Judgment

Title: Director of Public Prosecutions -v- Kilsaran Concrete Limited

Neutral Citation: [2017] IECA 112

Court of Appeal Record Number: 73CJA/16

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Date of Delivery: 06/04/2017

Court: Court of Appeal

Composition of Court: Birmingham J., Edwards J., Hedigan J.

Judgment by: Edwards J.

Status: Approved

Result: Allow and set aside

THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

Record No : CJA 73/16

IN THE MATTER OF SECTION 2 OF THE CRIMINAL JUSTICE ACT 1993

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

V

KILSARAN CONCRETE LIMITED

Respondent

Judgment of the Court delivered by Mr Justice Edwards on 6th April 2017

Introduction

1. On the 18th of February 2016 the respondent, having pleaded guilty to a count of failing to manage and conduct work activities in such a way as to ensure, so far as was reasonably practicable, the safety, health and welfare at work of the employees of an undertaking, resulting in personal injury to an employee, contrary to Section 8 (2)(a) as it relates to Section 8(1) of the Safety, Health and Welfare at Work Act, 2005 and Section 77(9)(a) of the Safety, Health and Welfare at Work Act 2005, was ordered to pay a fine of €125,000 with six months to pay, and distress in default. The charge arose out of an industrial accident which resulted in the death of Barry Gargan on the 6th of September 2011.

2. The director now seeks a review of the sentence imposed on the grounds that it was unduly lenient.

The Circumstances of the Case

3. The respondent is a limited liability company engaged in the business of manufacturing concrete products such as building blocks and paving stones. It operates from premises at Piercetown, Dunboyne, County Meath, incorporating a quarry and manufacturing facility, and employs approximately 400 people.

4. About 16 months prior to the incident, the respondent purchased a fully automated piece of machinery (the "wet cast production line") for the manufacture of pre-cast and standardised concrete products. The machine uses standardised moulds. The process starts with an empty mould. While moving along a conveyor the mould is filled with liquid concrete and then levelled off. It is then put onto a drying rack until the product hardens. It is later retrieved from the drying rack, a suction device removes the dried product from the mould, the finished concrete product is removed, the empty mould is then lifted by a mechanical arm and moved on to an adjacent vibrating table where any dried concrete remnants are shaken from the mould in a cleaning process, the cleaned mould is then removed and ultimately returns by conveyor to the filling line, where the process starts all over again.

5. When this machine is in use for the purpose for which it was designed, at no point in the manufacturing process is manual intervention necessary and the process is controlled externally by an operative using a control panel and a second individual carrying out a visual examination of the finished product.

6. The wet cast production line is enclosed within a safety cage to prevent access to the unguarded moving parts, and access to the caged area is controlled by a safety gate, the opening of which cuts off power to the machine.

7. A decision was made to use the wet-cast production line in an unorthodox manner to make bespoke products, ie., so-called Ballymun and Limerick kerbs, which were too big to be produced with the machine in automatic mode and which required the use of custom made wooden moulds, which could not be shaken or automatically cleaned.

8. The use of the wet cast production line for the manufacture of "Ballymun kerbs" or "Limerick kerbs" developed over a number of distinct phases.

9. The respondent received an order for Limerick kerbs in August 2010 and these were initially manufactured entirely by hand, using a custom made mould filled by bucket with wet concrete.

10. Due to the labour intensive and slow nature of this process, it was decided to use the wet cast production line in the manufacturing process as follows:

a) The door of the safety cage would be opened and left open.

b) The moulds would be individually brought into the safety cage and placed on the conveyor belt immediately before the dosing station.

c) The operative would leave the safety cage, closing the door behind him. The mould would be filled and taken to the drying area.

d) The process would be repeated.

11. The process would continue to completion.

12. The following day the process would be reversed as follows:

a) The mould is delivered from the drying area.

b) Two operatives would enter, leaving the safety door open and manually remove and disassemble the mould.

c) The two operatives would exit, with the disassembled mould, closing the door behind them.

d) The process would re-start.

13. In May/June of 2011, the respondent received a large order for Ballymun kerbs, and at some point a decision was made to leave the operatives inside the safety cage during the de-moulding process, with the broken down moulds being passed over the safety cage for reassembly. While this lead to an improvement in production speed, it remained slow as the moulds were being reassembled outside and therefore could not be fed back into the production line on a constant basis.

14. To address this shortcoming a decision was made to reassemble the moulds inside the safety cage. As there were no workstations inside the safety cage, the cleaning or vibrating table was used to re-assemble the mould, as it was the only flat surface available. In the normal way, a mechanical arm placed moulds onto the vibrating table for cleaning on a continuous basis and consequently this had to be overridden and shut off to allow the vibrating table to be used to re-assemble the moulds.

15. As the wet cast production line was only used to make Ballymun kerbs in the morning and had to be left in automatic mode at the end of the shift in the evening to complete the cleaning cycle, the operator at the control panel was required to disable the cleaning arm before commencing work in the morning.

16. On the morning of the 6th of September 2011, the operator at the control panel forgot to disable the cleaning arm. The deceased, Mr.. Barry Gargan, and a colleague entered the safety cage as normal and when the deceased commenced reassembling the mould on the vibrating table, the cleaning arm descended, crushing him and killing him instantly.

17. A statement from Mr.. Phelim Tierney, a student who had been working at the plant over the summer, told the court that he had earlier been involved in a "near miss" incident involving the same procedure, in which he was almost killed.

18. Christ Bagnall, the most experienced operative at the plant, said in a statement which was read to the Court that he had previously expressed concerns over the safety of this particular procedure, stating:

> *"The old process of manually pouring kerbs was deemed too slow. Carl asked my opinion about using the wet cast plant to manufacture the kerbs but I told him, 'It's nothing to do with me. You're the boss.' When Carl explained the proposed procedure to me, which included having two men inside the safety zone to de mould the kerb, I told him I wasn't happy with this as it was not the safest way of doing it."*

19. The "Carl" referred to was Mr.. Carl Griffin, a production engineer employed by the respondent at the time, and the person within the respondent's company who had instigated the unorthodox procedure just described. Mr.. Bagnall indicated that notwithstanding the concerns that he had raised with Mr. Griffin concerning the safety of the proposed procedure, Mr. Griffin insisted that that procedure should nonetheless be used.

