



District Court
New South Wales

Case Name: SafeWork NSW v The Owners – Strata Plan No 93899

Medium Neutral Citation: [2024] NSWDC 277

Hearing Date(s): 5 July 2024

Date of Orders: 11 July 2024

Decision Date: 11 July 2024

Jurisdiction: Criminal

Before: Russell SC DCJ

Decision: (1) The Owners – Strata Plan No 93899 was convicted on 5 July 2024.
(2) The appropriate fine is \$300,000 but that will be reduced by 25% to reflect the early plea of guilty.
(3) Order The Owners – Strata Plan No 93899 to pay a fine of \$225,000.
(4) Order pursuant to Section 122(2) of the Fines Act 1996 (NSW) that 50% of the fine is to be paid to the prosecutor.
(5) Order The Owners – Strata Plan No 93899 to pay the prosecutor’s costs agreed in the amount of \$40,000.

Catchwords: CRIMINAL LAW – prosecution – work health and safety – duty of persons undertaking business – risk of death or serious injury

SENTENCE – objective seriousness – mitigating factors – aggravating factors – plea of guilty – general deterrence – specific deterrence – capacity to pay appropriate penalty

COSTS – prosecution costs

OTHER – gate damaged by vehicle collision – worker

subsequently fatally crushed by damaged gate which fell on him – failure to prevent manual operation of gate – failure to direct workers not to operate gate until replaced or repaired – failure to post signage instructing workers not to operate gate until replaced or repaired – failure to urgently repair gate – failure to conduct risk assessment – failure to remove gate from service

Legislation Cited:

Crimes (Sentencing Procedure) Act 1999 (NSW), ss 3A, 21A, 22, 26, 27, 28, 30A, 30B, 30D, 30E
Fines Act 1996 (NSW), ss 6, 122
Strata Schemes Management Act 2015 (NSW), ss 8, 106
Work Health and Safety Act 2011 (NSW), ss 3, 20, 32

Cases Cited:

Baumer v R [1988] HCA 67; (1988) 166 CLR 51
Bulga Underground Operations Pty Limited v Nash [2016] NSWCCA 37; (2016) 93 NSWLR 338
BW v R [2011] NSWCCA 176
Capral Aluminium Limited v WorkCover Authority of New South Wales [2000] NSWIRComm 71; (2000) 49 NSWLR 610
DPP v Gregory [2011] VSCA 145; (2011) 34 VR 1
Green v The Queen [2011] HCA 49; (2011) 244 CLR 462
Jimmy v The Queen [2010] NSWCCA 60; (2010) 77 NSWLR 540
Mahdi Jahandideh v The Queen [2014] NSWCCA 178
Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357
Muldrock v The Queen [2011] HCA 39; (2011) 244 CLR 120
Nash v Silver City Drilling (NSW) Pty Limited; Attorney General for NSW v Silver City Drilling (NSW) Pty Limited [2017] NSWCCA 96
R v McNaughton [2006] NSWCCA 242; (2006) 66 NSWLR 566
R v Wilkinson (No. 5) [2009] NSWSC 432
SafeWork NSW v Maluko Pty Ltd [2023] NSWDC 274
Unity Pty Limited v SafeWork NSW [2018] NSWCCA 266
Veen v The Queen (No. 2) [1988] HCA 14; (1988) 164 CLR 465
WorkCover Authority (Inspector Howard) v

Boulderstone Hornibrook Pty Limited [2009]
NSWIRComm 92; (2009) 186 IR 125
WorkCover Authority of NSW (Inspector Carmody) v
Consolidated Constructions Pty Limited [2001] NSWIR
Comm 263; (2001) 109 IR 316

Texts Cited: SafeWork NSW Code of Practice, Managing the Risks
of Plant in the Workplace, August 2019
SafeWork NSW Code of Practice, Managing the Work
Environment and Facilities, August 2019
WorkSafe Western Australia Safety Alert, Worker
Crushed by Falling Gate, August 2018

Category: Sentence

Parties: SafeWork NSW (Prosecutor)
The Owners - Strata Plan No 93899 (Defendant)

Representation: Counsel:
M Moir (Prosecutor)
N Read (Defendant)

Solicitors:
Department of Customer Service (Prosecutor)
CVC Law (Defendant)

File Number(s): 2022/168641

JUDGMENT

- 1 The defendant in these proceedings was charged under the name “Owners Strata Plan 93899”. Its correct corporate name, in accordance with s 8(1) of the *Strata Schemes Management Act 2015* (NSW) (SSM Act), is “The Owners – Strata Plan No 93899”. This was corrected by an Amended Summons filed by leave.
- 2 The defendant (Owners) owned and controlled the common property of a strata title industrial complex at a site in Berkeley, NSW (the site). On 12 June 2020 a damaged gate at the site fell and fatally crushed Mr Jose Martins.
- 3 Owners has pleaded guilty to an offence that as a person who had a work health and safety duty pursuant to s 20(2) of the *Work Health and Safety Act 2011* (NSW) (the WHS Act) it failed to comply with that duty and thereby

exposed persons, include Mr Martins, to a risk of death or serious injury contrary to s 32 of the WHS Act.

4 Section 20 of the WHS Act provides:

“Duty of persons conducting businesses or undertakings involving management or control of workplaces

(1) In this section, *person with management or control of a workplace* means a person conducting a business or undertaking to the extent that the business or undertaking involves the management or control, in whole or in part, of the workplace but does not include—

(a) the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking, or

(b) a prescribed person.

