**ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES**

**DIRECTOR OF PUBLIC PROSECUTIONS**

v.

**ALL SEASONS ARBORY PTY LTD**

**DEFENCE SENTENCING SUBMISSIONS**

**The Charge and Plea**

1. ALL SEASONS ARBORY PTY LTD (All Seasons) has pleaded guilty to one count under the *Occupational Health and Safety Act* 2004 (theAct) contrary to sections 21(1) and (2)(a); the basis of each count is set out in the particulars.

# A committal proceeding was commenced. As a result of the indisposition of the presiding Magistrate the matter was adjourned. Upon resumption, the matter was resolved with withdrawal of one charge and the modification and reduction of particulars.

1. The plea of guilty was entered at the committal in June 2017-
   1. the plea was entered as a result of negotiation;
   2. the plea demonstrates the remorse of the company (and its directors) at the incident;
   3. in light of the negotiation involved and the reduction of charges and particulars it is to be treated as an early plea.
2. Note also that his Honour Judge Mclnerney in *R v. Redline Towing Pty Ltd* [2010] VCC at [74] recognised the utilitarian benefit of a plea of guilty.

Not only is that to the utilitarian benefit, that is that it saves the witnesses, it saves the State the cost of a trial, but it is also indicative of remorse.

# The plea is indicative of:

* 1. remorse.

1. Section 5(2)(e) of the *Sentencing Act* 1991 (provides):

"(2) In sentencing an offender a court must have regard to--

# (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and"

# It is plain that the plea is relevant. It can only be relevant by way of a discount to the fine the court would otherwise impose: *R v. Tasker and Tasker* (2003) 7 VR 128.

1. Section 6AAA of the *Sentencing Act* (relevantly) provides:

**"6AAA Sentence discount for guilty plea**

1. If-
   1. in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence; and
   2. the sentence imposed on the offender is or includes-
      1. an order under Division 2 of Part 3; or
      2. a fine exceeding 10 penalty units; or
      3. an aggregate fine exceeding 20 penalty units-

the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.

1. If the court makes a statement under this section, it must cause to be noted in the records of the court, in respect of each offence and the total effective period of imprisonment, if any, the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.
2. For the purposes of this section, an aggregate sentence imposed in respect of two or more offences is to be treated as a sentence imposed in respect of one offence."

# The court must state the penalty it would have imposed but for the plea of guilty. 1

* 1. There is no specific figure mandated as an appropriate discount for a plea of guilty in Victoria.
  2. In *Cameron v. The Queen* (2002) 209 CLR 339, it was accepted that judicial practice in Western Australia was to accord a discount of between 20 and 35 per cent for an early plea of guilty.2 Gaudron, Gummow and Callinan JJ observed (in construing s.8(2) of the *Sentencing Act* 1995 (WA)):

"[19] Once it is appreciated that s 8(2) of the Sentencing Act is to be reconciled with s 7(2)(a), which gives effect to the common law requirement that an offender not be penalised for pleading not guilty, s 8(2) must be read as allowing that a plea of guilty may be taken into account in ·mitigation for the reason that a guilty plea evidences a willingness to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice. That being so, the relevant question is not simply when the plea was entered but, as was accepted by the Court of Criminal Appeal in this matter, whether it was possible to enter a plea at an earlier time.

[20] The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet. As was acknowledged in *Atholwood v R* (1999) 109 A Crim R 465 by Ipp J, in the Court of Criminal Appeal of Western Australia, the question is when it would first have been reasonable for a plea to be entered."

* 1. In *R v. Tasker and Tasker* (2003) 7 VR 128 Eames JA for court said, at [24]:

"[24] Ordinarily, pleas of guilty are to be taken as evidence of some remorse quite apart from the value they have in saving expense and inconvenience to the community, but they would be worthy of a *significant sentencing discount* even if the only factor worthy of being given particular weight was the avoidance of expense and inconvenience of a trial."

[Emphasis added] And at [25]:

"[25] The entitlement to a discount on sentence for a plea of guilty arises whether or not the offender has prior convictions and irrespective of his motive for the plea, and in this case there was no reason why the value of the pleas ought to have been discounted at all, as to any of the relevant considerations."

1. It is submitted that the relevant considerations include:
   1. That the plea is evidence of remorse;
   2. That it saves the community the time and expense of the conduct of a committal proceeding and a trial;
   3. That the witnesses are spared the necessity of reliving the events;
   4. That the victims are spared the trauma of revisiting the matter at length;
   5. That it evidences a willingness to facilitate the course of justice.

**Character and antecedents -All Seasons**

1. The Company has no prior convictions.
2. All Seasons was formed in 2007 as an unincorporated business.
3. In 2009 it was registered as an Australian Proprietary Company.
4. All Seasons has no prior offending or incidents.
5. As at the 1st May 2014 the company employed 16 staff.
6. Safe work method statements were prepared for all tasks- (p 750 HUB).

