IN THE COURT OF APPEAL OF NEW ZEALAND

CA735/2015
[2017] NZCA 11

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

Hearing:	9 August 2016
Court:	Kós P, Randerson and French JJ
Counsel:	K N Hampton QC, S N Meikle and Z M McCoy for Appellant J C Holden and M J R Conway for First Respondent No appearance for Second Respondent
Judgment:	16 February 2017 at 1.00pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B No order for costs.

REASONS OF THE COURT

(Given by Kós P)

[1] On Friday, 19 November 2010 there was an underground explosion at the Pike River coal mine. Thirty-one men were in the mine. All but two were killed.

The appellants both lost a family member: Ms Osborne her husband Milton, and Ms Rockhouse her son Benjamin. Ms Rockhouse's other son Daniel was one of the two survivors.

[2] Prosecutions under the Health and Safety in Employment Act 1992 were commenced by the Department of Labour.[1] VLI Drilling International Pty Ltd,[2] a contractor, pleaded guilty to the three charges. It was fined $46,800. Pike River Coal Ltd,[3] the mine owner, faced nine charges. It did not defend them. It was in receivership by then. It was fined $760,000 and ordered to pay $3.41 million in reparation to the families of the 29 men killed and to the two survivors. That is, $110,000 per victim.

[3] PRCL's chief executive, Mr Peter Whittall, faced 12 charges. He pleaded not guilty. In about August 2013 Mr Whittall undertook to make a voluntary payment of $3.41 million in the event the prosecution offered no evidence against him. The same sum PRCL had been ordered to pay. Given PRCL's economic state, it was doubtful that payment would ever be made.

[4] In December 2013 Worksafe decided that it would not offer any evidence in support of the charges against Mr Whittall. Judge Farish in the District Court then dismissed the charges against Mr Whittall. In due course the families received payments totalling $3.41 million from Mr Whittall.

[5] Ms Osborne and Ms Rockhouse applied in September 2014 for judicial review of the prosecution decision not to offer evidence, and the District Court decision to dismiss the charges, against Mr Whittall.[4] They said the decisions were an unlawful bargain to stifle a prosecution in exchange for payment. It was not, however, suggested by the appellants that they would (or could) return the payments they had received.

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1 Hereafter the "HSE Act". The Department of Labour became part of the Ministry of Business, Innovation & Employment (MBIE) in July 2012. Health and safety functions undertaken by the Department of Labour and MBIE were assumed by a section of MBIE called Worksafe New Zealand, the first respondent, in December 2013.

2 Hereafter "VLI".

3 Hereafter "PRCL".

4 Hereafter "the Prosecution Decision" and "the District Court Decision" respectively.

[6] Brown J dismissed their applications in November 2015.[5] Ms Osborne and Ms Rockhouse now appeal.

Facts

[7] The facts are largely agreed and are set out fully in the judgment of Brown J. Shorn of inessentials, they are as follows.

[8] Four catastrophic explosions occurred at the Pike River Mine. The first was at 3.45 pm on Friday 19 November 2010.[6] Both Department of Labour and police investigations commenced the following day. A Royal Commission into the tragedy was announced on 29 November 2010.[7]

[9] Almost a year later, on 10 November 2011, the Department commenced proceedings against VLI, PRCL (in receivership) and Mr Whittall.

[10] On 31 July 2012 VLI pleaded guilty to three charges of failing to take all practical steps relating to the maintenance and operation of machinery.[8] Three VLI employees or contractors had died in the explosion. On 26 October 2012 VLI was fined $46,800. No reparation appears to have been offered. No reparation order was made.

[11] PRCL did not defend the charges against it. A formal proof hearing was conducted on 14 and 15 March 2013. The receivers of PRCL did not participate. On 18 April 2013 Judge Farish entered convictions on nine charges of failing to take all practicable steps in relation to methane explosion management, ventilation management, panel geology and explosion mitigation management.[9] At sentencing on 5 July 2013 Judge Farish imposed fines of $760,000 and ordered reparation of $110,000 to each of the 29 men who had died and the two survivors (a total reparation sum of $3.41 million). The Judge noted that the company appeared to

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5 *Osborne v Worksafe New Zealand* [2015] NZHC 2991, [2016] 2 NZLR 485 [High Court judgment"].
6 The other explosions occurred on 24, 26 and 28 November 2010.
7 It reported in October 2012.
8 HSE Act, s 6.
9 Sections 6, 15 and 18.

have the means to pay the reparation ordered, but it remained to be seen if it would honour it.

[12] Twelve charges were brought against Mr Whittall under ss 6, 15 and 18 of the HSE Act. They were that he was party to the failures by PRCL and that he personally had failed to take all practicable steps to ensure PRCL's employees were not harmed. Mr Whittall pleaded not guilty to all charges.

[13] Mr Whittall was covered by a directors' and officers' insurance policy. Economically, the insurer was indifferent to whether a dollar paid by it went to reparation or to defence of Mr Whittall. Over the ensuing five months, discussions took place between senior counsel for Mr Whittall, Mr Grieve QC, and the Crown Solicitor for Canterbury and Westland, Mr Stanaway. We will evaluate exactly what occurred — to the extent apparent on the evidence before us — later in this judgment.[10]

[14] A voluntary payment of $3.41 million on behalf of the directors and officers of PRCL — rather than PRCL itself — was proposed by Mr Grieve. The payment would be made if and after Worksafe advised the Court that no evidence would be offered in support of any of the charges. Mr Whittall would express his sympathy, personal empathy and condolences at a private meeting with families and survivors, and encourage PRCL's directors to attend also.

[15] A panel of officials was formed by Worksafe, which had in the meantime assumed the functions of the Department of Labour. The panel included Crown counsel. There was uncertainty whether Mr Whittall's proposal should be considered. Mr Stanaway's review of the charges was received.

[16] Mr Stewart, Worksafe's Chief Inspector, made the decision not to continue with the prosecution. His evidence was that while there was sufficient evidence to justify the prosecution, the likelihood of a successful prosecution was low. Reasons for that assessment included the following. At least 14 of the 92 Crown witnesses

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[10] Beginning below at [58].

were unavailable. Others were reluctant. Worksafe bore the burden of proof. Expert witness contests and lengthy pre-trial issues were likely.

[17] In addition "several reasons … indicated a trial was not in the public interest". These included that if the prosecution succeeded, the sentence imposed on Mr Whittall as a secondary party was likely to be only a low fine. A reparation order was unlikely. PRCL on the other hand had been convicted with record fines and a substantial reparation order. The comprehensive Royal Commission report had been received by now. Additionally, a 16–20 week trial would be costly to Worksafe, financially and otherwise.