(2) The person with management or control of a workplace must ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person.”

5 The maximum penalty for the offence is a fine of \$1,731,500.

The Risk

6 The risk described in par 14 of Annexure A to the Amended Summons is as follows:

“The risk was the risk to persons, in particular Mr Martins suffering serious injury or death as a result of the damaged Gate falling on them and thereby striking or crushing them while attempting to manually operate the Gate at any time after the motor vehicle incident.”

Reasonably Practicable Measures

7 Paragraph 15 of Annexure A to the Amended Summons pleads particulars of the defendant’s failure to comply with the duty under s 20(2) of the WHS Act as follows:

“The defendant failed to ensure so far as is reasonably practicable, that the Site, the means of entering and exiting the Site, and anything arising from it were without risks to the health and safety of any person, and in particular, Mr Martins in that it failed to take one or more of the following reasonably practicable measures to eliminate, or alternatively minimise if not reasonably practicable to eliminate, the risks to the health and safety of any persons:

Undertake, or require Chris Darby to arrange, an immediate risk assessment in relation to the safety and security issues at the Site arising from the motor vehicle incident and the resulting damage to the Gate.

Take the Gate out of service immediately after the motor vehicle incident and post signage to the effect that the damaged Gate was not to be operated manually until it was fully repaired or replaced.

Implement, or require Chris Darby to implement, measures to keep persons away from the damaged Gate, such as temporary barricades, exclusion zones and/or warning signs.

Direct that the damaged Gate not be touched and remain opened and unlocked so as to allow access to the Site pending the repair or replacement of the damaged Gate by a competent person.

Develop and implement a safe work method statement or safe work procedure for the manual operation of the Gate.”

Background

- 8 The parties presented an Agreed Statement of Facts and this material is summarised below.
- 9 Maluko Pty Ltd (Maluko) was a person conducting a business or undertaking (PCBU) at the site. The site was an industrial complex comprised of eight units, each occupied by a separate unit owner or tenant. Maluko initially owned and built the industrial complex at the site in approximately March 2017. It then sold off the units but leased Unit 5 itself.
- 10 Maluko’s business or undertaking involved building and concreting services. Maluko employed approximately five workers, including Mr Martins and Mr Steven Ferreira. Mr Ferreira was Maluko’s manager and sole director.
- 11 The site was managed and controlled, in part, by Owners.
- 12 Pursuant to ss 106(1) and (2) of the SSM Act, Owners had duties to properly maintain and keep in a state of good and serviceable repair the common property at the site and to renew and replace any fixtures or fittings comprised in the common property.
- 13 In 2019 Owners executed an agreement appointing Chris Darby Strata Pty Ltd (Darby) as the strata managing agent for the site. The agreement gave Darby complete authority to effect repairs at the site, maintain the common property and engage qualified people to carry out repair work at the site.
- 14 Darby employed Ms Karen Lee Johnson as a strata manager. At the time of the incident Ms Johnson had been in her role for approximately four weeks. Ms Johnson holds a strata licence and has done so since 2019.

- 15 Ms Johnson reported to Mr John Martin, who was the Regional Manager employed by CNG Property Group, the parent company of Darby. Ms Johnson was responsible for the day-to-day management of the site, on behalf of Darby. At the time of the incident, Ms Johnson had responsibility for approximately 107 strata properties, including the site.
- 16 In respect of the site, Ms Johnson took instructions from Mr Mario Perossa on behalf of Owners.
- 17 A perimeter fence was built around the site and included a large heavy metal custom-built sliding electric gate (the gate). The gate included guideposts and an end-stopper (stopper) to prevent the gate from overtravel in the closing direction. The gate was approximately 8.5 metres long and over two metres high.
- 18 The gate was also fitted with a sensor which caused the electric motor to stop as soon as the gate hit any obstruction, including the stopper. Each unit holder or tenant at the site had a remote-control pendant to operate the gate.
- 19 Access to the site was also possible through a pedestrian gate which was manually operated using a wire rope with a padlock.
- 20 The gate was part of the common property at the site, so the ownership of the gate vested in Owners.

The Events of 4 June 2020

- 21 On the night of 4 June 2020, a van collided with the gate at high speed (PX 1, Tab 4). The gate remained upright but was bent out of shape, partially pulled off its track, and disconnected from its electric motor. The guideposts were also damaged, and the stopper had come out of position and was no longer capable of preventing overtravel of the gate.
- 22 As a result of the collision the gate was at a 30-degree angle and was inoperable. The NSW Emergency Services attended to the site and placed warning tape around the gate and the damaged guideposts.
- 23 Following the collision, the gate was not repaired, replaced, made safe or otherwise attended to.

- 24 On 5 June 2020, a number of occupants within the site undertook makeshift repairs to the gate. These repairs resulted in the gate being able to be operated manually. When operated manually the gate presented a risk of falling as a result of moving past the displaced stopper. This allowed the gate to overtravel past the guideposts and become unsupported by the rollers.
- 25 An adequate physical stopper to prevent overtravel of the gate was not in place as part of the temporary makeshift repairs.