20. Mr. Griffin was co-accused with the respondent company. He also pleaded guilty and received a fine of €10,000. The applicant has not sought a review of that sentence.

21. The court was told that the Health and Safety Authority (HSA) accepted that the nature of the respondent's business, and particularly quarrying, was comparatively high risk. Despite this the respondent was considered by the HSA to have a relatively good safety record.

22. The respondent has one previous conviction recorded in 2006 for an offence under the Safety, Health and Welfare at Work Act 2005 arising out of a serious accident in a quarry operated by it, where an operator fell off a working platform resulting in the operator receiving serious injuries. The respondent was fined €100,000.

23. The sentencing court was provided with certain financial information concerning the respondent company. While some of this information may be commercially sensitive, and for that reason will not be specifically alluded to save to the extent necessary, it can be stated that the respondent is a substantial entity with very significant assets and turnover. While in common with other businesses involved with the construction industry it had seen a significant downturn in its business for a number of years from 2008, resulting in trading losses in that year and for a number of years thereafter, by the date of sentencing it was well on the road to recovering the ground lost and indeed had achieved a breakeven trading situation, with a forecast for an early return to trading profits.

24. The evidence before the sentencing court was that the respondent had been co-operative with the HSA's investigation into the accident, admitting that it was in the wrong and accepting blame for the tragedy. The plea had been entered at the earliest opportunity. The company had apologised to the Gargan family, and its directors had expressed remorse for what had occurred. It was acknowledged that the late Mr. Gargan had been an excellent employee.

Victim Impact Evidence

25. The sentencing court heard evidence from the deceased man's father, Brian Gargan, who speaking on behalf of the Gargan family, read a pre-prepared victim impact statement into the record. The court also heard in a similar way from Ms Shauna Clutterbuck, the deceased man's partner, who spoke on her own behalf and on behalf of her son Oliver. A further victim impact statement prepared personally by Oliver was also read by Ms Clutterbuck. All three statements spoke poignantly of the loss and heartbreak of those concerned at Barry Gargan's death.

26. The sentencing court also heard evidence that a fatal injury claim had been brought against the respondent on behalf of the relatives and dependents of Mr. Gargan, and that this had been settled and the settlement amount paid promptly by the respondent in circumstances where, by reason of a substantial insurance policy excess, the respondent was effectively self insured.

27. A number of other employees who witnessed the accident suffered nervous shock, and sought compensation from the company on that account. These claims were also settled and paid promptly in similar circumstances.

The Judge's Remarks at Sentencing.

28. After rehearsing at some length the circumstances of the accident and the effect on the victims of the death of Mr. Gargan, the sentencing judge continued:

> *"In respect of the investigation of the offence, there's no doubt at all both the accused, Mr. Griffin and Kilsaran Concrete, fully co operated with the investigation and that this was extremely helpful. In addition to the pleas, which I will deal with specific mitigation in bringing the matter to a successful conclusion, this would certainly have been an extraordinarily long trial and it would not have been uncomplicated though it was explained extremely well by Mr. Madigan and of course understandably so because there's no restrictions, very correctly, by*

both counsel for the from Mr. Griffin's counsel, Mr. Kenneally, and likewise Mr. Hartnett, there was no impediment or obstructions put in respect of any evidence. It was opened out as wide and as fairly as possible, which I believe is very helpful to the families, the Gargan family and to Ms Clutterbuck, but I'm satisfied that the plea of guilty was the early plea by very early plea by Kilsaran Concrete and also the plea by Mr. Griffin was of substantial benefit in this case. It has saved the Gargan family, Ms Clutterbuck and indeed her son Oliver great trauma and distress if they were in a court for it could be weeks listening to the evidence, coming every day. Where I'm not in any way diminishing the trauma and stress but this would have been additional trauma and stress every day in court and in respect of the evidence that would have to be told and proven in respect of the case."

29. The sentencing judge then went on to deal specifically with some aspects of the case against Mr. Griffin, before continuing as follows:

"Then, in respect of Kilsaran Concrete as to count number 8, I must have regard to the maximum custodial prison sentence the maximum custodial penalties are a two year custodial prison sentence or the maximum fine of €3 million. Then, I must decide where does this come in respect of the maximum sentence. I'm satisfied it would be in the middle range and one must also be realistic in respect of fines in that category, which I propose to be. Then, I must have regard to the mitigating the personal circumstances. The company employs currently employs 400 people. It's involved it's a private company. It's involved in quarrying, the manufacture of various concrete products, it's heavy vehicles and it is a substantial business. In mitigation, there was a plea of guilty, fully co operated with the investigation. Again, the pleas of guilty were of substantial benefit to the Gargan family and to the prosecution but more importantly and in particular to the Gargan family and to Ms Shaun Clutterbuck, Barry Gargan's partner and her son Oliver. It has saved the family great trauma and distress. Had the case proceeded it would have been a lengthy, prolonged case and having to sit in court every day listening to the evidence unfold or being given in addition to the tremendous stress and trauma that they have suffered, it would have been compounded if the case had proceeded to trial and if they had to listen to the evidence every day. They have been saved great stress and trauma in the circumstances. I'm satisfied that there's a genuine expression of remorse by the company. There was an effective policy of insurance at the time, though there was a previous conviction back in 2008, other than this conviction they have not come they have not been prosecuted and there has not been other convictions. Otherwise their work record was a good work record except for the two occasions, 2006 and of course on this on the occasion in respect of the death of Barry Gargan on the 6th of September 2011. The aggravating factors in the case is that this is a serious offence. These were the employers of Barry Gargan. They had a very, very substantial responsibility to Barry Gargan in respect of his health and safety when working at the particular location at the particular workplace. The failure of Kilsaran Concrete in respect of the safety of Barry Gargan when working in the manufacturing area that was the wet cast production or casting line where he was working inside in the guarded area he was working Barry Gargan was working at the vibration area inside the safety guard area putting back wooden moulds when the lift arm which was sensor controlled, it was an automatic control, made contact with Barry Gargan causing serious injuries being fatal injuries resulting in his death. Barry Gargan should not have been allowed or permitted to work inside this guarded area in the area of the wet cast production area

which was operational. Also, where the lift arm was operational and automatic and sensor controlled, it exposed him to high risk of injury and in this instance he was exposed to such a risk that resulted in his death. The effect of the death on Barry Gargan on his family, which was outlined by Brian Gargan, and then by his partner, Shauna Clutterbuck and his son Oliver, and what I would simply adopt it's the same as I have said in respect of the effect and the loss which I referred to in Carl Griffin's Mr. Carl Griffin's case. It is just an extraordinary loss which the Gargan family have had to carry, will have to carry, that his partner Ms Shauna Clutterbuck has carried, will carry and this will be carried into the future, indeed most likely for a very and of course I'm not forgetting his son Oliver who must now grow up without a father, a person to guide him, to just have the benefit of having a father or a Dad. This is an enormous, gigantic loss which really cannot be described in words. It is very difficult to describe in words even how careful and how measured or indeed how this tragic and untimely death of Barry Gargan has cost to his own family, the Gargan family, and of course to his partner Shaun and to his young son Oliver. There are serious aggravating factors in the case.