[18] After those matters were assessed, and after legal advice had been received, consideration was given to the conditional payment undertaking by Mr Whittall. Also considered was the offer of the meeting with family and survivors.[11] All those matters taken together formed considerations in the final decision not to proceed further against Mr Whittall.

[19] The Prosecution Decision was made by Mr Stewart on 5 December 2013, and approved by a deputy Chief Executive of the Ministry responsible for Worksafe.

[20] The next pre-trial conference before Judge Farish had been set down for 12 December 2013. On 10 December the Court was informed of the Prosecution Decision, and on that and the succeeding day a teleconference and face-to-face meeting with families and survivors were conducted at which the decision was explained.

[21] On 12 December 2013 the prosecution was called in open court in Christchurch before Judge Farish. The High Court judgment sets out at length the Judge's ruling delivered at that hearing.[12] We will address it further later in this judgment.[13] In the course of the ruling the Judge dismissed the charges against Mr Whittall and directed the Registrar to receive the payment of $3.41 million on the intended recipients' behalf.

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11 See above at [14].
12 High Court judgment, above n 5, at [29].
13 See below at [91]–[99].

Claim and defence

[22] The appellants commenced judicial review proceedings in September 2014. Because discrete issues arise on this appeal we can summarise the claim and defence succinctly.

[23] The appellants' claim was threefold:

(a) that in making the Prosecution Decision, Worksafe departed unlawfully from the Solicitor-General's Prosecution Guidelines,[14] failed to take into account relevant considerations (including that "money should not be paid to influence whether a prosecution should proceed" and s 5(g) of the HSE Act) and took into account irrelevant considerations (including Mr Whittall's conditional payment undertaking);

(b) that the appellants had a legitimate expectation that they be consulted on the proposal to offer no evidence against Mr Whittall before the Prosecution Decision was made; and

(c) that the District Court Decision to dismiss the charges was unlawful by reason of improper purpose (payment in return for dismissal of charges), failure to take into account the same considerations allegedly overlooked by Worksafe, and ultra vires (based on an allegation Judge Farish should not have sat).

[24] These allegations were denied by Worksafe.[15] Two affirmative defences were advanced. First, that the Prosecution Decision was not amenable to judicial review at all because it was made in the exercise of prosecutorial discretion. It was inappropriate for the High Court to interfere in the prosecutor's weighing of policy and public interest. Secondly, even if there was illegality in the decision, no relief other than declaration should be granted because any error was immaterial and did not affect the outcome of its decision — and because third parties (the insurer and

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14 Hereafter, the "Prosecution Guidelines".

15 The District Court, named as second defendant, abided the decision of the High Court.

the families who had received payment of the reparation sum) had altered their positions in reliance on the decision.

High Court judgment

[25] In his judgment of 27 November 2015, Brown J held that none of the grounds of review had been established. The appellants' application for judicial review accordingly was dismissed. To the extent necessary, we will consider the Judge's individual reasons within our analysis of the more limited set of issues arising on appeal. We turn to those issues now.

Issues

[26] The issues arising in this appeal are agreed to be these:

1. Is the prosecutor's decision on 4 December 2013 to offer no evidence in support of the charges against Mr Whittall on the basis that it was not in the public interest to do so ("Prosecution Decision") amenable to judicial review?

2. Did the prosecutor enter into an agreement with Mr Whittall that in return for the payment of $3.41 million to the victims it would offer no evidence in support of the charges against Mr Whittall?

3. In deciding not to proceed with the prosecution against Mr Whittall, did the prosecutor:

    3.1 fail to comply with the Solicitor-General's Prosecution Guidelines; or

    3.2 fail to have regard to s 5(g) of the Health and Safety in Employment Act 1992?

4. Did the applicants have a legitimate expectation that they would be consulted prior to the prosecutor making its decision?

5. If the answer to issues 2, 3 or 4 is yes, is the Prosecution Decision therefore unlawful, invalid or unreasonable?

6. If the answer to issue 5 is yes, should the relief sought by the appellants be granted?

7. Was the District Court's decision on 12 December 2013 to dismiss the charges against Mr Whittall unlawful by reason of:

    7.1 the process whereby the decision was made;

    7.2 the alleged unlawfulness of the Prosecution Decision; or

7.3 because the District Court Judge had recused herself?

Justiciability: Issue 1

[27] The first issue on appeal concerns whether the Prosecution Decision is amenable to judicial review at all.

[28] Brown J held that there was no absolute or general rule that a decision to bring or refrain from bringing a prosecution is not amenable to judicial review.[16] However, because (1) the decision not to proceed with the prosecution in this case was not the consequence of the adoption of a general policy and (2) the alleged error concerned giving weight to irrelevant considerations and the failure to take into account relevant considerations, the impugned process was of insufficient gravity to be amenable to judicial review.[17]

[29] Mr Hampton QC submitted that there was a distinction in the cases between judicial review of decisions to prosecute and decisions not to do so (or to discontinue a prosecution). The case for restraint in the judicial review of prosecutorial discretion was less in the latter case.[18] Secondly and regardless of the need for restraint, "the payment of $3.41 million (to satisfy a judgment debt already incurred by a different party) in return for the offering of no evidence in respect of the 12 charges against Mr Whittall amounts to an abuse of process and struck at the heart of the administration of justice". It was an "unlawful bargain". Such an abuse of process, such a bargain, was one of the exceptional cases where prosecutorial discretion might and should be reviewed.

[30] Ms Holden submitted that Brown J was correct to hold that the Prosecution Decision was not amenable to judicial review. Only in exceptional cases should the Courts interfere in the exercise of prosecutorial discretion.[19] The prosecution did not fail to exercise discretion. Rather the decision was based on an evaluation of

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16 High Court judgment, above n 5, at [40].

17 At [42].

18 Relying in particular on *R v Director of Public Prosecutions, ex parte Manning* [2001] QB 330 (DC) and *Marshall v Director of Public Prosecutions* [2007] UKPC 4, [2007] 4 LRC 557.

19 Relying on *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 at [19]; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [28]–[37]; and *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [61]–[69].

evidential sufficiency and public interest tests set out in the Prosecution Guidelines. Public interest evaluation required the consideration and weighing of policy matters. The Courts should exercise restraint in that respect. The discretion to prosecute is an executive rather than judicial function. The Courts have their own discrete responsibility for the conduct of criminal trials.[20] Prosecutorial decisions involved a high content of judgment and discretion. Political accountability exists for such decisions.