The Incident on 12 June 2020

- 26 At approximately 5.45am on 12 June 2020, Mr Martins arrived for work at the site. Mr Martins' usual duties involved him opening the gate and Maluko's workshop before the arrival of the other workers.
- 27 Mr Martins drove his vehicle up to the entrance at the site and alighted from his car to manually unlock the gate and push it open. Mr Martins attempted to push the gate open from several positions. However, it would not slide open.
- 28 As Mr Martins was attempting to push the gate open, the lack of a physical stopper allowed the gate to move too far in the closing direction, to the point where it came out from its guideposts and supporting rollers. Once out of the rollers the gate fell against a post that was part of the temporary repairs to the fence. The gate was resting at an angle and no longer aligned with the supporting rollers.
- 29 Mr Martins was attempting to move the gate back into position between the supporting rollers when the gate became unstable and fell onto him. The gate pinned Mr Martins to the ground at the entrance to the site until other workers arrived about 15 minutes later and lifted the gate off him. The incident was recorded on CCTV footage (PX 1, Tab 5).

Injuries

- 30 Mr Martins sustained fatal crush injuries as a result of the incident. He was 64 years old.

Systems of Work Prior to and at the Time of the Incident

- 31 The gate system included the gate, a pair of vertical guideposts at each side of the driveway, the stopper, and approximately 16 metres of ground track. The

guideposts were taller than the gate and when closed provided physical support to prevent the gate falling to the ground.

- 32 The stopper was in place to prevent the gate from moving too far and travelling beyond the guideposts and the support rollers. The motor was at the southern end of the gate and pulled the gate open in that direction but only to a set distance so that the gate could not go too far.
- 33 After the vehicle collision on 4 June 2020 the gate was unable to operate in its usual manner. The gate had become disconnected from the motor and the northern end guideposts were destroyed. The defendant did not ensure that the gate was taken out of service by placing signs to the effect that it was not to be operated manually until it was fully repaired.
- 34 From 5 to 12 June 2020 the gate was opened and closed manually by various workers at the site, including Mr Martins, as necessary when entering and leaving the site.
- 35 No risk assessment was conducted in relation to the damaged condition of the gate or in relation to its manual operation. There was no Safe Work Method Statement (SWMS) developed for the manual operation of the gate, nor was any information or direction provided to persons at the site that the gate was not to be touched or operated manually until it was fully repaired or replaced.
- 36 There was no system in place for ensuring the gate was tagged out or otherwise taken out of service from 4 June 2020 to prevent it from being used, until proper repairs had been carried out.
- 37 Owners reported the damaged gate to Darby on the morning following the collision. Ms Johnson received approval on behalf of Owners to arrange repairs to the gate and fence. That same morning on 5 June 2020, Ms Johnson issued a work order to iAutomate Gates and Doors to repair the damage, but Darby did not arrange for the gate to be repaired or replaced as a matter of urgency.
- 38 On the morning of 5 June 2020, Darby also issued a work order to Imperial Plumbing to repair severe damage caused to the water meter at the site as a result of the collision. These repairs were completed on an urgent basis that day.

- 39 Neither Darby nor Owners carried out or otherwise arranged for an immediate risk assessment to be conducted for the damaged gate. Neither was the gate locked out or otherwise removed from service following the damage.
- 40 Owners did not remove the gate from service or post a sign to the effect that the gate was not operational pending its full repair or replacement. Nor did Owners take any actions to prevent the manual operation of the gate, including using signs to the effect that the gate was not to be operated manually until it was fully repaired or replaced.

Guidance Material

- 41 The following guidance material was available at the time of the incident:
- (1) SafeWork NSW (SafeWork) Code of Practice, *Managing the Risks of Plant in the Workplace*, August 2019 (PX 1, Tab 13). Part 3.6 provided that damaged plant that poses a risk to health and safety should be withdrawn from service until those risks have been controlled.
 - (2) SafeWork Code of Practice, *Managing the Work Environment and Facilities*, August 2019 (PX 1, Tab 12). Part 1.1 provided specific guidance to entities with responsibilities under s 20 of the WHS Act. Part 1.3 provided clear guidance on the need for promptly replacing or repairing damaged fixtures and fittings within the work environment.
 - (3) Western Australian Safety Alert (WASA), *Worker Crushed by Falling Gate*, August 2018 (PX 1, Tab 14), which provided:
 - (a) “When an incident occurs that results in damage to a gate or when it is identified that a gate is not working correctly, the gate should be immediately tagged out and the employer property owner and/or property manager notified.”
 - (b) “Any damaged or defective gates should be immediately assessed and repaired by a competent person.”
 - (c) “Until such repairs are completed, measures must be implemented to keep people away from a damaged gate (for example by temporary barricades, exclusion zones, warning signs).”

Systems of Work Following the Incident

- 42 The gate was removed by a crane on the day of the incident. In late September 2020 a new automatic electric gate was installed at the site.

Evidence for the Defendant

- 43 Mr Cameron Petrovski affirmed an affidavit on 17 June 2024 (DX 1). Mr Petrovski is the director of CMG Air Pty Ltd (CMG Air) which is the owner of a unit in the Owners' strata.
- 44 CMG Air and the owners of the other seven units of the strata complex form the body corporate that is the defendant in these proceedings.
- 45 Mr Petrovski was authorised to make an affidavit on behalf of Owners. All of the owners have read Mr Petrovski's affidavit and had an opportunity to comment on its contents.
- 46 Mr Petrovski annexed to his affidavit a collection of documents marked "Exhibit CP1" which became Exhibit DX 2.