In respect first then I'm going to deal with Kilsaran Concrete. I must have regard to the seriousness of the offence and to the serious aggravating factors and balance them against the mitigating and the personal circumstances and I will have regard to the mitigating and the personal circumstances. Also, in respect of any penalty that I would impose which will be a financial penalty, I am required to have regard to the financial situation. So, in other words it should be proportionate. Indeed, I also believe I'm satisfied I should be I should and I will take into account in respect of the settlement which I have seen the figures and I would not I think perspicacity to all the parties concerned I will not mention them but I have noted them and that's a matter that I should take into account having regard to the fact that at least 98% of the amount, to their credit, it's a substantial mitigating factor, I would have regard to that in respect of the fine that I will impose. In respect of count number 8, then I'm imposing a fine of €125,000."

The Applicant's Submissions

30. In seeking a review of the fine, the applicant relies on the English case *of R v. Howe and Son (Engineers) Ltd.* [1999] 2 All E.R. 249, wherein Scott Baker J. identified a number of principles applicable to prosecutions in health and safety matters. They are as follows:

"In assessing the gravity of the breach it is often helpful to look at how far short of the appropriate standard the defendant fell in failing to meet the reasonably practicable test.

Next, it is often a matter of chance whether death or serious injury results from even a serious breach. Generally where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence. The penalty should reflect public disquiet at the unnecessary loss of life.

Financial profit can often be made at the expense of proper action to protect employees and the public. Cost cutting is a crucial tool in achieving a competitive edge. A deliberate breach of the health and safety legislation with a view to profit seriously aggravates the offence.

Other matters that may be relevant to sentence are the degree of risk and extent of the danger created by the offence; the extent of the breach or breaches, for example whether it was an isolated incident or continued over a period and, importantly, the defendant's resources and the effect of the fine on its business.

Particular aggravating features will include (1) a failure to heed warnings and (2) where the defendant has deliberately profited financially from a failure to take necessary health and safety steps or specifically run a risk to save money.

Particular mitigating features will include (1) prompt admission of responsibility and a timely plea of guilty, (2) steps to remedy deficiencies after they are drawn to the defendants' attention and (3) a good safety record.

Any fine should reflect not only the gravity of the offence but also the means of the offender...

The objective of prosecutions for health and safety offences in the workplace is to achieve a safe environment for those who work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders."

31. These principles have previously been approved and applied in a number of cases in this jurisdiction. See *The People (Director of Public Prosecutions) v. Rosebery Construction Ltd* [2003] 4 I.R. 338 and *The People (Director of Public Prosecutions) v. Oran Pre-Cast Concrete Ltd* [2003] JILL-CCA 121601 (Court of Criminal Appeal, ex tempore, 16th December 2003).

32. Counsel for the applicant submits that insufficient account was taken of a number of aggravating features in the case. He points to the inherent and obvious danger presented by the system of work and the particular work practice adopted in this case, and submits that there is a clear distinction between a system which presents inherent and obvious danger and an accident occurring due to an isolated instance of human error.

33. In *R v. Balfour Beatty Rail Infrastructure Services Ltd.* [2006] E.W.C.A. Crim. 1586 Lord Phillips CJ held that where a breach of health and safety laws occurs due to *"negligence or inadvertence on the part of an individual, which reflects no fault on the part of the management or the system that they have put in place or the training they have provided ... a deterrent sentence on the company is neither appropriate nor possible."*

34. The applicant submits that a number of features of the present case are indicative of an inherently dangerous system of work, involving the deliberate and conscious taking of an unjustified risk as opposed to an omission through negligence or inadvertence, namely: operatives being placed inside a safety cage; operatives being required to work in close proximity to dangerous moving machinery; operatives being required to work on an unsuitable surface and at an unsuitable platform; and reliance being placed on another operative to disable part of the machine at the start of the shift to remove the risk. Evidence was given at the sentencing hearing by a Mr. Mark Madigan, an Inspector from the HSA, who told the court that the accident was "wholly foreseeable". When it was put to him that the inside of the safety cage was "a fundamentally unsafe place to have operators" he agreed. Counsel for the applicant submits that the evidence establishes that the breaches in this case were entirely deliberate and conscious. It was not a case of unsafe practices merely being condoned. Participation in these unsafe practices was

actively encouraged and, in circumstances where Mr. Bagnall's expressed concerns were discounted and overruled, was in fact required of employees by management of the respondent company.

35. A further aggravating feature of the case, the Director submits, is the fact that the practice developed over a period of approximately 12 months. It was therefore not a "once off", or a response to an unexpected occurrence. Accordingly the accident resulting in the death of Mr. Gargan was the culmination of continuous and deliberate breaches of safety requirements over a prolonged period. It is disconcerting to say the least of it that the dangerous practices being engaged in were seemingly not identified and countermanded by the company's safety officer throughout this time.

36. Further, the applicant submits that the dangerous practices engaged in were motivated by commercial expediency and in pursuit of greater efficiency with a view to greater profit. The evidence clearly showed that the practice was adopted to speed up production and the applicant submits that a breach resulting from an intentional decision to engage in dangerous practices for commercial reasons is a significant aggravating feature relevant in assessing the appropriate level of the fine.

