is absolute or of general application that a decision to bring or to refrain from bringing a prosecution is not amenable to judicial review. However in considering whether judicial review should be entertained in my view a high level of restraint will be observed by the Court in recognition of the policy and constitutional dimension of such a decision, coupled with its discretionary nature.

[41] While it is for the highest appellate courts to formulate tests which circumscribe the circumstances in which review may be entertained, for example only in highly exceptional circumstances[25] or where there is an abuse of power,[26] in my view the task for this Court is to determine the issue by a consideration of the

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[24] *Cooke v Valuers Registration Board* [2014] NZHC 323.

[25] *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office*, above n 16.

[26] *R v Anderson*, above n 17 and *Maxwell v The Queen* above n 18.

specific circumstances rather than by pursuing an enquiry as to whether any particular threshold is satisfied.

[42] This being a case where the decision not to proceed with the prosecution was not the consequence of the adoption of a general policy, but where the alleged error comprised the giving weight to irrelevant considerations and the failure to take into account relevant considerations, I do not consider that the impugned process is of such gravity that the high level of restraint should be relaxed and judicial review permitted. I conclude therefore that the Prosecution Decision is not amenable to judicial review. In reaching that conclusion I am particularly influenced by the analysis of the Fiji Supreme Court in *Matalulu*.[27]

[43] In the event that my conclusion was found to be erroneous I turn to address the contentions in the applicants' first cause of action.

In deciding not to proceed with the prosecution against Mr Whittall did the prosecutor fail to comply with the Guidelines?

[44] The Guidelines in force at the date of the Prosecution Decision were the Solicitor-General's Prosecution Guidelines of 1 July 2013.[28] As pleaded in para 3 of the amended statement of claim those Guidelines were promulgated pursuant to s 185 of the Criminal Procedure Act 2011. Section 185(2) states:

> (2) In discharging his or her responsibility under subsection (1), the Solicitor-General may–
>
> (a) maintain guidelines for the conduct of public prosecutions; and
>
> (b) provide general advice and guidance to agencies that conduct public prosecutions on the conduct of those prosecutions.

27 *Matalulu v Director of Public Prosecutions (Fiji)*, above n 23.

28 Two versions of the Guidelines were in force during the time period relevant to this proceeding. The 2010 Guidelines were in force at the time when the informations were laid and the prosecution was commenced against Mr Whittall on 10 November 2011. However the 2013 Guidelines are the applicable Guidelines being those in force at the time of the Prosecution Decision.

[45] Furthermore s 188 states:

> **188 Duty of Crown prosecutor to comply with Solicitor-General's directions**
>
> A Crown prosecutor who conducts a Crown prosecution under section 187 must conduct that prosecution in accordance with any directions given by the Solicitor-General (either generally or in the particular case).

[46] The status of the earlier 1992 Guidelines was considered in *R v Barlow*[29] where Gallen and Neazor JJ held that the Guidelines could not be relied on as forming a basis of an expectation as to how a case may be conducted. The Court held that the 1992 Guidelines were only an indication of the approach that a prosecutor will follow, not a matter of law enforceable by a mandamus. On appeal[30] the Court of Appeal stated:

> The Guidelines do not and could not purport to control the exercise of the Courts' discretionary powers. Their only relevance for present purposes is to indicate the general practice which is adopted by the Solicitor-General.

[47] Paragraph [34] of the amended statement of claim asserts:

> 34. In making the decision Worksafe, in determining whether or not the public interest was served by continuing to prosecute the charges against Mr Whittall, was required to follow and to act in accordance with the guidelines and, in particular, clauses 5, 9.2 and 29 thereof.

[48] Clause 5 of the 2013 Guidelines, headed "The Decision to Prosecute", is a lengthy provision which includes the following:

> **The Test for Prosecution**
>
> 5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
>
> 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
>
> 5.1.2 Prosecution is required in the public interest – the Public Interest Test.

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29 *R v Barlow* [1996] 2 NZLR 116 (HC) at 121.
30 *R v Barlow (No 2)* [1998] 2 NZLR 477 (CA) at 479.

5.2 Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.

The Evidential Test

5.3 A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

[Clause 5.4 addresses the elements of the "definition" in clause 5.3.]

The Public Interest Test

5.5 Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.

...

5.7 Broadly, the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. This presumption provides the starting point for consideration of each individual case. In some instances the serious nature of the case will make the presumption a very strong one. However, prosecution resources are not limitless. There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option (particularly if the defendant is a youth).

[Several public interest considerations for and against prosecution are listed in cls 5.8 and 5.9 respectively.]

5.10 These considerations are not comprehensive or exhaustive. The public interest considerations which may properly be taken into account when deciding whether the public interest requires prosecution will vary from case to case. In regulatory prosecutions, for instance, relevant consideration will include an agency's statutory objectives and enforcement priorities.

5.11 Cost is also a relevant factor when making an overall assessment of the public interest. In each case where the evidential test has been met, the prosecutor will weigh the relevant public interest factors that are applicable. The prosecutor will then determine whether or not the public interest requires prosecution.

No prosecution

5.12 If the prosecutor decides that there is insufficient evidence or that it is not in the public interest to prosecute, a decision of "no prosecution" will be taken.

[49] Clauses 9.2 and 29 of the Guidelines state:

9. REVIEW OF CHARGES

...

9.2 Once charges have been filed, and before trial, the prosecutor should review the charges to determine whether those are the charges that should be prosecuted or whether:

9.2.1 Any of the charges should be amended to bring them into conformity with the evidence available;

9.2.2 Other charges should be added; and

9.2.3 Any charges should be withdrawn (because, for example, they are no longer considered necessary in the public interest, or are not adequately supported by the evidence).

...