Remorse and Contrition

- 47 On behalf of Owners, Mr Petrovski is "very sorry that the body corporate contravened its duty". Mr Petrovski acknowledged that Owners, "as a person with a degree of management and control of the premises, it failed to comply with its duty to ensure the premises was without risks to safety".
- 48 Mr Petrovski said that many of the owners personally knew Mr Martins and that the "owners have all been devastated by the incident" that resulted in Mr Martins' death.
- 49 Mr Petrovski explained that Mr Martins was an employee of Maluko which operated from a unit in the strata. Mr Petrovski is aware that Mr Martins and Mr Ferreria, who employed Mr Martins, socialised together regularly and had known each other for over 38 years. Mr Ferreria continues to see Mr Martins' wife and daughter since his death.
- 50 Mr Petrovski said that Owners "is regretful that it did not take the steps set out in the Amended Summons to ensure the strata complex was without risk to safety, and that Mr Martins suffered fatal injuries".
- 51 The unit owners never anticipated such an incident occurring. Mr Petrovski said that prior to the incident Owners did not understand that they could be liable for breaches of the WHS Act. The prosecution and incident have caused

Owners to “carefully consider” their obligations as persons with control of the common property and “to place greater importance in strata management issues”. Mr Petrovski stated that Owners “are committed to ensuring the body corporate takes active steps to rectify any damaged common property that could cause risks to health and safety, and to prohibit any unauthorised works that could give rise to such risks”.

The Strata Complex

- 52 Mr Petrovski provided a description of the strata complex. Maluko and another builder developed the complex in 2017, constructing eight industrial units in two separate buildings.
- 53 Vehicle access to the complex was through the gate which was opened each weekday morning using a remote control. This gate remained open all day until the last person to leave would close it.
- 54 The common property consists of the fence, the gate, parking bays, a small garden in front of the parking bays, and the concrete hardstand running between the northern and southern buildings.
- 55 The ownership of the strata units has not changed since 2017. Mr Petrovski listed the owners of each unit in the strata plan that together form Owners. The Owners do not employ any person on site to manage the common property.
- 56 Since December 2017, Owners have engaged Darby as the strata managing agent. Mr Petrovski annexed the Strata Management Agency Agreement to his affidavit (DX 2, Tab 3).
- 57 Under the agreement, Owners delegated Darby “full authority with no limitation for effecting repairs to and maintaining common property or engaging appropriately qualified tradespersons to undertake standard work orders”. Repairing the damaged gate was a standard work order as it was construction work with no requirement to work above three metres.
- 58 Mr Petrovski annexed a copy of Darby’s procedure for reporting hazards, incidents or repair requirements (DX 2, Tab 5).

- 59 Prior to the incident, Owners “relied heavily” on Darby to meet its obligations under the strata laws and to attend to any repair and maintenance issues. Each unit owner largely dedicated their time to running their business.
- 60 Before the incident Owners had found Darby to be “generally responsive to fixing any reported issues”.
- 61 Mr Petrovski said that before the incident, Darby had not provided Owners with any guidance or information about their responsibilities under the WHS Act in relation to the common property. In March 2020, Darby provided Owners with information regarding safety measures to take at the complex in relation to the coronavirus (DX 2, Tab 6), and from “time-to-time” Darby provided Owners with information about budgets and levies.
- 62 Before the vehicle accident on 4 June 2020, there had never been a requirement for major repair work, such as repairing the damage that occurred to the fence, water meter and gate, and there has been no such requirement since.
- 63 Mr Petrovski said that none of the owners turned their minds “to the issue of the gate falling and causing a serious risk to health and safety”.

4 – 12 June 2020

- 64 On 5 June 2020, Mr Angelo Cacciola, a sole trader whose wife owns one of the units and who was the point of contact between Owners and Darby between 2017 and 2019, spoke to Darby about the damage caused by the vehicle impact. Mr Petrovski annexed a copy of Mr Cacciola’s statement (DX 2, Tab 7) to his affidavit.
- 65 At 9.21am on 5 June 2020, Mr Cacciola sent numerous photographs of the damaged gate to Darby by email (DX 2, Tab 8).
- 66 On or around 5 June 2020, Darby called Mr Perossa, a unit owner and the point of contact between Darby and Owners, asking whether his plumbing business had persons available to repair the damaged water meter. During this conversation, Ms Johnson told Mr Perossa about the damage to the fence and gate and informed him that arrangements were being made for repairs to be performed.

- 67 On 6 June 2020, a plumber arranged by Darby attended the strata complex and repaired the damaged water service.
- 68 Mr Petrovski's mother, Ms Susan Petrovski, spoke to Darby following the vehicle collision on 4 June 2020 and inquired why the gate had not been repaired. Mr Petrovski said that his mother told Darby that "the fence and the gate needed to be fixed as soon as possible". A statement from Ms Petrovski is annexed to Mr Petrovski's affidavit (DX 2, Tab 9).
- 69 From 5 June 2020, no one from Darby nor any tradesperson engaged by Darby attended the site to inspect or repair the damaged gate.
- 70 Monday 8 June 2020 was a public holiday. Mr Petrovski attended the site multiple times on each workday between 5 and 12 June 2020. The gate was fully open each time he entered and left the site. Mr Petrovski said that he did not know that the gate was being manually opened and closed, but that he assumed it had been left open pending repair. Other owners at the site held the same belief as Mr Petrovski during that period.
- 71 After the incident, SafeWork issued improvement notices to Darby but not to Owners. Darby engaged a contractor to repair the gate in late September 2020.