37. In *The People (Director of Public Prosecutions) v. South East Recycling Limited* [2011] 3 I.R. 35, a case involving a breach of a waste disposal licence, O'Donnell J identified deliberate breach of the law for profit motives as being a significant aggravating feature. He said:

> *"... the court considers that it is a valid and appropriate and perhaps even essential approach to sentencing in a matter such as this that even in the absence of direct environmental damage, if activities are engaged in which are economically beneficial and if it appears that it is done deliberately and in a sense as part of an economic calculation, then it may be necessary to fix the fine at a level that does not simply ensure that profit is not made or benefit not obtained, but provides a significant disincentive to a breach of the law."*

38. The applicant further contends that insufficient attention was paid to the aggravating features that concerns as to safety expressly raised by an experienced employee were disregarded, and the fact that no heed was paid to, or lesson learned from, the "near miss" experienced and reported by another employee.

39. The applicant also contends that too much credit was given for alleged mitigation in this case, and that a number of factors were taken into account as mitigation which were not in fact mitigating.

40. Counsel for the applicant accepts that the respondent was entitled to credit for the early plea of guilty and its cooperation with the investigation. However, the applicant contends that the sentencing judge erred in taking into account the compensation paid in the fatal injury claim and the personal injuries actions. The respondent paid at least 98% of the compensation, with the insurer covering the remainder and this fact was referred to by the sentencing Judge. However, the applicant makes the point that the substantial insurance policy excess would have had the effect of reducing the premium to be paid by the respondent, and thus says it must be assumed that the respondent has derived a substantial benefit from carrying a large excess and it ought not to have been considered a mitigating factor.

41. The significance for the sentencing process of civil liability to pay compensation arising out of conduct that was also criminal was addressed in *The People (Director of Public Prosecutions) v. Anthony Lyons* [2014] I.E.C.C.A. 27. In that case, the payment of compensation for civil liability arising from a sexual assault was held not to be a mitigating factor in circumstances where it had not imposed a special burden

or significant financial strain on the respondent. The Court of Criminal Appeal stated (at paras 63 to 66):

> *"63. It is almost axiomatic that a person who, through criminal wrongdoing, inflicts injury or loss on another person, that he or she is separately and distinctly liable to pay full compensation in civil proceedings. It represents a civil liability independent of the criminal liability of the convicted person. While there are no statistics or objective information as to the degree to which civil claims are brought following or arising from criminal convictions, it would appear to be a relatively uncommon occurrence, largely because, it would seem, the range of persons which come before the criminal courts are so often persons of little or no means, thus rendering the bringing of civil proceedings futile. It does, however, occur. In this case the resolution of the civil proceedings has occurred by agreement before the full scope of the criminal proceedings had been completed. More often, when it does occur, it will occur after conviction and sentence. The fact that a person is exposed, on conviction, to a potential civil claim, is not a factor which is taken into account in sentencing. It is a separate civil liability. It is also self-evident that where a person who has been convicted has to pay compensation as a result of a successful civil claim subsequent to conviction, the compensation award can have no bearing on the original sentence imposed. In principle, therefore, the Court does not see any reason why the payment of compensation and settlement of a civil action prior to the completion of the criminal proceedings should automatically be a factor, even a marginal factor, in mitigation.*
>
> *64. Counsel for the DPP argued that compensation, and in particular compensation pursuant to s.6 of the Act of 1993, could be a mitigating factor, although marginal, in certain circumstances. (Of course, a compensation order under the Act is, by virtue of s.2, relate to the amount which a victim could recover by way of civil action. It may not exceed such an amount).*
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> *65. In this context, counsel for the DPP relied on the case of The People (DPP) v. McCabe [2005] IECCA 90. That was a case in which the convicted person had to sell his entire herd of cattle in order to pay compensation awarded in that case at the time of sentencing. It was submitted by the DPP that compensation in the particular circumstances of the McCabe case represented a special hardship on the accused and was something which could be taken into account as a mitigating factor as part of the totality of hardship or consequence of a conviction on the accused in that case.*
>
> *66. The Court considers that the application of the criteria of special hardship, according to the circumstances of an accused, irrespective of the amount of compensation, avoids any special treatment for an accused who happens to be particularly well off and can therefore be made pay a high level of compensation by reference to his means as required by s.6 of the Act of 1993."*

42. The Court of Criminal Appeal added, with reference to s. 6 of the Criminal Justice Act, 1993 (at para 68) that:

"...where serious indictable offences are concerned it would seem that, in principle, if a compensation order is being made it should be made only in addition to the appropriate sentence, including imprisonment, that meets the gravity of the case. Of course, the making of a compensation order may arise also in a case where a court, for reasons wholly independent of a compensation order, considers that a

non-custodial sentence, such as a suspended sentence, should apply. As stated, it may nonetheless be a marginal factor in mitigation, where the payment creates a special burden or hardship on the accused."

43. Counsel for the applicant draws our attention to the fact that at the time of sentencing, the respondent in the present case had a very high turnover and a balance sheet exhibiting very sizeable net current assets. There was no evidence that the payment of compensation had imposed special hardship or particular financial strain on the respondent company.

44. It was also argued on behalf of the applicant that the sentencing judge had erred in law in imposing a fine which either had no regard to, or alternatively paid insufficient regard to, the financial position of the respondent company and its ability to pay. The essence of the argument under this heading was that, by any yardstick, this was a case that required emphasis on the penal objective of deterrence, both general and specific. For a penalty to have a specific deterrent effect it must be meaningful, and it must be pitched at a level capable of having deterrent effect on the actual offender with respect to that offender's future conduct. It is contended that this can only be done, in the case of a proposed fine, by taking into account the resources available to the offender in determining the level of the appropriate fine. See the judgment of Murray C.J., on behalf of the Court of Criminal Appeal, to that effect in The *People (Director of Public Prosecutions) v. O'Flynn Construction Co Ltd* [2007] 4 I.R. 500, at para 22. It was submitted that in the present case this was not done, or sufficiently done.

45. The applicant accepts that any fine must nevertheless be proportionate and acknowledges the law in that regard concerning the sentencing of corporate offenders as set forth by this Court in *The People (Director of Public Prosecutions) v. Cavan County Council and Oxigen Environmental Limited* [2015] IECA 130.