**The nature of the breach and its seriousness**

1. The sentencing Court should look at the nature of the breach, not the consequences. This point has been the subject of recent consideration by the Victorian Court of Appeal. In *Dotmar Epp Pty Ltd v The Queen* [2015] VSCA 241 Priest JA for the Court said at para 22:

"[22] With respect, the fallacy inherent in that approach lies in the assumption that the seriousness of an offence under the OHSA is necessarily to be gauged by whether death or injury has been caused (or, for that matter, by whether there is an absence of death or injury). Such an approach equates the gravity of the consequences of a breach -that is, whether the breach resulted in death or injury, or neither death nor injury - with the gravity or seriousness of the breach. The OHSA is concerned generally with risks to health and safety; and, under Pt 3, concerned specifically with the duties owed with respect to health and safety. *It is the extent of the failure to ensure that employees are not exposed to risk to their health and safety which determines the objective gravity of the offence.* The consequences of the failure generally do not. That is not to say that the fact of death or injury occurring is necessarily irrelevant. The occurrence of an accident, resulting in death or injury of a particular kind, may inform an assessment of, first, the existence of the risk, and, secondly, the nature and seriousness of that risk."

# [Emphasis added.]

1. In the present case there is no evidence that All Seasons ignored a risk, at the time the belief was that the risk could be managed by an appropriate climber and could be done within the appropriate limits of approach. It is therefore not the case that there is an evidenced "disregard" for the health and safety of Mr Eckhart.
2. The Victorian Court of Appeal also addressed the issue recently in *DPP v. Frewstal Pty Ltd [2015] VSCA 266:*

**"[126]** An important question arose in this appeal concerning the effect on penalty if death or serious injury has resulted from the relevant breach of the OHSA. Given that this is so, it is necessary that we make some further observations as to sentencing in cases such as the present. In so doing, we are not unmindful of the fact that Chad Lynch's death has had a significant impact on those close to him. His widow, Greta Boyd, and his mother, Nola Hinch, both described the devastating effect upon them and their family of Mr Lynch's injuries and death. In cases such as the present, it is natural that the family members and friends of a person who has lost his or her life will focus primarily on the fact of death. So much is only a natural human response. It is therefore important that the court endeavour to make clear the manner in which legal principle dictates that sentencing must be approached in a case of this kind.

[127] In our opinion, sentencing judges should be guided by the following principles:

* + First, unlike cases of unlawful homicide, the occurrence of death or serious injury is not an element of the offences charged. An accused is punished according to the gravity of the breach of duty owed under the OHSA, not according to the result or consequences of the breach.
  + Secondly, the gravity of the breach is measured by two factors­ the seriousness of the breach itself (that is, the extent to which the defendant has departed from its statutory duty); and, the extent of the risk of death or serious injury which might result from the breach.
  + Thirdly, an assessment of the extent of the risk itself involves consideration of two factors -the likelihood of the occurrence of an event as a result of the breach (such as the event that occurred in the particular case) endangering the safety of employees or others; and, the potential gravity of the consequence of such an event (in particular, whether there is a risk of death or serious injury).
  + Fourthly, the fact that the breach in the particular case resulted in death is relevant only in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to health or safety resulting from the breach."

1. In *Director of Public Prosecutions v Amcor Packaging Australia Pty Ltd* (2005) 11 VR 557 at 565 [35], the Court said:

"[35] When determining the appropriate penalty in a case of the breach of a statutory duty imposed for the purpose of protecting the lives and well being of those who may be affected by the breach, the foreseeable potential consequences must be taken into account as it is the avoidance of those consequences which, when considering the objective seriousness of the offence, constitutes the raison d'etre for the establishment of the legislated regime in the first place. To a substantial extent the seriousness of a breach must be assessed by reference to those potential consequences and the measure of evidenced disregard concerning the safety of employees in the circumstances."

**The purpose of sentencing - general deterrence**

1. General deterrence is the most important sentencing factor (see *Amcor* at paragraph [36]).
2. General deterrence is not a justification for exceeding a proportionate sentence: *Veen No 2* (1988) 164 CLR 465 as applied by his Honour Judge Hassett in the *DPP v Nylex Corporation,* 24 October 1997, County Court.

**Specific deterrence**

1. The company has no prior convictions.
2. There is less need for specific deterrence where a company has made safety improvements following the event.

**Financial Circumstances**

1. The company is a family owned and operated business.
2. It is a Small Business.
3. There are not significant financial circumstances.

**Prosecution Relevant Comparators**

1. No Comparators have been provided by the prosecution to date.
2. The defence relies on the recent decision of the Magistrates court on 18 October 2017.

**Maximum Penalty**

1. A significant maximum penalty demonstrates the Parliament regards the worst classes of those offences as very serious. It is noted that a sentencing judge should not "aim for the maximum" but steer by it: *DPP v Aydin & Kirsch* (2005) VSCA 86 at [11].
2. A breach of section 21(1) and 2(a) of the **Occupational Health & Safety Act** 2004 carries a maximum penalty of 9000 penalty units for a body corporate. (See section 21.) At the time of these offences a penalty unit is $144.36. Therefore, the maximum penalty in dollars is $1,299.240.00.

**Sentencing in OHS Cases**

1. His Honour Judge Mclnerney observed in *R v Redline Towing and Salvage Pty Ltd:*

**"[70]** However, I think it is important for all parties to remember that these offences which were a cause and resulted in a work related fatality are as serious as any other criminal offence, which was earlier expressed by the Court of Appeal. But equally, such is not more serious than any other criminal offence. Such legislation brings what is previously known as an industrial accident into the criminal field, it does not create a field of its own."

**Counsel for the defendant**