Steps Taken by Owners Following the Incident

- 72 Mr Petrovski stated that the incident "resulted in significant and ongoing discussions" between the owners about their duties under the WHS Act and what is required to ensure that the common property is safe and risk free.
- 73 Those discussions included the following:
- (1) Any damage to the common property is to be reported immediately to Ms Petrovski. Following the incident, Ms Petrovski took responsibility for managing strata issues and dealing with the strata managing agent.
 - (2) Depending on the nature of the damage, the strata managing agent is to be requested to attend the site to assess any safety risks and requirements to make the areas safe.
 - (3) The only persons permitted to repair common property is the tradesperson appointed by the strata managing agent. No person is permitted to touch damaged property until it has been fixed by a tradesperson appointed by the strata managing agent. It is up to the

strata managing agent to repair damaged property, no matter how long it takes.

- 74 Mr Petrovski said that all owners and persons at the site agreed on the above matters which were the subject of “extensive discussion” between Owners and persons running businesses at the site, about what could have been done to prevent the incident.
- 75 On 7 December 2022, Owners resolved to terminate the agreement with Darby. Owners then executed a new agreement with a different strata management company, NetStrata. A “Full Delegation” agreement with NetStrata was recently renewed for a period of 36 months. A copy of the agreement was in Exhibit DX 2, Tab 10.

Financial Affairs of Owners

- 76 On 24 January 2023, the strata complex was valued at \$1,955,000 for insurance purposes. A copy of the valuation report was in Exhibit DX 2, Tab 11.
- 77 Mr Petrovski annexed the following documents to his affidavit, setting out Owners’ current financial position:
- (1) Darby’s interim reports for the financial year ending 31 December 2022 (DX 2, Tab 12).
 - (2) NetStrata Financial Report for financial period 1 December 2022 to 30 November 2023 (DX 2, Tab 13).
 - (3) NetStrata Financial Report for financial period 1 December 2023 to 31 May 2024 (DX 2, Tab 14).
- 78 Owners’ current financial position is reflected in the most recent NetStrata Financial Report (DX 2, Tab 14), showing:
- (1) The total assets of Owners (comprising an administrative fund and a capital works fund) are \$13,296.92.
 - (2) For the period between 1 December 2023 and 15 April 2024, Owners operated at a deficit of \$8,356.66.
- 79 In preparation for the sentence hearing each owner was asked to provide information about how a fine would personally impact them. Mr Petrovski listed the information provided by each owner and annexed relevant documents, including financial statements, tax returns and letters (DX 2, Tabs 15 – 32).

- 80 During the offence period, Owners held an insurance policy that was meant to cover legal expenses incurred in WHS matters up to an amount of \$50,000 with an excess of \$1,000. Soon after this prosecution commenced, Owners made a claim on this policy which was not responded to in a timely manner. Following complaints to regulatory agencies, on 24 April 2024 the underwriters responded to Owners, declining the claim for defence costs under the policy. A copy of a letter received from Wotton Kearney dated 24 April 2024 is annexed to Mr Petrovski's affidavit (DX 2, Tab 33). Mr Petrovski stated that Owners does not agree with that decision and is considering challenging it.
- 81 On 25 June 2024 the solicitors for Owners wrote to the insurer setting out their position and requesting a response within seven days (DX 2, Tab 34). At the time Mr Petrovski affirmed his affidavit, Owners had not received a response to the letter.
- 82 Following the incident, Owners cooperated with SafeWork's investigation which included complying with statutory notices and owners making themselves available to answer questions and provide information.

Consideration

- 83 I have had regard to the objects in s 3 of the WHS Act and the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSP Act).

Objective Seriousness of the Offence

- 84 The proportionality principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *Veen v The Queen (No. 2)* [1988] HCA 14; (1988) 164 CLR 465 at 472, 485-6, 490-1 and 496. At common law, the term "objective circumstances" was used to describe the circumstances of the crime. The gravity of the offence was assessed by reference to its objective seriousness: *R v McNaughton* [2006] NSWCCA 242; (2006) 66 NSWLR 566 at [15].
- 85 The task requires the court to consider where in the range of conduct covered by the offence the conduct of the offender falls: *Baumer v R* [1988] HCA 67; (1988) 166 CLR 51 at 57. This assessment will generally indicate the appropriate range of sentences available which will reflect the objective

seriousness of the offence committed, and set the limits within which a sentence proportional to the criminality of the offender will lie: *BW v R* [2011] NSWCCA 176 at [70].

86 In *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 at [27] the High Court said:

“The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.”

87 The sentencing judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime and are properly regarded as circumstances of aggravation or mitigation: *R v Wilkinson (No. 5)* [2009] NSWSC 432 at [61].

88 The existence of a reasonably foreseeable risk to safety that is likely to result in serious injury or death is a factor relative to the gravity of the offence: *Capral Aluminium Limited v WorkCover Authority of New South Wales* [2000] NSWIRComm 71; (2000) 49 NSWLR 610 at [82]. The question of foreseeability of the risk is to be determined objectively.