46. There is a further specific complaint that the sentencing judge failed to attach any or any sufficient weight to the need to provide general deterrence in determining upon the level of the fine in this case. In support of this contention we were referred to *R v Palmer & Harvey McLane Ltd* [2013] 1 Cr App Rep (S) 34 where Stanley Burnton L.J stated:

> *"However, the purposes of a fine go beyond that purpose. In our judgment, they include the marking by the court of society's condemnation of the company's breaches. The size of the fine marks the importance of the breach, both in terms of the gravity of the offending and the importance of the safety of employees and members of the public who may be affected by the operations of any business. There is punishment as a proper purpose and deterrence, not only of the appellant itself, the company whose breach of the statutory duty is in question, but of others who have in their hands care for their employees or members of the public or both."*

47. Our attention was drawn to a number of comparators, although it has to be said immediately that none of these are very close comparators. Moreover, while some represent reported or unreported judgments of the superior appellate courts, a number of them represent case notes of decisions of the District Court or Circuit Court that are recorded either on the website of the HSA (See www.hsa.ie /eng /Topics /enforcement/Prosecutions/), or in that organisation's annual reports. While such case notes are useful up to a point, they do not record a full account of the evidence or the *ipsissima verba* of the sentencing judge, and therefore must be treated with some caution. The comparators drawn to our attention include *The People (Director of Public Prosecutions) v. Roadteam Logistic Solutions* [2016] IECA 38; *The People (Director of Public Prosecutions) v. The Health Service Executive (HSE)* (HSA Casenote, Dublin Circuit Criminal Court, 25th

October 2013); The People (Director of Public Prosecutions) v. Smurfit Newspress Ltd (HSA Casenote, Trim Circuit Criminal Court, 29th October 2004) and *The People (Director of Public Prosecutions) v. Oran Pre-Cast Concrete Ltd* [2003] JILL-CCA 121601 (Court of Criminal Appeal, ex tempore, 16th December 2003).

48. It is suggested that the closest comparator is the Roadteam case. It is not contended that the facts were in any way similar. That case had involved inadequate securing of cargo by a haulier, leading to the death of two persons and injuries being caused to four others. However, it is put forward as the closest comparator on the basis that it exhibited not mere negligence or oversight but deliberate breaches of health and safety requirements for commercial gain. This Court regarded the particular breaches in that case as *"omissions ...of a high order"* and agreed with the comment of the sentencing judge in the court below that they amounted *to "a gross dereliction of the defendant's statutory duty"*. This Court also remarked that *"it was all the more serious because they related to a core activity of the appellant's business"*. A fine of €1,000,000 was upheld by this court. The applicant contends that the breaches in the present case were just as egregious.

49. The *Smurfit* case, which is also advanced as a comparator, is referred to in some detail in the *Roadteam* case. A fine of €1,000,000 was imposed in respect of two accidents in which one worker lost a leg and the second suffered a injury to his hand. The case note records that in imposing the fine, the sentencing judge noted what he described as a cavalier attitude to health and safety in the pursuit of profit.

50. In the *HSE* case, which is also put forward as a comparator, the defendant pleaded guilty to two charges, one involving a failure to have a written risk assessment and the other involving a failure to provide information, instruction and training to their employees in relation to the use by their employees of rear-hinged side doors on ambulances. The case had involved a fatality as a result of a person falling out of an ambulance. Cumulative fines of €500,000 were imposed. However it bears commenting upon that the case note is sparse in the details that it records and the usefulness of this case as a comparator is therefore very limited.

51. The case of *Oran Pre-Cast Concrete Ltd* is drawn to our attention in this context, not for the purpose of suggesting its similarity to the present case, but rather for the purpose of distinguishing it. That case had involved a prosecution arising out of an accident in which an employee fell to his death from a roof. A fine of €100,000 was imposed. However, the point is made that there was no deliberate disregard of health and safety requirements in that case, unlike in the present case. Rather, the defendant's culpability arose from the failure to prevent the occurrence of an accident. The circumstances were that two employees were tasked to fit a gutter while positioned on a mobile scaffolding tower. They unexpectedly found that they needed to step onto a roof due to the fault of a third party in failing to do adequate preparatory work. They did so in circumstances where they were insufficiently harnessed and one man fell thirty feet to his death. It was specifically noted in the judgment in *Oran Pre-Cast Concrete Ltd* that there was no element of risks being run specifically to save money in that case. The applicant emphasises that, on the contrary, that was indeed the situation case in the present case.

The Respondent's Submissions

52. The respondent has sought to emphasise the jurisprudence on the exercise by this Court of its jurisdiction to review a sentence on the grounds that it is unduly lenient pursuant to s.2 of the Criminal Justice Act 2003. We were referred to the line of cases, with which we are already very familiar, comprising *The People (Director of Public Prosecutions) v. Byrne* [1995] 1 ILRM 279; *The People (Director of Public Prosecutions) v. McCormack* [2000] 4 I.R. 356 and *The People (Director of Public Prosecutions) v. Stronge* [2011] IECCA 79.

53. The Byrne case indicated, *inter alia*, that *"nothing but a substantial departure from what would be regarded as the appropriate sentence"* could justify intervention by a reviewing court, while the McCormack case stated that *"undue leniency connotes a clear divergence ... from the norm"*. The Stronge case had spoken *of "a substantial or gross departure from what would be the appropriate sentence in the circumstances."* The Byrne case had also stressed the need for great weight to be afforded to the sentencing judge's reasons for imposing the sentence.

54. Some significance is attached by counsel for the respondent to the suggestion in *Stronge* that *"it is necessary for the divergence between that imposed and that which ought to have been imposed to amount to an error of principle, before intervention is justified"*. We would comment in that regard that while we do not disagree with that as a statement of principle, it may be trite to observe, as indeed Barron J did in *McCormack*, that any sentence that involves a clear divergence from the norm *"would, save perhaps in exceptional circumstances, have been caused by an obvious error of principle."* Indeed, we consider that the very fact that a sentence is regarded as being unduly lenient means a fortiori that there was an error of principle on the part of the sentencing judge; although frequently other discrete errors of principle leading to, or contributing to, the imposition of the unduly lenient sentence will also have been identified.

55. In addition the respondent has sought to remind us of some of our own more recent jurisprudence, namely that in *The People (Director of Public Prosecutions) v. C.McC* [2016] IECA 351 and *The People (Director of Public Prosecutions) v. Prenderville* [2015] IECA 33. In both of the latter cases this Court indicated that a sentencing judge enjoys *"a wide discretion"* as to the sentence to be imposed in any particular matter.

56. The respondent contends that the sentencing judge acted within the scope of his acknowledged wide discretion in characterising the offence as falling within the middle range of offending.