[31] Ms Holden did accept in argument that an arguable allegation of unlawful bargain stifling a prosecution fell within the exceptional circumstances in which a prosecutorial decision would be amenable to review.[21] She appeared also to accept that an allegation of error of law (in a material departure from the Prosecution Guidelines) might be reviewable. But she resisted the proposition that an arguable allegation of failure to take into account relevant considerations or of the consideration of an irrelevancy was reviewable. Ms Holden also resisted Mr Hampton's submission that a lower threshold for review exists in the case of a prosecutorial decision not to prosecute (or to discontinue a prosecution).

Discussion

[32] The question this issue asks is whether some conventional judicial review grounds are simply inarguable in the context of a challenge to prosecutorial decision-making. In particular, given the acknowledgements recorded in the preceding paragraph, whether a prosecutorial decision may be reviewed for failure to take into account relevant considerations or the consideration of a material irrelevancy.

[33] We make eight points.

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20 Relying on *Fox v Attorney-General*, above n 19, at [28].

21 We note that a stifling payment would amount to fraud, corruption or bad faith and be reviewable even when other grounds are non-justiciable: *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609 at [30]–[38].

[34] First, good reasons exist for the exercise of judicial restraint in the review of prosecutorial discretion. These include:[22]

(a) the importance of observing constitutional boundaries, including the Executive's role in deciding whether to prosecute, and the Courts' role in ensuring the proper and fair conduct of trials;

(b) the high content of judgment and discretion in prosecutorial decisions;

(c) the undesirability of collateral challenges to criminal proceedings which may disrupt due process;

(d) the High Court's inherent power to stay or dismiss a prosecution for abuse of process;

(e) the opportunity to challenge a prosecutor's opinion that an offence has been committed — either summarily, by applying for a discharge under s 147 of the Criminal Procedure Act 2011, or at trial; and

(f) the existence of other mechanisms for accountability of prosecutorial decisions, such as the responsibility of the relevant minister to Parliament.

[35] Secondly, the exercise of restraint — which relates to the scope and standard (or intensity) of review, and to the availability and scope of relief — is not to be confused with the issue of justiciability. The latter concerns whether the Courts are prepared to intervene at all in the exercise of their constitutional responsibility to review aspects of Executive action. As will become apparent in the discussion that follows, the exercise of prosecutorial discretion is justiciable. The Courts are prepared to review Executive action of that nature. But the intensity of review, and availability of relief, will be constrained for the reasons set out in the preceding

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[22] See generally *Polynesian Spa Ltd v Osborne*, above n 19, at [62]; *R (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756 at [31]; *Fox v Attorney-General*, above n 19, at [28]–[31]; and *Matalulu v Director of Public Prosecutions (Fiji)* [2004] NZAR 193 (Fiji SC) at 215.

paragraph. The latter point was made by Randerson J, in the High Court, in *Polynesian Spa Ltd v Osborne*:[23]

> *Hallett* is authority for the proposition that judicial review is only likely to be obtained in such a case [non-prosecution] where there has been a failure to exercise discretion, such as by the adoption of a general policy that in certain classes of cases, prosecutions will not be brought. There may be other grounds but it is likely only to be in exceptional cases that a court would intervene where a decision has been taken not to prosecute in a specific case not affected by factors such as the adoption of a general policy.

Absent abdication of discretion, relief ("intervention" in Randerson J's terms) is likely on review only in exceptional cases. But a prosecutorial decision will generally be justiciable, albeit the intensity of review and remedial response may be restricted.

[36] Thirdly, a stronger case for restraint exists where the prosecutorial decision is *to* prosecute. The risk of collateral interference with the criminal justice system is greater. The rights or wrongs of the prosecution, so far as the culpability of its subject are concerned, will be established by the conclusion of the criminal case. Mechanisms internal to the criminal jurisdiction are available, such as a stay of prosecution or discharge under s 147 of the Criminal Procedure Act. Collateral challenge serves little useful purpose. The factors summarised above at [34](c)–(e) are in play.

[37] Fourthly, the considerations are somewhat different where the decision challenged is *not* to prosecute (or to discontinue a prosecution). Such a challenge involves no collateral challenge to an active criminal proceeding. Culpability for an alleged crime will not be established at all unless review is successful. The factors noted above at [34](c)–(e) are absent. The costs and risks of private prosecution place that mechanism beyond the reach of most concerned citizens. There may be, as in this case, a statutory bar on private prosecution.[24] The distinction between decisions to prosecute and decisions not to prosecute was discussed in *R v Director of Public Prosecutions, ex parte Manning*.[25] In that case a prisoner had died in

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23 *Polynesian Spa Ltd v Osborne*, above n 19, at [69].

24 Section 54A(2) of the HSE Act precludes private prosecution if Worksafe has taken enforcement action.

25 *R v Director of Public Prosecutions, ex parte Manning*, above n 18.

custody while under restraint following an altercation with two prison officers. A coronial inquest found this was an unlawful killing caused by the application of excessive force to the prisoner's neck by a prison officer. But the prosecutor decided not to lay charges in the criminal jurisdiction. The prisoner's family was told there was insufficient evidence to justify a prosecution or establish a realistic prospect of conviction. The Divisional Court (Lord Bingham CJ and Morison J) held the decision not to prosecute was susceptible to judicial review, but that the power was to be sparingly exercised due to matters of constitutional policy and the high level of judgment and discretion involved. But, the Court observed, "the standard of review should not be too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied".[26]

[38] Similarly the Divisional Court (Richards LJ, Forbes and MacKay JJ) in *R (on the application of da Silva) v Director of Public Prosecutions* considered an application for judicial review of a decision not to prosecute a police officer for shooting a commuter who was mistaken for a suicide bomber.[27] The Court said it was well established that a decision not to prosecute is susceptible to judicial review, and that different considerations apply in such a case than to decisions to prosecute.[28] Further, in *Marshall v Director of Public Prosecutions* the Privy Council said the threshold for review may be "to some extent lower" for decisions not to prosecute than for decisions to prosecute.[29] We agree with that conclusion, so far as it relates to intensity of review and remedial response. But as Henry J observed in *Hallett v Attorney-General (No 2)*, there is no jurisdictional distinction between decisions to prosecute and decisions not to prosecute: if the decision is reviewable logically it must be so regardless of which way the decision goes. The question of jurisdiction to review is not to be confused with the discretionary power to give relief. [30]

[39] Fifthly, a decision not to prosecute because of an unlawful general policy — in effect an abdication of discretion — is both reviewable and likely to result in relief