29. VICTIMS

29.1 Victims of crime in the criminal justice system are to be:

29.1.1 Treated with courtesy and compassion; and with

29.1.2 Respect for their dignity and privacy.

29.2 The key means of observing these principles is through the provision of information to ensure that victims understand the process and know what is happening at each stage. So far as is possible, the victim should have explained to them the court processes and procedures, and should be kept informed of what is happening during the course of the proceedings.

29.3 Prosecutors should seek to protect the victim's interests as best they can whilst fulfilling their duty to the Court and in the conduct of the prosecution on behalf of the Crown.

29.4 Crown prosecutors are referred to the protocol "Victims of Crime – Guidance for Prosecutors" (issued with these Guidelines) for greater detail as to the role and duties of prosecutors in respect of victims. Prosecutors in government agencies should be aware of and take into account the guidance provided in that protocol.

[50] The manner of Worksafe's alleged failures in this respect is detailed in paras 35 and 36 of the amended statement of claim:

35. Worksafe failed to act in accordance with the guidelines in that it had regard to and gave weight to the following irrelevant considerations:

35.1 The offer to pay $3.41m in return for Worksafe offering no evidence in support of the charges against Mr Whittall.

35.2 Alleged witness unavailability.

35.3 Anticipated contests between expert witnesses.

35.4 Indicated and anticipated procedural/pre-trial issues.

35.5 An asserted view that PRC was the principal offender and had been held to account, with record fines and reparation ordered.

35.6 The seriousness of the alleged offences, it being asserted there was no causative link alleged, and the maximum sentence was likely to be a fine only, in the tens of thousands of dollars.

35.7 The fact that the Royal Commission into the disaster had heard all the evidence and provided a comprehensive report on the tragedy.

35.8 The unlikelihood of the amount of reparation ordered being received from PRC by the families of the dead and the survivors.

35.9 The matters referred to in [the letter referred to in paragraph 12 above] (to be superseded by an open letter for disclosure purposes if required).

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

36. In making the decision Worksafe failed to act in accordance with the guidelines in that it failed to have regard to the following relevant considerations:

36.1 The Court was likely to impose high fines by way of penalties.

36.2 The catastrophic and continuing harm caused by the disaster.

36.3 The emotional and financial loss and or damage caused to the applicants and, as well, to the families of the other dead and the survivors.

36.4 The public and the applicants' interest in completing the prosecution so as to decide the culpability or otherwise of Mr Whittall.

36.5 The proper administration of justice.

36.6 The principle that money should not be paid to influence whether a prosecution should proceed.

36.7 The interests of justice.

[51] The applicant's submissions addressed the assertions comprised in the first cause of action in two parts:

(a) first, the asserted illegality of what was alleged to be an agreement between Worksafe and Mr Whittall for a monetary payment; and

(b) secondly, the inappropriateness of Worksafe's consideration of the other pleaded factors.

Alleged illegal agreement

[52] The applicants submitted that at common law an agreement to stifle a prosecution, by for example withdrawing charges in return for a payment, is an unlawful contract and is void on public policy grounds, citing *The Bhowanipur Banking Corporation Ltd v Sreemate Durgesh Nadini Dasi*[31] and *Jones v Merionethshire Permanent Benefit Building Society*.[32] In the New Zealand context reference was also made to *Polymer Developments Group Ltd v Tilialo* where Glazebrook J said:[33]

> [63] Few would have any doubt that certain contracts to stifle prosecutions are clearly contrary to public policy. For example, most would agree, for a variety of reasons, that the situation in *Callaghan v O'Sullivan* [1925] VLR 664, whereby money was paid by an alleged criminal to police officers so that they would not institute a prosecution, is against public policy. …

[31] *The Bhowanipur Banking Corporation Ltd v Sreemate Durgesh Nadini Dasi* (1942) BOMLR 1 (PC).

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

[33] *Polymer Develpments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) at [63].

[53] The applicants contended that an unprincipled and unlawful agreement was made between Worksafe and Mr Whittall "to drop all the charges in return for a payment to be made by an insurer". The implications of that agreement for the first cause of action were described in this way in the applicant's submissions:

> [Worksafe] took into account the agreement between itself and Mr Whittall pursuant to which it would offer no evidence if the $3.41m was paid. It was wrong for this to be taken into account. The payment of the money was an irrelevant consideration because it was paid pursuant to an illegal agreement and contrary to public policy, and therefore could not be part of any public interest aspect of the decision making process.

[54] Unsurprisingly Worksafe accepted that an agreement to stifle a prosecution would not be consistent with the Guidelines, observing that no reasonable prosecutor would enter into such an agreement. It then made the point that the pleading did not specifically allege any agreement in the terms asserted in the applicant's submissions, only that the prosecutor had regard to and gave weight to the "offer" referred to in para 35.1.[34]

[55] I consider that Worksafe's demur is entirely proper. An allegation of what is in effect contended to be a contract interfering with the course of justice should be explicitly pleaded, not just to be inferred from an allegation of having regard to an irrelevant consideration.

[56] However the contention having surfaced, it should not be left hanging. It was Worksafe's contention that the "offer" was of a voluntary payment to be received by the victims of the tragedy in the nature of reparation. It rejected the applicants' submission that there had been a "requiring or receiving" of the payment on the part of Worksafe. It emphasised that it did not enter into any binding agreement to secure the payment on behalf of the victims or at all.

[57] The distinction between a voluntary payment as compared with one which is made as a consequence of a binding bargain appears to be a critical feature. The point is usefully captured in the judgment in *Polymer Developments*:

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[34] At [50] above.