89 The court must identify all the factors that are relevant to the sentence, discuss their significance and then make a value judgment as to what is the appropriate sentence given all the factors of the case: *Muldrock*. This approach to sentencing, known as the “instinctive synthesis” approach, involves the making of a global judgment without any attempt to state precisely how any given factor has influenced the judgment.

90 The Court of Criminal Appeal has examined the sentencing process with regard to the WHS Act in the matter of *Nash v Silver City Drilling (NSW) Pty Limited; Attorney General for NSW v Silver City Drilling (NSW) Pty Limited* [2017] NSWCCA 96. Justice Basten at [34], under the heading “Assessment of Risk” said:

“The sentencing judge commenced his consideration with the proposition that ‘greater culpability attaches to the failure to guard against an event the occurrence of which is probable rather than an event the occurrence of which is extremely unlikely’. However the truth of that proposition depends upon other considerations including (a) the potential consequences of the risk,

which may be mild or catastrophic, (b) the availability of steps to lessen, minimise or remove the risk, and (c) whether such steps are complex and burdensome or only mildly inconvenient. Relative culpability depends on assessment of all those factors.”

91 Further at [42] his Honour continued:

“The culpability of the Respondent is not necessarily to be determined by the remoteness of the risk occurring, nor by a step-by-step assessment of the various elements. Culpability will turn upon an overall evaluation of various factors, which may pull in different directions. Culpability in this case is reasonably high because, even if the [event] which occurred might not be expected to occur often, the seriousness of the foreseeable resultant harm is extreme and the steps to be taken to avoid it, which were not even assessed, were straightforward and involved only minor inconvenience and little, if any, costs.”

92 At [53] his Honour dealt with the proper approach to considering the objective seriousness of offences under the WHS Act, saying:

“It is important to note that the risk to be assessed is not the risk of the consequence, to the extent that a worker is in fact injured, but is the risk arising from the failure to take reasonably practicable steps to avoid the injury occurring. To discount the seriousness of the risk by reference to the unlikelihood of injury resulting is apt to lead to error. The conduct in question is the failure to respond to a risk of injury, conduct which will be more serious, the more serious the potential injuries, whether or not they are likely to materialize. The objective seriousness of the conduct will also be affected by the ease with which mitigating steps could have been taken.”

93 My findings about the defendant’s level of culpability are based upon the following:

- (1) The risk of the gate falling was foreseeable. Even a cursory inspection of the rough and ready temporary repairs would have led to the realisation that there was no stopper and the gate could slide past the southern rollers and then fall. Further, there was guidance material which disclosed the risk.
- (2) The likelihood of the risk occurring was significant. This is particularly illustrated by the CCTV of the incident (PX 1, Tab 6) which shows that Mr Martins had to wrestle with the gate to get it to move.
- (3) The potential consequences of the risk were serious injury or, as happened, death.
- (4) There were simple no-cost steps available to eliminate or minimise the risk.
- (5) There was no burden or inconvenience involved in those steps.
- (6) The death of Mr Martins was caused by the breach of a safety duty by Owners.

- (7) This was a continuing offence and the evidence shows that workers were exposed on several days to the risk, not just on 12 June 2020.
- (8) The maximum penalty for the offence is a fine of \$1,731,500, which reflects the legislature's view of the seriousness of the offence. The penalty increased from \$1,500,000 to \$1,731,500 only two days before the incident, but during the period of the continuing offence committed by Owners.
- (9) The default of other parties (Maluko, which has already been sentenced, and Darby, which has pleaded guilty but is yet to be sentenced) made a significant contribution to the creation of the risk and the death of Mr Martins. However, Owners had its own independent safety duty under the WHS Act. As the owner of the common property, which included the gate, it had the power as well as the obligation to make the site safe.
- (10) This case is not of the usual type which comes before the court, where a PCBU conducting a for-profit business creates or ignores a risk to workers engaged or controlled by it. The risk here was created by persons unknown performing ad hoc repairs to put the gate back into service, before it could be professionally repaired.
- (11) Owners did report the damage to the gate promptly to the strata managing agent and did follow up the agent to have the gate repaired.

94 I find that the level of culpability of Owners is in the lower end of the mid range.

Deterrence

95 The penalty imposed in relation to this offence must provide for general deterrence. Owners of a workplace must take the obligations imposed by the WHS Act very seriously. The community is entitled to expect that both small and large property owners will comply with safety requirements. General deterrence is a significant factor when safety obligations are breached: *Bulga Underground Operations Pty Limited v Nash* [2016] NSWCCA 37; (2016) 93 NSWLR 338 at [180].

96 The penalty must reflect the need for specific deterrence. Owners is still in control of the site.

Aggravating Factors

97 The injury, emotional harm, loss or damage caused by the offence was substantial: s 21A(2)(g) CSP Act. This is also a factor relevant to the determination of objective seriousness. It will not be "double counted".