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26 At [23].
27 *R (on application of da Silva) v Director of Public Prosecutions* [2006] EWHC 3204 (Admin).
28 At [23].
29 *Marshall v Director of Public Prosecutions*, above n 18, at [18].
30 *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 (HC), at 102.

being ordered (usually in the form of an order to reconsider). In *R v Commissioner of Police of the Metropolis, ex parte Blackburn* the respondent had made a policy decision not to enforce a law prohibiting the running of gaming houses.[31] The English Court of Appeal held that while the Commissioner had a discretion not to prosecute he could not adopt an absolute stance of non-prosecution of certain offences. He could not, for instance, decide to never prosecute for theft of goods under the value of £100.[32] Similarly, in *Hallett* Henry J accepted that adoption of a general policy of non-prosecution of certain offences would be reviewable, although found no such policy had been adopted on the facts.[33]

[40] Sixthly, judicial review of a decision not to prosecute may be advanced on grounds other than abdication of discretion. Of particular relevance in this case, these may include failure to take into account relevant considerations and the consideration of irrelevancies. As Randerson J suggested in *Polynesian Spa*, there are grounds other than a policy of non-prosecution on which judicial review of a decision not to prosecute may be available. There is a line of primarily English cases, which we now discuss, in which the contemplated grounds for review have included a failure to comply with prosecutorial guidelines, failure to consider relevant factual considerations, failure to give reasons, failure to have regard to relevant considerations, considering irrelevant matters, error of law, and unreasonableness or perversity.

[41] In *R v Director of Public Prosecutions, ex parte C* a complainant alleged non-consensual buggery by her husband, but the prosecutor made a decision not to prosecute.[34] The Divisional Court (Kennedy LJ and Baker J) held a decision not to prosecute could be reviewed where an unlawful policy not to prosecute had been adopted, the decision failed to accord with the applicable code for crown prosecutors, or the decision was perverse in the sense it was one no reasonable prosecutor could have arrived at.[35] The Court found this was "one of those rare cases" where the prosecutor's decision was flawed because it did not accord with the

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31 *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 (CA).
32 At 136.
33 *Hallett v Attorney-General (No 2)*, above n 30, at 102.
34 *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App R 136 (QB Div).
35 At 141.

prosecution policy set out in the relevant code. The prosecutor had erred in assuming the husband would run a defence of consent and in not considering the possibility of a defence of complete denial of actus reus.[36] The decision was remitted to the prosecutor for reconsideration.

[42] A broader approach still was taken in *Manning*, discussed earlier at [37].[37] The Divisional Court held that in that case there was a duty to give reasons: this was a death in custody case, there had been a verdict of unlawful killing by the coronial inquest, and there was credible evidence identifying the responsible prison officer.[38] The reasons given to the family were inadequate.[39] The Court also considered the prosecutor had failed to consider important evidential considerations in assessing the prospects of obtaining a conviction.[40] The decision whether to prosecute was remitted for reconsideration.

[43] Relevancy and irrelevancy review in the case of non-prosecution received some support in the decision of the Fiji Supreme Court in *Matalulu v Director of Public Prosecutions*. That case concerned a decision by the Director of Public Prosecutions to discontinue a private prosecution alleging a tribal chief had sworn false evidence.[41] The case is of some significance given the identity of the Judges who sat (Van Doussa, Keith and Robert French JJ)[42] and its subsequent qualified endorsement by the Privy Council in *Mohit v Director of Public Prosecutions of Mauritius*.[43] The analysis of the Court is consistent with the principles set out above. Cases where a purported exercise of power would be reviewable included those where the prosecutor acted under direction or control of another person, acted in bad faith or dishonestly, such as by discontinuing a prosecution for payment of a bribe, abused the process of the court (although the proper forum for review would ordinarily be the court involved) or fettered his or her discretion by adopting a rigid

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36 At 144.
37 *R v Director of Public Prosecutions, ex parte Manning*, above n 18.
38 At [33].
39 At [34].
40 At [41].
41 *Matalulu v Director of Public Prosecutions (Fiji)*, above n 22. The Supreme Court of Fiji is the highest court of that country.
42 Van Doussa and French JJ were, at the time, Judges of the Federal Court of Australia. Keith J was a Judge of the Court of Appeal of New Zealand.
43 *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343.

policy.[44] The Court went on to endorse at least limited reviewability on relevancy/irrelevancy grounds:[45]

> 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. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.

[44] The analysis in *Matalulu* was endorsed (with some qualification) by the Privy Council in *Mohit v Director of Public Prosecutions of Mauritius*.[46] The application for review challenged the prosecutor's decision to discontinue a private prosecution brought against a politician for harbouring a criminal. Lord Bingham, giving the advice of the Board, did not consider the potential grounds for challenge necessarily limited to those listed in *Matalulu*.[47]

[45] The reality remains, however, that it will be difficult to make out grounds of review such as having regard to irrelevant considerations or failing to have regard to relevant considerations because of the width of the considerations to which the prosecutor may properly have regard, as well as the limited scope of considerations that are truly mandatory rather than merely permissive. That is one reason why it is said courts will only intervene in exceptional cases.

[46] Seventhly, there has been some controversy as to the extent to which error of law may be a basis for review of a prosecutorial decision. The Court in *Matalulu* doubted that it could:[48]

> … an error of law which informs a decision not to continue with a prosecution is not an error which goes to the scope of the DPP's power or vitiates the proper exercise of the DPP's discretion. Decisions to initiate or not to initiate or to discontinue prosecutions may be based on judgments about the prospects of success on questions of law and fact. The DPP is

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44 At 215.
45 At 216.
46 *Mohit v Director of Public Prosecutions of Mauritius*, above n 43.
47 At [18].
48 *Matalulu v Director of Public Prosecutions (Fiji)*, above n 22, at 216.

> empowered to make such judgments even though they may be wrong on the law or mistaken on the facts.

The appeal in *Matalulu* was dismissed despite the Court finding the non-prosecution decision was based on an erroneous view of the law.[49]

[47] On the other hand is *R (F) v Director of Public Prosecutions*.[50] The Divisional Court (Lord Judge CJ, Fulford and Sweeney JJ) granted judicial review of a decision not to prosecute the complainant's husband for rape. The prosecutor had proceeded on a mistaken view as to the applicable legal principles applying to whether a defence of consent might succeed. The prosecutor was ordered to reconsider in light of the correct legal principles.

[48] This broad approach is supported by the House of Lords decision in *R (Corner House Research) v Director of the Serious Fraud Office*, a case about a decision to discontinue a serious fraud office investigation. There Lord Bingham (delivering the principal speech) said:[51]

> Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. *He must direct himself correctly in law.* He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. …

We agree with those observations. A material error of law in the exercise of prosecutorial discretion will be reviewable.