> [46] A number of reasons have been put forward for the rule prohibiting most agreements to stifle prosecutions. One rationale for the prohibition was set out by Bowen LJ in *Jones* at pp 183–184 as being to ensure that decisions whether to prosecute were not influenced by an indirect motive. *Reparation* (whether by the offender or a relative) *could well be a matter that could be taken into account in a decision not to prosecute but there must be no bargain made about it.* He said:
>
> > "The duty to prosecute, or not to prosecute, is a social and not a legal duty, which depends on the circumstances of each case. It cannot be said that it is a moral duty to prosecute in all cases. The matter depends on considerations, which vary according to each case. But the person who has to act is bound morally to be influenced by no indirect motive. He is morally bound to bring a fair and honest mind to the consideration and to exercise his decision from a sense of duty to himself and others.
> >
> > What is it that the law requires about the exercise of this moral duty? *It is that it shall not be made a matter of private bargain.*
> >
> > (emphasis added).

[58] Despite the applicants' resolute depiction of the events as an agreement, the record reveals that the proposed payment was consistently referred to as a voluntary payment and one in the nature of reparation to the disaster victims. It was considered in that light by those whose task it was to make the Prosecution Decision. It was also apparent that the perception of Judge Farish was to the same effect.[35]

[59] In my view the unpleaded allegation that Worksafe and Mr Whittall entered into an unprincipled and unlawful binding agreement to stifle the prosecution in return for Mr Whittall arranging for the payment of a sum of money is not established on the evidence before the Court.

Was the proposal of a voluntary payment an irrelevant consideration?

[60] Ms Holden submitted that, the offer having been made, it was lawful and appropriate for the prosecutor to take it into account. Indeed it was suggested that the prosecutor could very well have been criticised if the prosecution had proceeded and failed or if the prosecutor had made the decision not to continue with the prosecution at a significantly later date, thereby denying the victims the prospect of a

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35 Para [9] in [29] above.

substantial payment. Attention was also drawn to cl 5.9.10 of the Guidelines which states the following is a public interest consideration against prosecution:

> 5.9.10 Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants should not be able to avoid prosecution simply because they pay compensation);

[61] The point was made that that clause recognises that compensation payments are not precluded from consideration in the public interest factors against prosecution. In the present case the fact of the proposed voluntary payment was only one of several factors and hence the "simply because" precondition was not applicable. That state of affairs was reflected in the following paragraphs in the document which was prepared for distribution to the victims' families:

> 5. A further factor was the without prejudice proposal from counsel for Mr Whittall to make a voluntary payment of $3.41 million to meet the reparation ordered against PRCL and also the proposal that a private meeting be arranged between Mr Whittall and the families and survivors to which the company directors at the time of the explosion would also be invited.
>
> 6. [Worksafe] sought advice from the Solicitor General on whether the financial offer should be taken into account, and if so, how. After consultation with the Solicitor-General and careful consideration, it was determined that the offer should be taken into account. However, ultimately it was the low likelihood of conviction together with the other public interest factors weighing against prosecution that led the Ministry to the conclusion not to proceed with the charges.

[62] Possibly also relevant on this question is the point made on behalf of the applicants that while the Act prohibits insurance against fines,[36] there is no such constraint so far as reparation orders are concerned.[37]

[63] As discussed above, the applicants' argument was premised on the existence of an illegal agreement as amounting to an irrelevant consideration. I did not understand the applicants to contend that, in the absence of a binding agreement, the existence of a voluntary offer (which was not of course the applicant's depiction of

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36 Section 56I.

37 *Department of Labour v Street Smart Ltd* (2008) 5 NZELR 603 (HC) at [54].

events) was an irrelevant consideration. I accept Worksafe's submission on the allegation in para 35.1.[38]

Worksafe's consideration of other pleaded factors

[64] The various factors the subject of the applicants' criticism were those referred to in the five page decision document of 5 December 2013.[39]

[65] The applicants first submitted that the issues of witness unavailability, contest between experts and contested pre-trial evidential issues were three issues which should not have been taken into account in considering the issue of public interest. Rather they were factors which related to evidential sufficiency which Worksafe had always accepted was met.

[66] Worksafe's stance on this issue was inconsistent. Its written submissions treated these matters as having been considered as part of the Evidential Test while at para 19 of Worksafe's statement of defence these factors were referred to as additional factors taken into account in considering whether continuing with the prosecution was in the public interest. In Mr Stewart's first affidavit these issues appear to be viewed at para 54 as relating to evidential matters while at para 68 in expanding on the reasons in the decision summary document they are treated as public interest considerations.

[67] In my view it is possible and permissible for factors such as these to be taken into account at both stages. I say that because the Evidential Test is concerned with a certain threshold, namely whether a reasonable prospect of conviction exists, whereas the Public Interest Test involves a broad range of considerations in which it is legitimate, in my view, to include such particular difficulties in the mix. In that connection I note again the content of cls 5.10 and 5.11.[40]

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38 At [50] above.
39 At [23] above.
40 At [48] above.

[68] Worksafe's submissions made essentially the same point but in a slightly different way in its conclusion on the application of the Evidential Test:

> Following the review of evidential sufficiency by the Crown Solicitor, a senior prosecutor, the prosecution concluded that the Evidential Test was met, however, the prospects of success at trial were low. It is submitted that the assessment that the prospects of success were low forms an important backdrop to the application of the Public Interest Test that followed, in particular in relation to factors concerning cost and best use of resources.

[69] So far as the remaining matters are concerned, there is room for differences of opinion as to the significance of such matters as the implications of the Royal Commission's Report, the seriousness of an offence under s 50 of the Act and the absence of causation as an ingredient, and the depiction of a charge against a director of a company under s 56(1) of the Act as a secondary offence.

[70] In my view none of the remaining matters listed in para 35 of the amended statement of claim can be rejected as truly irrelevant considerations. That is recognised in the applicants' submissions with reference to the issue of the high costs of continuing with the prosecution for a trial contemplated to be 16–20 weeks duration. It was said that, while cost may be a legitimate factor,[41] it must have significantly less importance in a multiple death case.