57. The respondent further contends that the sentencing judge was fully alive to the various aggravating features of the case highlighted on behalf of the applicant, and took them into account. It is suggested that the sentence imposed was therefore balanced, fair and just.

58. With respect to the mitigating factors in the case, the respondent contends that the sentencing judge engaged in a balanced consideration of all the relevant factors.

59. Dealing specifically with the contention that compensation paid was wrongly taken into account as a mitigating factor, it was submitted that payment of a civil award is a matter of relevance in terms of ascertaining the ability of a company to pay a fine imposed in a criminal prosecution and was correctly taken into account the sentencing judge. Various passages from *The People (Director of Public Prosecutions) v. Anthony Lyons* [2014] IECCA 27; *The People (Director of Public Prosecutions) v. Rosebery Construction Ltd* [2003] 4 IR 338 and *The People (Director of Public Prosecutions) v. Cavan County Council and Oxigen Environmental Limited* [2015] IECA 130, are advanced in the respondent's written submissions as providing some support for this submission.

60. It has been further submitted on behalf of the respondent that the sentencing judge was also entitled to take into account the financial difficulties that had been faced by the respondent (and indeed other building material firms) as a result of the financial collapse in 2008 and the resultant effect on the construction industry. The court was provided with details of the respondent's financial situation which showed that it operated at a loss for many years and was obliged to dispose of certain assets to secure the future of the company. It was submitted that this situation was also a matter that the sentencing judge was entitled to take into account in measuring the appropriate fine.

61. We were referred to the following passage from O'Malley, *Sentencing Law and Practice* (3rd Edition, 2016) at para 2.12:

> *"A penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and to society at large the painful consequences of engaging in the conduct constituting the relevant offence."*

It is suggested that the sentencing remarks of the judge at first instance fully reflect this principle, particularly in the way in which he highlighted the aggravating features and the harm done. It was submitted that in constructing the sentence the sentencing judge was guided by the principles of proportionality and deterrence, and in doing so took account of the gravity of the offences as well as the respondent's circumstances.

62. In response to the comparators put forward by the applicant counsel for the respondent advocates that caution should be exercised in relation to these in circumstances where the facts are not comparable to those in the present case. It is emphasised that the appropriate sentence in a given case is contingent on the facts of the case.

63. The respondent says in response to the applicant's emphasis on the remarks of this Court in *The People (Director of Public Prosecutions) v. Roadteam Logistic Solutions* [2016] IECA 38 that while a breach of a core activity is a serious aggravating factor, it is but one of a number of factors to which the sentencing court should have regard. It does not in and of itself dictate the level of fine to be imposed.

64. A number of other comparators are advanced in illustration of this, i.e *The People (Director of Public Prosecutions) v. Irish Ferries* (no citation provided), a case in which it is said there was a prosecution relating to a core activity of the company. The defendant company pleaded guilty to failing insofar as reasonably practicable to ensure that persons not in its employment were not exposed to risk to their safety, health and welfare in circumstances where a rubber tyre which fell from a 90 metre high crane and fatally injured a worker. The sentencing judge is said to have imposed a fine of €125,000.

65. Similarly, in The *People (Director of Public Prosecutions) v. Kelly's of Fantane (Concrete) Ltd* (Nenagh Circuit Criminal Court, 11th July 2004) the death of the deceased resulted from the performance of a core activity of the defendant company. The defendant company pleaded guilty to failing to manage and conduct work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of its employees. The defendant company was involved in construction work and was laying road-surfacing materials and using six 40-tonne dump trucks to transport the materials. While one of the dump trucks was being reversed it collided with and fatally injured an employee of the defendant company. The sentencing judge imposed a fine of €20,000 on the defendant company.

66. The respondent contends that there were aggravating factors present in *Roadteam Logistic Solutions* not present in the instant case rendering it of limited comparative value. In *Roadteam Logistic Solutions* the breach of statutory duty resulted in the deaths of two individuals and personal injuries to four additional persons. The respondent does not seek to assert that the consequences of the breach in the instant case were anything other than extremely serious. However, the lesser number of fatalities and injured parties ought to be noted.

67. In relation to *The People (Director of Public Prosecutions) v. The Health Service Executive (HSE)* (HSA Casenote, Dublin Circuit Criminal Court, 25th October 2013) we are asked to note that the fines amount of €500,000 was an aggregate figure

and that the break down between the two counts to which the defendant pleaded guilty was a fine of €350,000 in respect of the failure to conduct a risk assessment and €150,00o in respect of the failure to provide information, instruction and training to their employees in relation to the use by their employees of rear-hinged side doors on ambulances.

68. In relation to *The People (Director of Public Prosecutions) v. Smurfit Newspress Ltd* (HSA Casenote, Trim Circuit Criminal Court, 29th October 2004) the respondent asks us to note that the case involved two separate incidents, and that the defendant company had pleaded to a total of six charges.

69. In conclusion the respondent has submitted that the sentence imposed in this case was not unduly lenient, but rather was balanced fair and just.

The Court's Analysis and Decision

70. Having regard to the criticisms of the sentence imposed by the court below voiced by the applicant we will consider the case in the first instance under four main headings before then indicating our conclusions. Those headings are: (i) the assessment of the gravity of the case; (ii) the allowance made for mitigation; (iii) proportionality in the overall sentencing process; and (iv) sentencing policy issues.

The assessment of the gravity of the case

71. The sentencing judge was required in the first instance to assess the gravity of offence. It is well established that this is to be done with reference to the available range of penalties, and by seeking to locate on that range where the case falls to be located having regard to the culpability of the offender and the harm done. In a case of this sort, involving as it does a corporate offender and serious circumstances, the only viable penalty is likely to be a monetary fine. In the instant case the range of available fines runs from zero up to €3,000,000.

72. In this case the respondent's culpability was very high indeed. The offence involving an egregious failure to maintain or enforce safety standards, resulting in a fatality. There were numerous highly aggravating features of the offence. Harm was caused not just to the late Mr. Gargan, who lost his life, but also to the deceased man's parents and siblings, to his partner Ms Clutterbuck and her son Oliver, and also to Mr. Gargan's co-workers who witnessed the accident and suffered nervous shock as a result.