[49] Eighthly, failure to accord to the applicable code for the conduct of prosecutions was also noted as a legitimate ground for review in *R v Director of Public Prosecutions ex parte C*, as we noted in [41] above.[52] Such failure may logically be cast as either an error of law or a failure to consider a relevant consideration.

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49 At 217.

50 *R (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin), [2014] 2 WLR 190.

51 *R (Corner House Research) v Director of the Serious Fraud Office*, above n 22, at [32] (emphasis added).

52 See also *R (F) v Director of Public Prosecutions*, above n 50, at [6].

[50] Having considered the general applicable principles, we turn now to apply them to the present case.

[51] The primary grounds advanced by the appellants are justiciable. That is, they are susceptible to review. The primary pleaded allegations are of entry into an unlawful bargain to stifle a prosecution, failure to accord with the Prosecution Guidelines (advanced as a failure to take into account relevant considerations) and failure to take into account s 5(g) of the HSE Act. We accept those grounds must, in the context of a decision to discontinue prosecution of Mr Whittall, be justiciable. No good policy reason exists for the Court summarily to refuse to consider them.

[52] We also consider the secondary ground of legitimate expectation to be justiciable. The Fiji Supreme Court in *Matalulu* contemplated review might be available for want of natural justice, although it said it would not be easy to conceive of such situations.[53] We can see no reason to single out the legitimate expectation ground as non-justiciable here given it does not ask the Court a question it has no legal yardstick to resolve or cross the line into an area it would be constitutionally inappropriate for the Court to go.[54]

Conclusion on Issue 1

[53] For these reasons we conclude that the Prosecution Decision is amenable to judicial review on all grounds raised.

The Prosecution Decision: Issues 2–6

Agreement to stifle prosecution — Issue 2

[54] Issue 2 concerns whether the prosecutor entered into an agreement with Mr Whittall that in return for the payment of $3.41 million to the victims it would offer no evidence in support of the charges against Mr Whittall. Brown J found that

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53 *Matalulu v Director of Public Prosecutions (Fiji)*, above n 22, at 216.

54 *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC) at 757; *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [27]; and Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [3.07].

the proposed payment was consistently referred to as a voluntary payment in the nature of reparation and there was no agreement to stifle a prosecution.[55]

[55] An agreement to stifle a prosecution in exchange for payment is clearly unlawful. Bowen LJ in the English Court of Appeal in *Jones v Merionethshire Permanent Benefit Building Society* said:[56]

> 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*.

The concept of a bargain or agreement requires a meeting of the minds. Each party must understand that one is making a promise of payment in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting.[57]

[56] But this rule does not mean that the defendant may not advance an undertaking to pay reparation in the event that charges are not pursued further. That was made clear by Glazebrook J in the High Court in *Polymer Developments Group Ltd v Tilialo* when observing "[r]eparation (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."[58] Two things follow. The first is that reparation *may* be a relevant consideration in a decision not to pursue charges.[59] The second is that the prosecutor may not enter any sort of agreement to drop charges in exchange for such a payment. That is, there must be no express or tacit indication by the prosecution that the consequence of the making of the offer by the defendant is that it will necessarily then be accepted as the conclusion of a bargain.

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55 High Court judgment, above n 5, at [42].

56 *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 (CA) at 183–184 (emphasis added).

57 *The Bhowanipur Banking Corporation Ltd v Sreemati Durgesh Nandini Dasi* (1942) BOMLR 1 (PC) at 1–2.

58 *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) at [46].

59 *Jones v Merionethshire Permanent Benefit Building Society*, above n 56, at 184–185.

[57] Having set out the legal principles, we turn to the narrative of what transpired between Mr Whittall and Worksafe to ascertain whether an unlawful bargain was entered. We bear in mind that the type of bargain being tested for is in its nature seldom set out on paper and must be inferred from the conduct of the parties and the whole circumstances.[60]

[58] The genesis of the impugned Prosecution Decision is an email sent on 8 July 2013 from Mr Stanaway to Mr Grieve about the possibility of meeting to attempt a plea arrangement resolution. Mr Stanaway said he had firm instructions from Worksafe to resolve the case with a plea arrangement within the Prosecution Guidelines, although final signoff would be left to Worksafe. Messrs Stanaway and Grieve arranged to meet, although Mr Grieve indicated he would not be able to responsibly advise Mr Whittall until disclosure of evidence had been completed.

[59] On 2 August 2013 they met. In a letter dated 7 August 2013 Mr Grieve recorded that he was looking for a means to "conclude" the prosecution. Without prejudice, he proposed "a voluntary payment of a realistic reparation payment, conditional upon the informant electing not to proceed with any of the charges against Mr Whittall".

[60] Mr Stanaway took instructions from Worksafe and on 20 August he reverted. The proposal was not rejected out of hand. The "most principled and appropriate outcome" however would be a guilty plea "to at least one charge", with a common stance on causation and reparation. Restorative justice and a statement of regret or apology were also canvassed.

[61] Discussions continued. On 16 October 2013 Mr Grieve wrote again.[61] A voluntary payment of $3.41 million "on behalf of the directors and officers" of PRCL — rather than PRCL itself — was proposed. It is common ground that the source of these funds was to be the insurer of the directors and officers at the time of the tragedy. Two considerations determined the figure proposed. First, it was the sum ordered as reparation by Judge Farish against PRCL — but still unpaid by it.

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60 *The Bhowanipur Banking Corporation Ltd v Sreemati Durgesh Nandini Dasi*, above n 57, at 2.

61 The letter is set out at length in [14] of the High Court judgment, above n 5.

Secondly, it reflected the costs of defending the prosecution in a 16–20 week trial, with extensive expert evidence.[62] Mr Grieve said:

> 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 the families will not receive anything like the amount offered.

The letter proposed that "in advance of the $3.41 million being made available" Worksafe advise the Court "that no evidence will be offered in support of any of the charges". Mr Whittall would express his sympathy, personal empathy and condolences at a private meeting with families and survivors, and encourage PRCL's directors to attend also.

[62] No formal reply to that letter issued. Worksafe continued to prepare for trial. On 15 November 2013 Mr Stanaway provided Worksafe with his formal review of the charges. That review was not produced in evidence. However some of it is apparent from the evidence given by Mr Stewart, Worksafe's Chief Inspector. He deposed as to two meetings held involving himself, Mr Stanaway and a panel of officials on 26 and 28 November 2013. Mr Stewart deposed that it was apparent that while there was sufficient evidence to justify the prosecution, the likelihood of a successful prosecution was low. Reasons for that adverse assessment included the following. At least 14 of the 92 Crown witnesses were unavailable. Others were reluctant. Worksafe bore the burden of proof. Expert witness contests and lengthy pre-trial issues were likely.