[71] Assuming that proposition to be sound, the response made by Worksafe is that that submission goes to the weight which the prosecutor attributed to the cost factor. However it is well established that the weight to be given to relevant considerations is quintessentially a matter for the decision maker, not a matter for challenge in judicial review.[42]

[72] The fact that in a number of instances the applicants' real basis for complaint was the weight perceived to have been accorded to a particular consideration also appears in the submissions relating to para 36 of the amended statement of claim concerning the alleged failure to have regard to relevant considerations. It was submitted that Worksafe failed to pay "proper regard" to the very heavy fines and reparation orders which it was contended could have been imposed.

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[41] Clearly that is correct. It is addressed in cl 5.11 of the Guidelines.

[42] *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [50].

[73] Worksafe responded that there was in fact no precedent for the imposition of high fines for a s 56 offence but the key point is that the prosecutor gave genuine consideration to the issues and hence due regard was had to the matter in the course of the decision-making process.

[74] With reference to paras 36.2 to 36.4 of the amended statement of claim the applicants' submission stated:

> It is submitted that [Worksafe] overlooked in its decision making the catastrophic harm caused by the accident and ongoing emotional and financial loss and damage caused to the victims. In the context of a mass death accident, it is incomprehensible that [Worksafe] downplayed or ignored the importance of the families' and the public's interest in a trial to ascertain culpability.

[75] While the depth of the applicants' concerns is palpable, it is simply not tenable in the face of the record to suggest that Worksafe "overlooked" the harm which resulted from the tragedy. The decision itself noted the fact of the Royal Commission's report which Mr Stewart referred to in his first affidavit in the following way:

> [T]he Royal Commission on the Pike River Coal Mine Tragedy had heard evidence and provided a comprehensive report on the tragedy. 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. For this to have occurred before criminal charges have been determined was unusual and we considered it a meaningful contribution to addressing the harm caused by the disaster.

[76] Nor do I consider that a submission that Worksafe "ignored" the matters referred to is justified or indeed entirely fair. The allegation that certain factors may have been "downplayed", whether consciously or otherwise, may be closer to the mark. However at that point the Court is again being asked to embark on a process of assessing the weight which was given to various matters but that is a step beyond the Court's jurisdiction in judicial review.

[77] On the basis of my consideration of the record, the first affidavit of Mr Stewart and the submissions for both sides I conclude that the contention that Worksafe failed to act in accordance with the Guidelines in the manner alleged in para 36 of the amended statement of claim is not established.

In deciding not to proceed with the prosecution against Mr Whittall did the prosecution fail to have regard to s 5(g) of the Act?

[78] Section 5(g) of the Act states:

> **5 Object of the Act**
>
> The object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work by–
>
> ...
>
> (g) providing a range of enforcement methods, including various notices and prosecution, so as to enable an appropriate response to a failure to comply with the Act depending on its nature and gravity; and

[79] In para 37 of the amended statement of claim the applicants assert:

> 37. In making the decision Worksafe did not have regard to s 5(g) of the Act in that it failed to provide an enforcement method against Mr Whittall, namely prosecution, appropriate to his grave and serious failures to comply with the Act.

[80] Worksafe's response to this allegation is threefold. First it contends that s 5(g) cannot require prosecution of all breaches of the Act that reach a certain level of gravity even where prosecution is not in the public interest. Secondly it argues that the allegation does not add anything to the assertion discussed above that the prosecutor failed to have regard to the catastrophic and continuing harm caused by the disaster and the emotional and financial loss or damage caused to the families of the dead and to the survivors. Worksafe submits that it is implicit in the prosecutor's consideration of those issues that it took into account the s 5(g) statutory object.

[81] Thirdly attention is drawn to the informant's memorandum dated 11 December 2013 which states:[43]

> 34. It is clear that the considerations listed in the Guidelines are not exhaustive and 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 specific and general deterrence principles to keep workers safe (particularly in inherently dangerous industries).

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[43] At [27] above.

> 35. The informant has taken into account and carefully weighed the competing factors.

[82] While it is the case that s 5(g) is not explicitly identified in the documents which evidence Worksafe's consideration of the issues relating to the Prosecution Decision, I agree with the Worksafe contention that in all the circumstances it cannot be said that Worksafe did not have regard to the s 5(g) objective.

Did the applicants have a legitimate expectation that they would be consulted prior to the prosecutor making its decision and, if so, did the failure to so consult with them render the Prosecution Decision unlawful, invalid or unreasonable?

[83] The applicants plead that they had a legitimate expectation that:

(a) they would be consulted by Worksafe as to the proposal to offer no evidence in support of the charges in return for the payment of $3.41 million in satisfaction of the reparation order made against PRCL; and

(b) they would be consulted about whether they accepted that Mr Whittall had rectified the loss or harm that had been caused to them through means of the payment of money by a third party in satisfaction of the reparation order made against PRCL.

[84] That legitimate expectation was said to arise from:

(a) Victims' Rights Act 2012, s 12;

(b) Victims of Crime – Guidance for Prosecutor Guidelines, cl 16; and

(c) Solicitor-General's 2013 Prosecution Guidelines, cl 5.9.10.

[85] Those materials relevantly provide:

(a) **12 Information about proceedings**

(1) A victim must, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor, about the following matters:

(a) the progress of the investigation of the offence:

(b) the charges laid or reasons for not laying charges, and all changes to the charges laid:

...