73. There was a deliberate breach of the law in order to maximise profits. There was a conscious and deliberate discounting of safety concerns raised by an experienced employee. A previous near-miss was disregarded and ignored. The practices which culminated in the accident were adopted incrementally over a period of in excess of a year and created a very high level of risk and significant danger. This was not a case of passive neglect or omission giving rise to a one off incident, or where a momentary lapse of attention by an operative gives rise to tragic consequences. On the contrary, there as a willful neglect of the duty to ensure, as far as practicable, the safety of the respondent's employees and a calculated decision to take unjustified risks. The impugned practices were not merely condoned, they were actively encouraged and, indeed, participation in them was required by a member of senior management in the respondent company. While there is no suggestion that there was actual knowledge of the practices in question at board level, it is a matter of concern that in an entity the size of the respondent these practices do not appear to have been picked up on any safety audit, or brought to the attention of the board by the company's safety officer. That these things did not occur raises legitimate questions concerning the safety culture in this division of the respondent's business at the material time. While the manufacture of concrete kerbing is only one facet of the respondent's business, the manufacture of pre-cast concrete products is undoubtedly a core activity of their business.

74. Ignoring for the moment the respondent's financial resources and ability to pay, and assessing gravity with reference to the full spectrum of potential fines, we consider that this case would merit a headline sentence towards the top end of mid range or towards the bottom end of the high range on that spectrum, where the available scale is divided three ways to give a low range (involving fines from zero to €1,000,000), a mid range (involving fines from €1,000,001 to €2,000,000) and an high range (involving fines from €2,000,001 to €3,000,000). In our view therefore an appropriate headline sentence would have been a fine of between €1,750,000 and €2,250,000.

75. The sentencing judge did not nominate any particular headline sentence. However, he did express the view that the case *"would be in the middle range"*, but he immediately qualified this statement by adding that *"one must also be realistic in respect of fines in that category."* We will consider that qualification in more detail under the heading of Proportionality, and also consider in that context the relevance, if any, in this case of the respondent's financial resources and ability to pay. It is sufficient to state at this stage that we agree with the applicant that the sentencing judge failed to adequately reflect the gravity of the offending conduct in his sentence, and that was an error of principle.

The allowance made for mitigation

76. On the mitigation side of the equation, the applicant suggests that it was inappropriate for the trial judge to have treated payments made by way of compensation as a mitigating factor in the circumstances of this case. The current law on this is well covered in the applicant's submissions summarised earlier in this judgment. In general such payments are not to be treated as mitigation, though some account may be taken of them if there is evidence that they will give rise to particular hardship for the offender.

77. We would add the following remarks. The situation with respect to compensation is not wholly black or white. Notwithstanding that a legal liability to pay compensation on foot of a civil claim may arise where somebody has been injured due to a clear breach of statutory duty in the health and safety sphere by a defendant, an early facing up to such a claim or claims, and the payment of financial restitution, can be evidence of genuine remorse.

78. In addition, the payment of compensation by a so-called man of straw, e.g., a person who is unemployed or in low level employment, and who has no assets, and who has borrowed from friends or relatives, or perhaps his local credit union, in order to do so, may be treated as mitigation for several reasons. Firstly, because it can again be evidence of remorse and of the taking of responsibility, secondly, it may provide some financial restitution for the injured party in a situation where, even if he or she secured a judgment, there would otherwise be little likelihood of being able to execute it, and thirdly because the taking on of such debts may represent a hardship for the offender.

79. In this case, however, there was little basis for the taking into account of the payment of compensation beyond regarding the manner in which the claims were speedily addressed as an earnest of remorse. However, remorse was separately taken into account by the sentencing judge. The actual payments did not impose significant hardship on the respondent having regard to its resources, and the point is well made by the applicant that the existence of a policy excess was irrelevant. The decision to insure subject to a substantial excess was a commercial decision taken by the respondent, for which it would have received benefits, and in particular would have been liable to pay a lower premium.

80. It is a problem in this case that it is unclear from the sentencing judge's judgment how much discount he gave for mitigation overall, much less the extent to

which discount was allowed for the compensation factor. However, although it cannot be quantified, it is clear from the judgment that some allowance was made for the payment of compensation and we agree with the applicant that that was an error of principle.

81. We are satisfied that it was proper to have made due allowance for the plea of guilty, the offender's co-operation, remorse, remedial steps taken, and the respondent's generally good safety record apart from the circumstances giving rise to this case. The sentencing judge does not appear to have regarded the previous conviction in this case, which was some time ago and related to a completely different aspect of the respondent's business, as reducing the mitigation to which the respondent was entitled on account of a generally good safety record. We consider that he was correct in that regard.

82. We do not know the exact amount of discount actually afforded in this case, and would merely remark that anything above a 50% discount could not have been legitimately contemplated in the circumstances of this case. Indeed a discount at that level, if applied, would be regarded as generous.

Proportionality

83. As we stated in *The People (Director of Public Prosecutions) v. Cavan County Council and Oxigen Environmental Limited* [2015] IECA 130, in certain circumstances the penalty range provided by a statute may be *"a less than reliable tool for accurately gauging the seriousness of any particular offence arising under [the Act in question], and certainly not one to be relied upon in isolation."* This remark is apposite to a situation where a regulatory statute creates a myriad of offences for which it provides a single penalty range. That was true in the case of the Waste Management Act 1996 which featured in the *Cavan County Council and Oxigen Environmental Ltd* case, and it is also true in this case.

84. In this case the respondent has pleaded guilty to an offence under the Safety, Health and Welfare at Work Act 2005 (the Act of 2005). The greater part of the Act of 2005 is concerned with specifying the duties imposed on employers, employees and others to ensure safety in the workplace, and the procedures to be put in place for that purpose. The Act makes the failure to comply with almost any obligation created in that regard a criminal offence. There are therefore a myriad of potential offences. Despite this there is only one penalty section, s.78, and identical penalties are provided for all potential offences whether they involve venial or mortal sins. The potential penalty that might be imposed in the case of a corporate offender involves a fine of up to a maximum of €5,000 in the case of an offence prosecuted summarily, and in the case of an offence prosecuted on indictment a fine of up to a maximum of €3,000,000. However, as many of the offences created by the Act of 2005 may only involve non compliance with a regulation and not a morally culpable failure to maintain or enforce safety standards, were such a case to be prosecuted on indictment the maximum fine could never realistically be contemplated; nor indeed could any fine other than one towards the lower end of the notional spectrum. It would simply not be realistic to assess seriousness in such cases with reference to the vast range available, and a court is understandably likely to approach the task with reference to what it considers to be the realistic range.