[63] In addition "several reasons … indicated a trial was not in the public interest". These included that if the prosecution succeeded, the sentence imposed on Mr Whittall as a secondary party was likely to be only a low fine. A reparation order was unlikely. PRCL on the other hand had been convicted with record fines and a substantial reparation order. The comprehensive Royal Commission report had been received by then. And a 16–20 week trial would be costly to Worksafe, financially and otherwise. No decision as to whether to proceed or not was made at that point, however.

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[62] The Crown duly exchanged 92 witness briefs.

[64] Mr Stewart deposed that the reparation payment proposal was considered separately and subsequently to that assessment. That was because of concerns as to its legitimacy and appropriateness. Subsequent consideration, following legal advice, was that the offer of the voluntary payment "could be considered as one of the factors to be taken into account". Also considered was the offer of the meeting with family and survivors.[63]

[65] On 4 December 2013 Mr Stewart made the decision not to proceed with the prosecution, to offer no evidence and to request the District Court dismiss the charges. The decision was approved by a deputy Chief Executive of the Ministry responsible for Worksafe, a Mr Podger. Mr Stewart's reasons, set out in a decision summary dated 5 December 2013, are essentially those set out above. He enlarges on those reasons in his affidavit evidence but it is unnecessary to traverse that detail here. It suffices to quote the concluding paragraph:

> The public interest was not met by continuing with a long costly trial with a low probability of success. In reaching this conclusion we were aware that this would be a disappointment for the families but consideration of the public interest is not confined to consideration of the interests of victims alone. Weighing the interests of the families in the balance against the other public interest factors I have outlined above, overall our view was that the public interest was better served by not proceeding with the prosecution.

[66] It appears Mr Stanaway then sought an open (that is, not without prejudice) version of Mr Grieve's 16 October 2013 letter. That was sent to him on 7 December 2013. Although its terms differ in some limited respects, it is not suggested the variations are material to this appeal. Mr Stewart's decision was made with reference to the without prejudice version.

[67] Having set out the narrative of events, we do not consider a meeting of minds and striking of a bargain over the payment of reparation in return for withdrawal of charges can properly be inferred from the evidence.

[68] First, the fact that the earlier discussions between Messrs Stanaway and Grieve may have many characteristics of a negotiation does not inevitably lead to the conclusion that the eventual Prosecution Decision was a bargain. Mr Stanaway was

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63 See above at [14].

not the decision-maker for the Crown, and he did not have any authority to settle the final outcome. One of his particular responsibilities was to attempt to improve Mr Whittall's proposal. There is nothing inconsistent with the legal principles identified earlier for the Crown Solicitor to undertake that activity, so long as the resolution of the defendant's ultimate proposal does not include an express or tacit indication by the prosecution that it will then be accepted as the conclusion of a bargain.

[69] Secondly, we conclude that the arrangement involved no express or tacit indication by the prosecution that Mr Whittall's proposal would necessarily be accepted. As we have said, Mr Stanaway was not the decision-maker. The proposal by Mr Whittall amounted to a conditional reparation undertaking: that in the event the prosecution terminated, the payment would be made. Mr Whittall put his best foot forward (his proposal being enhanced at the margin by Mr Stanaway's efforts) and it was then for Worksafe to make its decision whether to pursue the prosecution or not. The conditional reparation undertaking was a factor in the final decision, but as *Polymer Developments* indicates, there is nothing improper about that.[64] As a matter of law, Mr Stewart was entitled to consider it. The weight given to it is another matter. And the weighting given is irrelevant to the present discussion which concerns whether an impermissible bargain was entered.

[70] Thirdly, we bear in mind also that Mr Stewart was an independent public servant. He was not financially interested in the outcome, or the alleged bargain. He had not negotiated with Mr Grieve. He was not captive to a bargaining mindset. His decision was reviewed and confirmed by Mr Podger. It is apparent also that he had concerns as to the legal propriety of taking the conditional reparation undertaking into account. Initial (and adverse) assessments as to prospects of success, and as the public interest in continued pursuit of the charges were made without consideration of the offer. The evidence given by Mr Stewart is credible and no realistic basis to conclude otherwise was presented by the appellants. Only after legal advice was the offer then taken into account.

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64 *Polymer Developments Group Ltd v Tilialo*, above n 57.

[71] Finally, in our view it cannot be said, in the words of Bowen LJ in the English Court of Appeal in *Jones v Merionethshire Permanent Benefit Building Society*, that a "fair and honest mind" was not brought to the Prosecution Decision.[65] And that is the test. While Mr Hampton criticised the overall evaluation of Mr Stewart as to risk, outcome and public interest, he did not suggest that he acted in any sense in bad faith. Indeed, when that was put to him he eschewed the suggestion. Absent reviewable error (to which we are about to turn), that evaluation is not for this Court to re-determine.

[72] For these reasons we consider no improper bargain was reached between Mr Whittall and Worksafe as to the payment of reparation. Mr Whittall's insurer offered a substantial reparation sum in the event the prosecution terminated. The prosecutor was entitled in law to consider that conditional reparation undertaking as part of the prosecution process (and the absence of that reparation sum in the event the prosecution proceeded on).

Failure to comply with Prosecution Guidelines — Issue 3.1

[73] The question then, in terms of issue 3.1, is whether Worksafe failed to comply with the Prosecution Guidelines in making the Prosecution Decision. In the High Court Brown J found it was permissible for issues of witness availability and pre-trial admissibility to be considered in assessing the public interest in prosecution and that none of the matters considered were irrelevant.[66]

[74] Two preliminary points should be noted. The first is that s 188 of the Criminal Procedure Act 2011 provides an express duty on the part of Crown prosecutors to conduct prosecutions in accordance with the Prosecution Guidelines. The second is that the Guidelines themselves are expressly aspirational. They state that they "are not an instruction manual for prosecutors, nor do they cover every decision that must be made by prosecutors and enforcement agencies. They do not purport to lay down any rule of law".[67] Care must be taken therefore not to

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65 See above at [55].
66 High Court judgment, above n 5, at [67] and [70].
67 Prosecution Guidelines, cl 2.3.

crystallise the essentially discretionary nature of prosecution decisions by reference to the Guidelines as if they were a code.[68]

[75] The argument advanced by the appellants sprang in large measure from the submission that an unlawful agreement to stifle a prosecution had been entered. As we have rejected that premise, we address here only the remaining aspects of the appellants' argument.