Mitigating Factors

- 98 Owners has no previous convictions: s 21A(3)(e) CSP Act.
- 99 Owners is otherwise of good character: s 21A(3)(f) CSP Act. The steps which it took after the incident demonstrate this.
- 100 Owners is unlikely to re-offend: s 21A(3)(g) CSP Act.
- 101 Owners has good prospects of rehabilitation: s 21A(3)(h) CSP Act. It has taken positive steps to guard against the risk of an incident such as this ever happening again. It has brought its documentation and its procedures into line with those which, on all the evidence, should have been in place before this incident occurred.
- 102 Owners has shown remorse for the offence: s 21A(3)(i) CSP. It has provided evidence that it has accepted responsibility for its actions and has acknowledged that the death of Mr Martins was caused by its actions.
- 103 Owners entered a plea of guilty: s 21A(3)(k) CSP Act. The court must take into account the fact that the offender has pleaded guilty, when the offender pleaded guilty, and the circumstances in which the offender indicated an intention to plead guilty: s 22(1) CSP Act. It is appropriate to give Owners a 25% discount for its plea.
- 104 Owners gave assistance to law enforcement authorities: s 21A(3)(m) CSP Act. It cooperated at all times with the prosecutor and provided all documents requested in a prompt fashion.

Parity

- 105 Maluko was also prosecuted for a breach of its health and safety duties arising under the WHS Act, relating to the same incident: *SafeWork NSW v Maluko Pty Ltd* [2023] NSWDC 274. Darby was also prosecuted, and has pleaded guilty, but is yet to be sentenced.
- 106 Where two or more offenders are involved in the same criminal conduct or enterprise the parity principle requires that there should not be such disparity between the sentences imposed so as to give rise to a justifiable sense of grievance. The effect of the application of the principle may vary according to

the circumstances of the matter, including differences between the charged offences; the parity principle is not limited to persons charged with the same offences arising out of the same criminal conduct. Its application is governed by consideration of substance over form: *Green v The Queen* [2011] HCA 49; (2011) 244 CLR 462 at [30].

107 The principle operates in the nature of a “check” required of the sentencing court: *DPP v Gregory* [2011] VSCA 145; (2011) 34 VR 1 at [31]. The Court should first determine the appropriate sentence having regard to the objective criminality and the other relevant factors and then consider whether the sentence needs further adjustment because of the parity principle: *DPP v Gregory*. In *Jimmy v The Queen* [2010] NSWCCA 60; (2010) 77 NSWLR 540 at [139] Justice Campbell said:

“An essential characteristic of the parity principle is that it permits comparison of two individual sentences and alteration of one sentence as a direct result of the comparison with the other sentence.”

108 The court should not use a co-offender’s sentence as a starting point and then increase or decrease the sentence by reference to other factors: *Jimmy v The Queen* at [32]; *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357.

109 It is appropriate for the court to consider the respective contributions of Owners, Maluko and Darby. The reason for doing so is not to reduce the culpability of any one party in any proportionate way in an overall penalty, but rather it is a factor that assists in determining the real culpability of a defendant for the offence charged: *WorkCover Authority of NSW (Inspector Carmody) v Consolidated Constructions Pty Limited* [2001] NSWIR Comm 263; (2001) 109 IR 316 at [46]. The contribution of other entities may in some cases be relevant in mitigation: *WorkCover Authority (Inspector Howard) v Boulderstone Hornibrook Pty Limited* [2009] NSWIRComm 92; (2009) 186 IR 125 at [241].

110 There are some factors to suggest that Owners was just as culpable as Maluko. I accept the submission (MFI 1) made by counsel for SafeWork as follows:

- (1) Both Owners and Maluko pleaded guilty to a charge that they failed to control the same serious risk, at the same location and over the same period of time.

- (2) The reasonably practicable precautions which both Owners and Maluko should have taken were essentially the same. Both Owners and Maluko had an obligation to give a simple direction not to move or use the gate manually while it was in a damaged state.
- (3) Both Owners and Maluko had personnel on site who should have inspected the gate and prevented it from being manually operated before it was repaired.

111 However, the following factors lead me to conclude that Owners was less culpable than Maluko:

- (1) Maluko constructed the industrial units and the gate, so it had a unique insight into how the gate worked.
- (2) Maluko was the employer of Mr Martins. Maluko knew that Mr Martins used to arrive at work early each morning and open the gate. Maluko knew that Mr Martins had manually opened the gate more than once in the days prior to the incident.
- (3) Mr Petrovski and other owners were not aware that Maluko was causing the gate to be opened each day. All they saw was the gate in an open position when they attended the site.
- (4) Owners did promptly report the damage to the gate to its strata managing agent, with a request for the damage to be repaired.

Capacity to Pay a Fine

112 I am required to have regard to s 6 of the *Fines Act 1996* (NSW) before imposing a fine. Where an offender seeks to have a fine reduced on the basis of a limited capacity to pay, it bears the evidentiary onus of convincing the court that it should exercise its discretion to limit the amount of the fine. The offender's capacity to pay is relevant but not decisive: *Mahdi Jahandideh v The Queen* [2014] NSWCCA 178 at [16]. A substantial fine may still be warranted as a result of the seriousness of the offence and the need for general deterrence.

113 In *Unity Pty Limited v SafeWork NSW* [2018] NSWCCA 266 at [79] the Court of Criminal Appeal said:

“First, and more generally, questions of specific deterrence should take into account the size and scope of the operations of the defendant; a fine which may be crippling to a small business may have virtually no impact on the financial operations of a large corporation. The maximum penalty for the offence is undoubtedly set having regard to such a factor. Secondly, the Court is required to have regard to ‘the means’ of the defendant, pursuant to s 6 of the *Fines Act 1996*.”