(d) the date and place of each event listed in subsection (2):

(e) the outcome of the prosecution of the offence (and of any proceedings on appeal), for example—

(i) any plea of guilty or conviction entered, and sentence imposed or substituted; or

(ii) any finding that an accused is unfit to stand trial; or

(iii) any finding that the charge was not proved; or

(iv) any acquittal or deemed acquittal; or

(v) any grant of free pardon.[44]

(b) CASES INVOLVING A DEATH

16. Prosecutors will on request meet the family of someone killed as a result of a crime and explain a decision on prosecution. In any case involving a death the prosecutor has a role to play in minimising the additional distress criminal proceedings are likely to cause to a victim's family and friends. The bereaved family are likely to be acutely concerned about any major decision taken in the case, e.g. to change the charge or accept a plea to an alternative or lesser charge, or to terminate the proceedings.

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[44] The events referred to in s 12(1)(d) include any preliminary hearing or trial relating to the offences and any hearings set down for sentencing for the offence.

(c) 5.9 The following section lists some public interest considerations against prosecution which may be relevant and require consideration by a prosecutor when determining where the public interest lies in any particular case. The following list is illustrative only.

> ***Public interest considerations against prosecution***
>
> ...
>
> 5.9.10 Where the victim accepts that the defendant has rectified the loss or harm that was caused (although defendants should not be able to avoid prosecution simply because they pay compensation);

[86] The applicants' written submissions on this issue were again premised on the contention that an agreement was made between Worksafe and Mr Whittall concerning the $3.41 payment. The tenor of the argument is reflected in the following paragraphs:

> ... There was a secret arrangement in which the prosecutor assumed a role almost as a kind of unauthorised agent for the victims, which even extended to "trading" the dismissals of charges (and dismissals "on the merits") for the payment of the reparations owed to the victims by PRC.
>
> In truth, [Worksafe] placed itself in a highly compromised position. It purported to act for the victims and to negotiate with Mr Whittall about the reparation owed to the victims, but excluded them from any input into the terms of the "unfortunate bargain" that it made.

[87] In reliance on *Manning*[45] it was contended that there is a heightened obligation on the prosecutor to provide reasons to victims in circumstances where life has been lost. Further in the course of oral argument when Mr Hampton was speaking to his written Opening, which referred to a legitimate expectation to be "consulted meaningfully", it emerged that the nature of the consultation which was envisaged was not merely prior notice of but also prior agreement to the course proposed.

[88] Worksafe first drew attention to the requirements for establishing a legitimate expectation of consultation as stated by the Court of Appeal in *Green v Racing Integrity Unit Ltd*:[46]

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45 *R v DPP ex parte Manning*, above n 13 at [28]–[33].

46 *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623.

> [13] It was not in dispute in the High Court or before us that the [appellants] must establish three elements if they are to succeed on a claim for breach of a legitimate expectation, in the administrative law context: (1) a promise or commitment, in this case by the adoption of a settled practice or policy, to act in a certain way; (2) their legitimate or reasonable reliance on the promise or commitment; and (3) the appropriate remedy if any that should be granted.
>
> [14] We accept that success at the first step – establishing the existence and content of the expectation pleaded – might not come in the form of an explicit promise. A promise can be implied from past practice or policy. But where the expectation is in the form of a practice or policy, as alleged here, its existence and content must equally be established to the level of a commitment or undertaking. The existence and content of such a practice or policy must be both unambiguous, and settled in the sense that it is regular and well established.

[89] Although the prospect of consultation with the families of the deceased was considered,[47] Worksafe accepts that it did not "consult" with the families of the deceased before deciding to not continue with the prosecution of Mr Whittall. However it was Worksafe's submission that the obligation under the cited provisions[48] was to provide information, not to engage in consultation prior to making its decision.

[90] Such provision of information included the following steps in advance of the 12 December hearing before Judge Farish:

(a) a suppression order was sought on 10 December 2013 in order that the families of the deceased could be informed about the Prosecution Decision;

(b) on 10 December 2013 a telephone conference was convened with representatives of the families to advise that the prosecutor was not proceeding with the charges against Mr Whittall;

(c) on 11 December 2013 a meeting was convened in Greymouth with the families of the survivors and the deceased to explain the Prosecution Decision;

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47 At [21] above.

48 At [77]–[78] above.

(d) on 11 December 2013 the families were given through their lawyer and representative a copy of a statement setting out the reasons and basis for the Prosecution Decision.

[91] Responding to the applicants' submissions, Worksafe contended that *Manning* can be distinguished in the present case because the Court there considered that the Director of Public Prosecutions was only required to give reasons in limited cases, such as where there was a death in custody. The submission was made that *Manning* is not authority for the proposition that reasons must be given or consulted on prior to a prosecutorial decision being made or finalised.

[92] Reference was also made to *Re Adams' Application for Judicial Review* where the Northern Island Court of Appeal stated:[49]

> The DPP did not act in breach of any duty of fairness in failing to consult the appellant before reaching his decision not to prosecute the police officers. One of the matters with which the DPP should concern himself is the interests of victims, but there is no general duty to consult a victim: see *R v Director of Public Prosecutions ex parte C* (2000, unreported).

[93] I accept Worksafe's submission that the obligation imposed by the provisions cited in the claim is an obligation to provide information. Although it appears that information was provided, it is also apparent that it was provided within a condensed and even pressured timeframe which, given the significance of the information, did not provide the recipients sufficient time within which to fully digest it prior to the hearing on 12 December 2013. Furthermore the information was provided within the constraint of the suppression order which would likely have compounded the pressured environment for the recipients of the information. Notwithstanding the constructive motivations of the relevant Worksafe personnel, the events of 10-12 December were less than ideal.

[94] However the issue which I am required to determine is a different one, namely whether the circumstances were such as to impose on Worksafe an obligation to consult with the families first and before reaching a decision. In my view none of the provisions cited or the cases referred to in argument support a conclusion that the

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49 *Re Adams' Application for Judicial Review* [2001] NI1 (CA, Northern Island).

applicants had a legitimate expectation of prior consultation on the part of Worksafe, either in terms of the traditional meaning of the word "consult" or in the extended meaning of prior agreement as suggested on behalf of the applicants in the course of argument.