[76] Mr Hampton submitted that Worksafe was wrong to consider the payment because cl 5.9.10 of the Prosecution Guidelines is dependent on victim acceptance that the defendant had rectified the loss or harm caused (and with the express proviso that defendants "should not be able to avoid prosecution simply because they pay compensation").

[77] We reject this submission. The Guidelines are not a code. The significance of reparation as a consideration may be greater where the victims accept that loss or harm has been (or will be) rectified. But that does not mean that reparation is to be disregarded altogether where it cannot rectify the loss caused, or where a victim considers that it will not do so. There is a significant public interest in reparation, especially under the HSE Act.[69] Hence there is a presumption in favour of ordering reparation where it is an option, and payments received must be first applied towards an amount of reparation.[70] Reparation for victims is an object of sentencing in itself.[71] Reparation was an important aspect of the sentencing of PRCL. But that company was in receivership, had not paid and was unlikely to pay. It is impossible to disentangle this factor from Mr Whittall's proposal. On the other hand, there is also a significant public interest in acknowledgment of responsibility.[72] Mr Whittall maintained his innocence in making the payment. Mr Whittall's refusal to acknowledge guilt goes to Worksafe's weighting of factors in making the Prosecution Decision. Such fine questions of weighting — here the importance of

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68 *R v Barlow (No 2)* [1998] 2 NZLR 477 (CA) at 479.
69 *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095 at [40].
70 Sentencing Act 2002, s 12; Summary Proceedings Act 1957, s 86E.
71 *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189 at [8].
72 Sentencing Act, s 7(1)(b); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [45].

reparation versus acknowledgement of responsibility — are not ones for the Court on judicial review.[73]

[78] Mr Hampton also submitted Worksafe had failed to comply with the Prosecution Guidelines by concluding that the test for evidential sufficiency was met but then considering factors such as witness availability and pre-trial admissibility issues in assessing whether there was public interest in continuing the prosecution. Those factors should only be relevant to evidential sufficiency. He said it was inconsistent for Worksafe to find the likelihood of a successful prosecution was low despite finding the evidential sufficiency test was met.

[79] We reject this. The Guidelines are clear that factors such as cost (and therefore the difficulty of prosecution) can be considered under the public interest test.[74] Worksafe had concluded that although the case could credibly be put before a Court, success was unlikely or at least contingent on pre-trial arguments. The litigation risk was significant. That is the sort of factual and holistic assessment a prosecutor must be entitled to make. Precise parcelling out of relevant considerations between evidential sufficiency and public interest is not pivotal given the substantial discretion inherent in the Guidelines.

Failure to have regard to purpose of the HSE Act — Issue 3.2

[80] Brown J found that although the purpose of the HSE Act in s 5(g) was not explicitly mentioned in the documentary evidence, Worksafe had regard to that purpose in considering the catastrophic and devastating harm caused to the families and survivors and the importance of general and specific deterrence.[75]

[81] Mr Hampton submitted Worksafe failed to have regard to s 5(g) of the HSE Act, which provides that one of the objects of the Act is to promote prevention of harm in the workplace by:

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73 *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [50].
74 Prosecution Guidelines, cl 5.11.
75 High Court judgment, above n 5, at [80]–[82].

> … 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; …

He submitted the decision foreclosed the bringing of a private prosecution, by reason of s 54A(2) of the HSE Act, and that was inconsistent with s 5(g).

[82] We do not consider s 5(g) fettered Worksafe's discretion in making the Prosecution Decision. Prosecution may in some cases be an appropriate response to an alleged breach of the HSE Act, but here Worksafe decided it was not. The section does not preclude a prosecutor from facilitating finality in the dismissal of charges.

[83] Mr Hampton also submitted that this case was in the category of most grave breaches of the HSE Act imaginable and therefore Worksafe was required to consider the importance of holding Mr Whittall accountable.

[84] The premise of this submission, if accepted (and it is by no means clear that it is correct, in terms of the gravity of Mr Whittall's alleged offending rather than PRCL's proven offending), would then necessitate a close analysis of the weighting of relevant factors including the gravity of the alleged offending. We consider that lies beyond the proper scope of judicial review of a prosecution decision.

Legitimate expectation of consultation — Issue 4

[85] Brown J held Worksafe only had a duty to provide information under the applicable legislation and prosecution guidelines, and these documents were not the basis for a legitimate expectation of prior consultation or agreement by the victims to the discontinuance of the prosecution.[76]

[86] Mr Hampton submitted the appellants had a legitimate expectation Worksafe would "meaningfully consult with the victims and … [seek] their agreement to the proposal that $3.41 million was paid in return for the offering of no evidence".[77] Put that way, the argument appears to suggest that the victims needed to consent to or approve discontinuation of the charges. That cannot be sound, as we will explain.

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[76] At [93]–[94].

[77] We note that, as we have already concluded, this mischaracterises the position regarding the offer.

Mr Hampton's argument also rested on a broader expectation of consultation, short of a requirement for victim consent, and he emphasised the exceptional circumstances and the fact the victims would effectively be precluded from bringing a private prosecution.

[87] What is singular here, however, is that the alleged expectation is based wholly on provisions of the Victims' Rights Act 2012 and prosecution guidelines. We make four points. First, statutory provisions are not to be enlarged by individual applications of the doctrine of legitimate expectation. Secondly, what legitimate expectation requires is a commitment to act in a certain way *plus* reasonable reliance on that commitment by the applicant.[78] Thirdly, the evidence of Ms Osborne and Ms Rockhouse does not allege any such commitment by Worksafe: neither a prior representation nor practice as to consultation on which a legitimate expectation by them as to consultation on the continuation or otherwise of charges might be founded. They simply depose that they were not asked, and did not consent. Fourthly, the implications of the argument pressed on us run far beyond the immediate case. The case law analysed above emphasises that the Crown has an independent discretion to be exercised as to the bringing of charges. As the cases show, it would be wrong for the Crown to fetter that discretion by a policy not to enforce the law in some respect.[79] So too it would be wrong for it to fetter its discretion by making arrangements to bring or to drop a prosecution by reference to the consent of victims. Had an arrangement been made with the victims in this case that the prosecution would continue unless they agreed otherwise, that arrangement would itself have been unlawful.