85. We would suggest that experience and precedent indicates that cases involving moderate culpability and resulting in moderate harm would rarely attract a fine in excess of a six figure sum today, with the result that the first one third of the available range may represent the realistic spectrum of fines that is in fact applied in such cases. The fact that the fines applied are at the low end (in the first one third) of the actual available range is not reflective of their actual gravity. A low fine relative to the range that the Oireachtas has set will not necessarily be indicative of the culpability involved and the harm done in such cases.

86. Even in the case of offences such as the present involving a highly culpable failure to maintain or enforce safety standards, and resulting in serious harm, the requirement to impose a proportionate sentence may in some cases militate against benchmarking gravity with reference to the full range of potential fines, and again in that situation a court would be justified in approaching the task with reference to a lesser more realistic range taking into account the offender's resources and ability to pay.

87. However, in an appropriate case gravity should be assessed with reference to the full available range.

88. In this case while the sentencing judge noted that the available range involved a fine of up to a maximum of €3,000,000, and expressed the view that the case fell to be located in the middle range, he also stated that *"one must be realistic in respect of fines in that category"* which suggests that he intending adjudging the case with reference to what he considered to be the realistic range rather than with respect to the full range. We have already indicated that in certain cases that may be an appropriate approach. It begs the question: was it the appropriate approach in the circumstances of this case?

89. A major problem with the sentencing judge's approach is that he gives no indication in his judgment as to what he considers the realistic range to be, or as to the criteria by means of which he has determined upon that range. The most potentially relevant considerations in that regard would be the financial resources available to the respondent, and the respondent's ability to pay, but the only reference the sentencing judge makes to such considerations is where he states: *"Also, in respect of any penalty that I would impose which will be a financial penalty, I am required to have regard to the financial situation. So, in other words it should be proportionate."*

90. It is acknowledged that the sentencing court was provided with some financial information which it was entitled to have regard to. Precise figures will not be given in this judgment for reasons of commercial sensitivity. However, the information before the sentencing judge indicated that following the economic downturn that began in 2008 the respondent had incurred serial losses in subsequent years and that this had continued until 2014. Further, the court was told that it had had to dispose of some assets to fund continuing operations in the teeth of the losses that it had accumulated. However, the evidence was that as of the date of sentencing the company was experiencing a recovery, and a break-even trading situation had been achieved in 2015 with the forecast of a return to profitability in 2016. The company's current turnover is very substantial (in the nine digit range) and despite the disposal of some assets it retains a very strong balance sheet comprising assets valued at many millions of euro.

91. We do not consider that the circumstances of the present case justified the sentencing judge in disregarding the full available range of fines in favor of an unspecified, but manifestly lesser, range of fines that he considered to be realistic. In doing so he fell into error. While this approach might be justified in some cases in the interests of proportionality, it was not called for in the circumstances of this case where the circumstances were truly egregious and this respondent has adequate resources and ability to meet any fine imposed. That is not to say that having to meet a very substantial fine would not be painful for the respondent company and its shareholders. It is very likely to be so, and indeed it is desirable that it should be so in the interests of meaningful deterrence, both general and specific. However there is simply no evidence that the imposition of a very substantial fine in this case would threaten the viability of the company or precipitate its dissolution.

Sentencing policy issues

92. In *The People (Director of Public Prosecutions) v. Cavan County Council and Oxigen Environmental Limited* we stated:

> *"In the case of a corporate offender, while there is no constitutional requirement of proportionality in terms of interference with personal rights and personal liberty, sentencing must nevertheless be fair to the corporate offender and be in accordance with the constitutional guarantee of due process. Accordingly, the process of sentencing a corporate offender must still take account of the gravity of the offence, including the culpability of the offender, and relevant circumstances of the entity concerned should be taken into account in mitigation. A sentencing court must still have regard to the sentencing objectives of retribution, deterrence (both specific and general), and rehabilitation but there will frequently be more emphasis on deterrence than on the other objectives"*

93. In this case the applicant complains that the sentence imposed by the court below failed to adequately address the need for deterrence, both general and specific. We agree. The law breached in this case was designed to protect and promote public welfare and particularly the welfare of employees in their place of work. The respondent's reckless disregard for safety in the pursuit of profit drove a coach and four through the policy of the legislature, and requires to be punished and future conduct of that sort requires to be deterred. The ultimate sentence was one of €125,000 and it was entirely inadequate in the circumstances of this case to communicate the appropriate messages. Even assuming a generous but appropriate discount of 50% for mitigation, that would have meant the sentencing judge's starting point was €250,000 which was simply too low by far, both in terms of adequately punishing the offence, but also and more importantly in terms of deterring the respondent, and others, from engaging in similar breaches and disregarding safety requirements in the future.

Conclusions

94. We are satisfied that the sentence in this case was unduly lenient as being a clear departure from the norm, and one caused by the several errors of principle that we have identified. In the circumstances we will quash the sentence imposed in the court below and proceed to resentence the respondent.

Resentencing

95. In accordance with established practice in this Court we invited the parties to submit, on a contingent basis, any additional materials that they would wish to have taken into account in the event of the Court having to proceed to a resentencing. We were informed on behalf of the respondent that the trend towards improved trading conditions and a likely return to profitability in the short to medium term indicated in the earlier data provided to the sentencing court continues.

96. We consider that the gravity of this case, considered with reference to the range of punishments set by the Oireachtas, and having regard to the respondents very significant culpability and the substantial harm done, merited a headline sentence involving a fine of €2,000,000. We will allow a 50% discount for the mitigating factors in the case. The final sentence therefore will be a fine of €1,000,000.

Costs

97. We will hear submissions from counsel on both sides concerning the costs of the prosecution. However we draw to the parties attention s. 78(4) of the Act of 2005 which provides:

> "Where a person is convicted of an offence under the relevant statutory provisions in proceedings brought by the Authority or a prescribed

person under section 33 , the court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay to the Authority or the prescribed person under section 33 the costs and expenses measured by the court, incurred by the Authority or the prescribed person under section 33 in relation to the investigation, detection and prosecution of the offence including costs and expenses incurred in the taking of samples, the carrying out of tests, examinations and analyses and in respect of the remuneration and other expenses of employees of or consultants and advisers engaged by the Authority or the prescribed person under section 33 , as the case may be."

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