Was the District Court Decision unlawful by reason of the process whereby the decision was made?

[95] Under the heading "improper purpose", having first noted that the District Court Decision was made pursuant to s 68(1) and (2) of the Summary Proceedings Act 1957 (the SPA), the third cause of action then stated:

> 46. The SP Act, and s 68 in particular, provided for the lawful conduct of a summary hearing by way of submissions and evidence before the final disposition of the charges.
>
> 47. The District Court decision was made with the knowledge that $3.41m would only be paid if no evidence was offered in support of the charges and the charges were dismissed.
>
> 48. The District Court decision was made with the knowledge that $3.41m was to be paid by insurers to satisfy the reparation order.
>
> 49. The District Court decision allowed for, endorsed, and gave effect to the payment of $3.41m in return for the dismissal of the charges and was thus contrary to the purposes of the SP Act and s 68 thereof.
>
> 50. The District Court decision was contrary to the public interest and contrary to the proper administration of justice.
>
> 51. The District Court decision was unlawful, invalid and unreasonable.

[96] The allegations in paras 47 and 48 were admitted in the statement of defence.

[97] As it developed the applicants' argument involved two limbs. First, it was said that there had been no proper discharge of s 68(1) in that it could not be said that the prosecution had been heard by the Court "on the merits". Secondly, it was asserted that the Judge had not brought any objectivity to the process but had enthusiastically endorsed what was described as "the agreement reached". Although much greater emphasis was placed on the second line of argument, I will address them in sequence.

Alleged failure to conduct hearing on the merits

[98] Although s 68 has been repealed,[50] because the proceedings against Mr Whittall commenced on 10 November 2011 and were not finally determined before the Criminal Procedure Act 2011 came into force on 1 July 2013, s 68 continued to apply.[51]

[99] Section 68(1) states:

> **68 Decision of Court**
>
> (1) The Court, having heard what each party has to say and the evidence adduced by each, shall consider the matter and may convict the defendant or dismiss the information, either on the merits or without prejudice to its again being laid, or deal with the defendant in any other manner authorised by law.

[100] The applicants' contention as reflected in para 46 appeared to be that s 68(1) requires that there be a full hearing with evidence adduced before it is open to a Judge to dismiss an information.

[101] In response Ms Holden drew attention to *Haskett v Thames District Court* where Hammond J considered the three-stage process which had evolved in the practice of District Courts in exercising summary jurisdiction.[52] She submitted that it would be contrary to the interests of justice and the public interest of a District Court did not have the power and jurisdiction to enable it to act effectively by allowing charges to be withdrawn without conducting a full defended hearing and hearing all the evidence.

[102] I accept her submission that the inherent jurisdiction permits a dismissal of informations pursuant to s 68(1), consistent with the practice referred to in *Haskett*, without the Judge hearing all the evidence.

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[50] Summary Proceedings Amendment Act (No 2) 2011.
[51] Criminal Procedure Act 2011, s 397.
[52] *Haskett v Thames District Court* (1999) 16 CRNZ 376 (HC).

Alleged failure to act judicially

[103] The thrust of the applicants' complaint was that the Judge did not bring an independent mind to bear on the issue of discharge but instead "rubber-stamped" the Prosecution Decision by simply endorsing the payment as pleaded in para 49. The applicants referred to the underlying principle as being the need for the Court "to protect its own process from being degraded and misused", citing the House of Lords decision in *R v Horseferry Road Magistrates Court ex parte Bennett*[53] which approved the New Zealand Court of Appeal decision in *Moevao v Department of Labour*.[54]

[104] The nub of their argument was captured in the issue framed in their submissions in this way:

> 78. The issue is whether a Judge faced with such a proposal not to call evidence had no choice but to accept it.

[105] The answer to that postulated issue is clearly in the negative. As Ms Holden submitted, confronted with the prosecutor's decision to not oppose dismissal of the charges, the options then open to the District Court were to consider the prosecutor's position in offering no evidence and to determine whether it was in the interests of justice to dismiss the informations on that basis or instead to not adopt the position taken by the Crown and remand the matter through to a further date.

[106] Observing that authorities relating to s 347 of the Crimes Act 1961 are relevant to the determination of matters under s 68 of the SPA, Ms Holden drew attention to *Timbun v The District Court at Auckland* which concerned a charge of stupefying and sexual violation.[55] As the complainant could not be located when the trial was to commence, the Crown offered no evidence against Mr Timbun. His counsel then made an application for discharge under s 347 of the Crimes Act 1961 which the Crown did not oppose. However the District Court Judge remanded Mr Timbun to another date to face trial again on these charges.

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[53] *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42 (HL) at 76.
[54] *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).
[55] *Timbun v The District Court at Auckland* HC Auckland CIV-2009-404-1239, 10 June 2009.

[107] Mr Timbun applied for judicial review of the Judge's decision declining to grant the application for a discharge and sought an order that the decision be quashed and that he be discharged.

[108] The High Court ruled that the Judge had applied the correct test, namely what was in the overall interests of justice, when he declined to discharge Mr Timbun pursuant to s 347 and that there was no basis upon which it could interfere with the exercise of the District Court Judge's discretion. Lang J stated:

> [40] I take the view that this issue is ultimately answered by reverting to fundamental principles. One of these is that it is for the Court and not counsel to determine the outcome of an application for discharge under s 347. The Crown position must obviously be taken into account and in some cases may be decisive, but that does not alter the fact that the Judge is required to bring an independent mind to bear on the issue that he or she is required to decide. It would be completely wrong in principle for a Judge to grant an application for discharge solely because the Crown did not oppose it.
>
> [41] ... For the reasons that I have given, however, I am satisfied that the Judge was entitled, and indeed required, to look beyond the stance taken by the Crown in order to decide whether the interests of justice required him to grant or dismiss the application for discharge.