[88] This much is underscored by the very statutory provisions the appellants here rely upon to support legitimate expectation. Those in the Victims' Rights Act 2012 are concerned with duties of courtesy, compassion and the provision, as soon as possible, of *information* about various prosecution-related matters (including the final outcome).[80] These obligations are altogether at a remove from a statutory requirement of consultation *before* prosecutorial discretion is exercised.

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78 *Green v Racing Integrity Unit* [2014] NZCA 133, [2014] NZAR 623 at [13].
79 See above at [39].
80 Victims' Rights Act 2012, ss 7 and 12.

[89] Mr Hampton sought also to pray in aid specific prosecution guidelines promulgated by the Crown Law Office after enactment of the Act just referred to. These are the Victims of Crime — Guidance for Prosecutor Guidelines of 2012. These too only refer to the need to give information to victims.[81] They do not create a legitimate expectation of consultation. Finally the Prosecution Guidelines themselves state one illustrative public interest consideration against prosecution is where the victim has accepted the defendant has rectified the harm.[82] Significantly, there is no converse consideration in favour of prosecution in the absence of such acceptance.

Issues 5 and 6

[90] Issues 5 and 6 depend on affirmative answers to Issues 2, 3 or 4. The answers given to those were in the negative, so Issues 5 and 6 fall away.

The District Court Decision: Issue 7

[91] The final issue is whether the District Court Decision to dismiss the charges was unlawful by reason of procedural error (including because Judge Farish had earlier recused herself).

[92] Brown J found s 68 of the Summary Proceedings Act 1957 allows a dismissal of charges without a full hearing of all evidence, and that Judge Farish brought an independent mind to the decision to dismiss the charges and fully considered the interests of justice.[83] He also held the District Court Judge could reassume jurisdiction upon the withdrawal of Mr Whittall's objection to her presiding.

[93] The first submission made by Mr Hampton was that the decision to dismiss was itself unlawful because (1) it gave effect to an unlawful prosecution bargain and (2) the Court simply rubber stamped the Prosecution Decision, omitting to consider

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81 Victims of Crime — Guidance for Prosecutor Guidelines, cl 16.
82 Prosecution Guidelines 2013, cl 5.9.10.
83 High Court judgment, above n 5, at [102] and [117].

dismissal of the charges without prejudice to them being relaid, which s 68 of the Summary Proceedings Act permitted.[84]

[94] We reject the first argument for the reasons given earlier. As we have found the Prosecution Decision was lawfully made, there is no issue of alleged unlawfulness infecting the District Court Decision.

[95] We also reject the second argument. We agree with Brown J that the Judge brought an independent mind to the circumstances of the payment before concluding that continuing with the proceeding would not be in the best interests of the community. She evidently had read and digested detailed submissions for both prosecution and defence in preparing her oral judgment. She was apprised of the nature of the reparation payment. There is no basis to infer she had not exercised independent judgment in concluding the outcome was "a good outcome" because of the "time and the length of the hearing and the resources for a fineable only offence, with a very small chance of successful prosecution is not in the best interests of your community or indeed the wider community."

[96] We also do not accept that Judge Farish erred in apparently not considering the option of dismissing the charges without prejudice to them being relaid, as allowed by s 68 of the Summary Proceedings Act. The types of case in which that power might be exercised include where there has been a technical defect or omission from the charges or evidence.[85] This was not the sort of case in which the power to dismiss without prejudice might be invoked. Nor was that option requested by Worksafe, and it was implicitly excluded from consideration because it would have put the payment of reparation into doubt. The Judge was informed that the proposed payment was to be made "in the event charges do not proceed against Mr Whittall".

[97] Mr Hampton also submitted Judge Farish should not have dismissed the charges when she had earlier recused herself from presiding over the anticipated

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[84] That since-repealed provision continued to apply given the date of commencement of charges against Mr Whittall.

[85] *Commissioner of Inland Revenue v Ryburn* [1977] 2 NZLR 553 (CA) at 555; *Morgan v Minister of Transport* [1980] 1 NZLR 432 (CA) at 434; and *Tongotongo v Department of Labour* [1981] 1 NZLR 505 (CA) at 508.

trial. He suggested a Judge cannot "unrecuse" himself or herself even with the consent of the parties because of the importance of the public perception of impartiality.

[98] The Judge had earlier recused herself in July 2013 from presiding over Mr Whittall's trial, at his request. That was because she had found PRCL guilty of breaches of the HSE Act. She was concerned about a potential public apprehension that she might not thereby bring an open mind to hearing charges against Mr Whittall. The Judge maintained administrative responsibilities for the case pre-trial, as all parties were well aware and accepted. The Judge evidently reconsidered the recusal question on 12 December 2013 before deciding to preside over the decision to dismiss charges. Neither Mr Whittall nor Worksafe's counsel had any objection.

[99] We consider the Judge was correct to assume jurisdiction on 12 December 2013 to deal with the prosecution request for dismissal of the charges. First, the cause for disqualification in the first instance had been removed with the withdrawal of Mr Whittall's objection.[86] Secondly, Judge Farish was no longer being asked to consider whether Mr Whittall was guilty. It was only on that question she might be seen perhaps to have formed a pre-determined view given her decision convicting PRCL. A fair-minded lay observer would have appreciated the distinction between the Judge presiding over a formal and substantive criminal trial of charges against Mr Whittall — when she had found related charges proved against PRCL — and the decision to dismiss the Whittall charges on public interest grounds. The observer would not have considered her to be unable to bring an impartial mind to the particular issue she was required to decide.[87]

Conclusions reached by this Court

[100] The Prosecution Decision and District Court Decision were lawfully made. There was no unlawful agreement to stifle the prosecution by payment of money. Rather Worksafe properly and independently considered Mr Whittall's conditional

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86 RE Flamm *Judicial Disqualification: Recusal and Disqualification of Judges* (2nd ed, Banks & Jordan, California, 2007) at 651.

87 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

reparation undertaking, amongst other factors, in concluding it was no longer in the public interest to continue prosecution.

[101] We add that even if the Prosecution Decision or District Court Decision had been shown to be unlawful, we would not have quashed them. It is impossible to restore the circumstances pertaining at the time of those decisions, because the $3.41 million has been irretrievably transferred to the families. That is a sufficiently strong reason to decline substantive relief.[88] Mr Hampton accepted in argument that that would have to be the case (but submitted that declaratory relief might still be granted). We would have considered granting declaratory relief had unlawfulness been established. It has not, so we say no more.

Result

[102] The appeal is dismissed.

[103] The Crown does not seek costs, so there will be no cost order.

Solicitors:
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Crown Law Office, Wellington for Respondents

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88 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61]; *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48]; and *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549 at [90]–[91].