114 I accept the submission of counsel for the defendant that Owners is a not-for-profit statutory corporation formed to manage the common property for the small industrial complex at the site. Its funds come from levies upon the owners of the eight individual units. The burden of any fine will fall upon the unit owners. As with any strata expense, it is up to each owner to fund levies from cash flow or borrowings, or by personal contributions from business owners and operators. The evidence shows that the businesses on site are all trading, some more profitably than others. Each strata industrial unit has a real estate value, which might be a means of secured borrowing by an owner to pay a special levy raised to pay the fine and the costs.

115 I will take these matters into account in fixing the fine.

Victim Impact Statement

116 The defendant was convicted at the sentence hearing on 5 July 2024.

117 Part 3 Division 2 of the CSP Act deals with Victim Impact Statements. The provisions apply to an offence being dealt with summarily by the District Court where the offence results in the death of, or actual physical bodily harm to, any person – s 27(2)(a).

118 A Victim Impact Statement may be tendered to the court only by the prosecutor – s 30A(2). A court must accept a Victim Impact Statement tendered by a prosecutor if the statement complies with the requirements of the Division – s 30B. A victim to whom a Victim Impact Statement relates may read out the whole or part of their Victim Impact Statement – s 30D(1).

119 A court to which a Victim Impact Statement has been tendered must consider the statement at any time after it convicts but before it sentences, and may make any comment on the statement that the court considers appropriate – s 30E(1).

120 By s 28(2) a family victim in relation to an offence may prepare a Victim Impact Statement that contains particulars of the impact of the primary victim's death on the family victim or other members of the primary victim's immediate family. Members of a primary victim's immediate family include children and grandchildren of the deceased – s 26.

- 121 A Victim Impact Statement of a family victim may also be taken into account by the court in connection with the determination of punishment for the offence, on the basis that the harmful impact of a primary victim's death on family victims is an aspect of harm done to the community – s 30E(3). Such statements can only be taken into account on punishment if the prosecutor applies for this to occur, and the court considers it to be appropriate. In the present instance the prosecutor applied for this to occur and I determine that it is appropriate to take the statement into account.
- 122 Ms Susana Martins, the daughter of Mr Martins, read to the court her Victim Impact Statement.
- 123 Ms Martins described the anguish caused by the unexpected death of Mr Martins, without the family having the chance to say goodbye. Ms Martins described the family's "world being rocked to the core in an extremely difficult way" when they were told by police officers that her father had died in a workplace accident. She said that from that moment, their lives changed forever and would never be the same.
- 124 Ms Martins has experienced "sleepless nights" and eating problems due to stress. These impacts have created flow-on effects due to Ms Martins' pre-existing medical conditions, with Ms Martins saying that her "physical health and wellbeing is suffering".
- 125 Ms Martins explained the burden she experienced through being Mr Martins' only child and needing to organise his funeral by herself. Ms Martins was confronted with needing to make decisions about things that she thought she "still had at least 20-30 years" to consider.
- 126 Ms Martins said that her "mental and emotional health were at an extremely low point", with the impact of her father's death exacerbating pre-existing mental illnesses, making her body feel "like it was going to explode".
- 127 Ms Martins described the immense difficulty "holding it all together" for her mother and other family members. She said that it was "one of the hardest things I've had to do in all my lifetime".

- 128 Before Mr Martins' death, Ms Martins described herself as "one to socialise with friends and family, the Portuguese community with cultural functions, being a happy and social person, going to restaurants and enjoying life, just like my father was before his life was taken". After the incident, Ms Martins said that this changed, and she did not want to see or speak to anyone or go anywhere.
- 129 Ms Martins struggled, and still struggles, to accept that her "father was gone". Ms Martins is "still waiting and waiting for him to come home from work". "Shock, anger, disbelief, resentment, loss [and] pain" are all part of Ms Martins' daily life now and something she considers will "haunt" her forever. Mr Martins was "such an important person" to Ms Martins, who she described as her and her son's "male role model".
- 130 Ms Martins lamented the "avoidable way" that Mr Martins died, saying that her father "should be here today, living, laughing and socialising with his friends".
- 131 Ms Martins said that the incident and situation is "unbelievable". Mr Martins was planning his retirement and planning to travel to Portugal to see his friends and family. Ms Martins described Mr Martins' desires to spend more time with his wife, daughter and grandson, "finally relaxing and resting after working so hard in the concreting business all his life, wanting so hard to provide for his family". "Family was everything" to Mr Martins, whom he "loved with all his heart" and who his "family loved so much, so very much, in return".
- 132 Ms Martins struggles to accept "the horrible way" Mr Martins was taken from them, saying that "all I ask is that justice is found and that my father's death was not in vain".

Costs

- 133 The parties have agreed to an order that the defendant is to pay the prosecutor's costs in the amount of \$40,000.

Penalty

- 134 My orders are:

(1) The Owners – Strata Plan No 93899 was convicted on 5 July 2024.

- (2) The appropriate fine is \$300,000 but that will be reduced by 25% to reflect the early plea of guilty.
- (3) Order The Owners – Strata Plan No 93899 to pay a fine of \$225,000.
- (4) Order pursuant to Section 122(2) of the *Fines Act 1996* (NSW) that 50% of the fine is to be paid to the prosecutor.
- (5) Order The Owners – Strata Plan No 93899 to pay the prosecutor's costs agreed in the amount of \$40,000.

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