[109] Turning to the present case, the applicants contend that Judge Farish failed to look beyond the Prosecution Decision. In support of that contention they note that the District Court Decision failed to refer to:

(a) section 68 of the SPA or discuss the alternatives (ss 68(1) and 78) to the dismissal of the informations;

(b) the legality of accepting money from an insurer to be paid to satisfy another defendant's reparation order in return for the offering of no evidence;

(c) the absence of any consent of or consultation with the victims and the consensual position taken by it and Mr Whittall;

(d) the Court being asked to seal an agreement which was placed before it as a fait accompli; and

(e) the public perception of the dismissal of the informations in the context of a tragedy.

[110] While acknowledging that the Judge did not explicitly refer to the interests of justice test, Ms Holden argues that in essence the Judge so concluded in finding that it was not in the best interests of the community for the prosecution to continue. She submitted that the Judge took into account the reasons outlined in the informant's 11 December memorandum and reached her own view on the issues and that it was apparent from reading the ruling that the Judge had not simply endorsed the Prosecution Decision.

[111] The applicants' challenge can only be determined by reference to and analysis of the terms of the District Court Decision. It is comparatively brief, having been delivered orally at the conclusion of the hearing on 12 December 2013.

[112] Naturally enough the applicants place emphasis on those parts of the Decision which refer to the fact of the payment and its implications for the previously made reparation order.

[113] However, while the applicants may understandably view it with a cynical eye, the Judge was at pains from the very commencement of her comments to endeavour to explain her perception that two discrete processes had been involved. As she said in the first paragraph:

> [1] I think it is very important to understand that the decisions that have been reached today have been reached by two discrete processes. They are the decision in relation to whether or not the prosecution should proceed against Mr Whittal and quite discrete and separate from that, there has clearly been another process which Mr Whittal and the other directors and their advisors have been having once I made the reparation orders in July of this year.

[114] The Judge reiterated that point in front-footing the "buy out" notion at para [9]:

> [9] Now some of you I know will say and think and believe that this is Mr Whittal buying his way out of a prosecution and I can tell you it is not. The decision not to prosecute or to continue with the prosecution has been taken at a very high level and the voluntary payment is really a side issue in terms of that determination, it is quite a side issue and I am quite satisfied of that. ...

[115] Furthermore the Judge referred to a number of factors which were consistent with the application of an overall justice analysis and inconsistent with the notion that only the voluntary payment had figured in her consideration:

(a) the difficulties associated with preparation of the prosecution case: paras [2], [4] and [5];

(b) the difficulties associated with proof of the particular offence: para [6];

(c) the prosecution's assessment by reference to the Guidelines: para [6].

[116] A very significant indication that the Judge did adopt the correct approach can be seen in the observation at para [10]:

> [10] So I see this outcome as being a good outcome. One, because the time and the length of the hearing and the resources for a fineable only offence, with very small chance of successful prosecution is not in the best interests of your community or indeed the wider community.

[117] While structured and couched in a fashion consistent with an immediate oral judgment, it is impossible in my view to conclude from a consideration of the entirety of the Decision that the Judge had abdicated her role under s 68 of the SPA and failed to undertake her own analysis of the appropriateness of the course proposed.

Was the District Court Decision unlawful by reason of the alleged unlawfulness of the Prosecution Decision?

[118] On this issue the pleading stated:

> The District Court failed to have regard to a relevant consideration, namely that Worksafe's decision was unlawful, invalid and unreasonable for the reasons set out in paragraphs 34 to 38 and 39 to 44 above and that it was therefore not in the public interest to dismiss the charges.

[119] The references to paras 34 to 38 and paras 39 to 44 are to the totality of both the first and second causes of action respectively against Worksafe. The consequence of pleading the case by employing that cross-reference technique is an expansive and arguably oppressive pleading.

[120] In my view a finding of a failure on the part of a court or tribunal to have regard to an alleged invalidity or illegality of an action on the part of a party before it could only fairly be sustained if it was demonstrated that the court or tribunal had explicit knowledge of the claimed invalidity or illegality of the action.

[121] Such a scenario did not arise in the present case. The Judge was the recipient of memoranda from both the informant and the defendant. The thrust of the informant's memorandum was that the decision which had been taken was one made in accordance with the obligations under the Prosecution Guidelines and by the application of a principled and conventional approach. That the Judge had plainly considered that memorandum is apparent from the references to it at para 5 of the Decision.[56] Nothing in the memorandum warranted the Judge coming to the conclusion that the Prosecution Decision was invalid or illegal in the manner alleged in the first and second causes of action.

[122] The Judge's task was to exercise the jurisdiction under s 68(1). The attack on that Decision is the subject of the third cause of action. Absent express knowledge of any invalidity or illegality on the part of Worksafe, I do not accept that the Judge's Decision can be made the subject of discrete attack via the route of the allegation in the fourth cause of action.

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[56] There was also reference to the defendant's memorandum at para 4.

Was the District Court Decision unlawful because the District Court Judge had recused herself?

[123] The fact of recusal is first addressed in paras 9 and 10 of the amended statement of claim:

> 9. In or about July 2013 Mr Whittall sought and obtained a transfer of the charges to the District Court at Wellington for a defended summary hearing and an order from Judge Farish recusing herself from presiding at the hearing (the recusal order).
>
> 10. With the consent of both Worksafe and Mr Whittall, Judge Farish continued to manage the files relating to Mr Whittall's prosecution.

[124] Then, under the heading "Ultra vires – District Court Judge recused", the fifth cause of action stated:

> The District Court Judge had been lawfully recused from acting and remained so recused when she purported to make the District Court decision.
>
> Consequently there was no jurisdiction for the Judge to make the District Court decision.

[125] Worksafe's response to para 9, which is repeated at para 53 of the statement of defence, stated:

> 9. In relation to paragraph 9 it admits that Mr Whittall sought and obtained a transfer of the charges to the District Court at Wellington for a defended summary hearing and says that the decision granting transfer was made on 13 June 2013. It denies that Mr Whittall sought and obtained an order from Judge Farish recusing herself from presiding at the hearing, whether in July 2013, or at all. It says further that both parties anticipated that Judge Farish would recuse herself in relation to the hearing of the trial but were agreed Judge Farish would remain the judge with supervision and management of the file until a hearing date was assigned and a judge allocated.

Paragraph 10 of the amended statement of claim was admitted by Worksafe.

[126] The position appears to be that no formal recusal order was recorded but, as is evident from para [3] of the District Court Decision, Judge Farish considered that she had recused herself from presiding at the trial in response to Mr Whittall's request.

[127] Citing United States commentary the applicants contended that a recused judge cannot adjudicate on any substantive matter in the material case[57] although acknowledging that the judge may perform ministerial, non-discretionary acts to ensure that the case is properly disposed of by an unbiased decision maker.[58]

[128] The applicants maintain that the only issue is whether a judge in dismissing charges is simply "managing the file" and providing "supervision and overview" or whether such a dismissal crosses the line and is part of a non-ministerial, discretionary act. In their submission a s 68(1) dismissal is a substantive decision involving a core adjudicative function which brings a charge to a conclusion.

[129] Worksafe did not appear to resist that submission which was not surprising given the law as reviewed in the context of the third cause of action.[59] However Worksafe contended that, whether or not Judge Farish had formally recused herself, she was not prevented from making an order under s 68(1) dismissing the charges either because of the parties' ongoing consent to her participation or because she reassumed jurisdiction for the purposes of determining the application.

[130] With reference to the first proposition, namely ongoing consent, it was Worksafe's submission that consent of the parties is relevant not only on the fact of recusal but also to the scope of recusal. It was said that while Mr Whittall had requested Judge Farish to recuse herself due to her role in the hearing involving PRCL, he had not raised any issue concerning her determining whether to dismiss the charges. Reference was made to the fact that the defendant's memorandum of 11 December 2013[60] in relation to dismissal recorded Judge Farish as the relevant judicial officer.

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57 Richard E Flamm *Judicial Disqualification: Recusal and Disqualification of Judges* (2nd ed, Banks & Jordan Publishing Company, California, 2007) at 646–648, 652.

58 S Matthew Cook "Extending the due process clause to prevent a previously recused judge from later attempting to affect the case from which he was recused" (1997) 2 BYU Law Review 423 at 444.

59 At [103] above.

60 At [28] above.

[131] I do not accept that argument. If objection is taken to the participation of a judicial officer on the grounds of apparent bias, then the expectation would plainly be that the objection would extend to any dimension of the adjudicative role in any particular case. Nor do I accept the submission for Worksafe that because the decision to dismiss the charges was in Mr Whittall's favour, then there can have been no appearance that Judge Farish was biased against Mr Whittall with the consequence that the grounds for recusal were not relevant. Rather, the issue must be whether at the relevant time the Judge was or was not recused.

[132] However, depending on the grounds advanced for an application to recuse, I accept that it is possible for an objection made by a party to be withdrawn, thereby enabling a Judge (if the Judge considers it appropriate) to reassume the judicial role in effect with the consent of the party who initially raised an objection.

[133] I recognise that that is an invitation which the recused judicial officer may decline to accept. I also recognise that a reassumption of the judicial role may be, or may be perceived to be, unsatisfactory in that it could appear to be effectively placing in the hands of one party the power to select a particular judicial officer. However such reservations aside, I do not consider that, at least in a scenario of apparent bias, a judicial officer once recused may not resume the judicial role if the original objection is subsequently withdrawn.

[134] In my view that is what transpired in the present case. On 6 December 2013 the Crown Solicitor sent an email to the District Court which stated:

> Currently the matter has a scheduled teleconference with Judge Farish on Thursday the 12th December (adjourned from 22 November). Judge Farish, I understand, is maintaining oversight of the case in the meantime.
>
> Mr Grieve QC and I have requested that Judge Farish, (rather than convene a teleconference), sit in open Court in Christchurch at 10 am on the 12th December in Court 6 to deal with the matter. I understand the Judge is provisionally amenable, with time and a Court available.

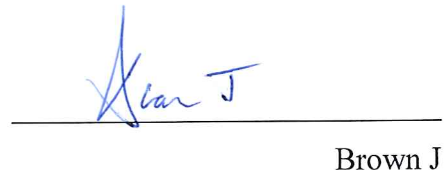
[135] While less than explicit as to the intended course of action, that request was followed by the filing of the memoranda of the informant and Mr Whittall and by the appearance of counsel before Judge Farish on 10 December 2013 when the application was made for the suppression order.[61] Certainly by that point, which was prior to the 12 December 2013 hearing, both the nature of the application to be made and the fact that Mr Whittall no longer objected to her determining the matter were apparent to Judge Farish. As Worksafe points out, the Judge's express reference in the Decision to her earlier recusal indicates that she had not forgotten about the objection and the fact that she proceeded with the hearing indicates that she considered that she was entitled to assume jurisdiction in the circumstances.

[136] For those reasons I conclude that in dismissing the charges on 12 December 2013 the Judge was not acting *ultra vires* and the challenge to her exercise of jurisdiction cannot succeed.

Disposition

[137] For the reasons above none of the grounds of review are established and the application for judicial review is dismissed.

[138] In the event that costs are sought and are not agreed, then any memorandum seeking costs should be filed by 18 December 2015 and any memoranda in response by 5 February 2016.



Brown J

Solicitors:
Crown Law, Wellington

[61] At [26] above.