IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. AP-18-2496
AP-18-2497
AP-18-2505
AP-19-0361
AP-19-0362
AP-19-0363

160 LEICESTER PTY LTD
RAMAN SHAQIRI
STEFCE KUTLESOVSKI — Appellants

v

CITY OF MELBOURNE
VICTORIAN BUILDING AUTHORITY
ENVIRONMENT PROTECTION AUTHORITY — Respondents

JUDGE:	HIS HONOUR JUDGE WRAIGHT
WHERE HELD:	Melbourne
DATE OF HEARING:	19 & 20 August 2019
DATE OF SENTENCE:	6 September 2019
CASE MAY BE CITED AS:	160 Leicester Pty Ltd, Shaqiri, Kutlesovski v City of Melbourne, VBA, EPA
MEDIUM NEUTRAL CITATION:	[2019] VCC 1430

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW
Catchwords:	Appeal against sentence – consolidated appeals – charge of deposit industrial waste of a particular kind at a site not licensed to accept industrial waste of that kind – failing to comply with a Minor Works Pollution Abatement Notice – being an owner of land, using that land in contravention of a planning scheme – carrying out building work without notice – carrying out building work outside hours – carrying out building work without a permit – no prior criminal convictions – demolition of the Corkman Irish Hotel – calculated and deliberate breaches of the law, motivated by the prospect of profit – serious example of breaches of building and planning laws – maximum penalty – applicable sentencing principles – double punishment – totality – extra curial punishment – lack of genuine remorse.

Legislation Cited:	*Environment Protection Act* 1970, *Planning and Environment Act* 1987, *Melbourne City Council Activities Local Law* 2009, *Building Act* 1993, *Criminal Procedure Act* 2009, *Sentencing Act* 1991.
Cases Cited:	*Barbaro & Zirilli v The Queen* [2012] VSCA 288, *Mill v The Queen* (1988) 166 CLR 59, *EPA v Barnes* [2006] NSWCCA 246, *Chief Executive, Office of Environment & Heritage v Orica Pty Ltd; Environment Protection Authority v Orica Pty Ltd* [2015] NSWLEC 109, *Environment Protection Authority v Orica Australia Pty Ltd* [2014] NSWLEC 103, *Leichhardt Council v Geitonia Pty Ltd (No 7)* [2015] NSWLEC 79, *Markarian v The Queen* (2005) 228 CLR 357, *DPP v Aydin* [2005] VSCA 86, *DPP v Dalgliesh* (2017) 262 CLR 428

APPEARANCES:	Counsel	Solicitors
For the Appellants	Mr N Papas QC Mr T Trood	Pointon Partners
For the City of Melbourne & the Victorian Building Authority	Mr S Molesworth QC Mr C Carr	Victorian Building Authority & City of Melbourne
For the Environment Protection Authority	Mr S Russell	Environment Protection Authority

HIS HONOUR:

Introduction

1. This is an appeal by three appellants against sentences imposed by the Magistrates' Court sitting at Sunshine on 12 September 2018 and the Magistrates' Court sitting at Melbourne on 20 February 2019. The two appeals were consolidated by this Court on 14 March 2019.

2. The three appeals that emanate from the Sunshine Magistrates' Court relate to charges brought by the Environment Protection Authority (EPA) against 160 Leicester Pty Ltd, Raman Shaqiri and Stefce Kutlesovski. Each of those appellants were charged with two offences as follows:

    - Charge 1 - deposit industrial waste of a particular kind at a site not licensed to accept industrial waste of that kind contrary to s 27A(2)(a) of the *Environment Protection Act* 1970, which carries a maximum penalty of $777,300; and

    - Charge 2 – Failing to comply with a Minor Works Pollution Abatement Notice contrary to s 31B(6) of the *Environment Protection Act* 1970, which carries a maximum penalty of $46,638.

3. The three appeals that emanate from the Melbourne Magistrates' Court relate to charges brought by two prosecution authorities, the City of Melbourne and the Victorian Building Authority (VBA) against 160 Leicester Pty Ltd, Raman Shaqiri and Stefce Kutlesovski. 160 Leicester Pty Ltd was charged with the following offences:

    - Charge 1 – Being an owner of land, using that land in contravention of a planning scheme contrary to s 126(2) of the *Planning and Environment Act* 1987, which carries a maximum penalty of $186,552;

    - Charge 2 – Carrying out building work without notice contrary to Local Law 9.1 of the *Melbourne City Council Activities Local Law* 2009, which carries a maximum penalty of $2,000;

- Charge 3 – Carrying out building work outside hours contrary to Local Law 9.5 of the *Melbourne City Council Activities Local Law* 2009, which carries a maximum penalty of $2,000;

- Charge 4 – Failing to comply with a building order contrary to s 118(1) of the *Building Act* 1993, which carries maximum penalty of $388,650; and

- Charge 5 – Carrying out building work without a permit contrary to s 16 of the *Building Act* 1993, which carries maximum penalty of $388,650.

4. Raman Shaqiri and Stefce Kutlesovski were each charged with the following offences:

    - Charge 1 – Being an owner of land, using that land in contravention of a planning scheme contrary to s 126(2) of the *Planning and Environment Act* 1987, which carries a maximum penalty of $186,552; and

    - Charge 2 - Carrying out building work without a permit contrary to s 16 of the *Building Act* 1993, which carries maximum penalty of $77,730.

5. None of the appellants have any prior history.

Circumstances of the offences

The City of Melbourne and VBA prosecution

6. The Corkman Irish Pub (Hotel) was a building located at 154-160 Leicester Street, Carlton. The registered proprietor of the land and the Hotel is 160 Leicester Pty Ltd. 160 Leicester Pty Ltd has two directors, Raman Shaqiri and Stefce Kutlesovski.

7. In the early hours of 8 October 2016, a fire was deliberately lit in several areas of the ground floor of the Hotel. At 5:54am the Metropolitan Fire Brigade responded to a report of smoke coming from the Hotel and managed to bring the fire under control at 6.31am, shortly after the fire had commenced. The areas where the Hotel had been burnt were limited to the ground storey. There was no visible

damage to the main structure of the Hotel and the fire had not entered the walls or roof cavities.

8. On Monday 10 October 2016, Frank Magaldi, a Registered Building Practitioner (Building Inspector) under the *Building Act* 1993*,* and a Melbourne City Council (MCC) Senior Building Inspector, attended the site in order to carry out his functions on behalf of the MCC. Mr Magaldi observed that there were no visible signs of fire externally and he took photographs of the exterior of the Hotel. However, the building was unoccupied and locked and as such, Mr Magaldi was unable to enter the Hotel.

9. In the afternoon of 10 October 2016, Mr Magaldi contacted the registered office of 160 Leicester Pty Ltd with a view to speaking to either Mr Shaqiri or Mr Kutlesovski, and was told that one of the owners would contact him. Approximately 15 minutes later, Mr Shaqiri, called Mr Magaldi. Mr Magaldi informed Mr Shaqiri that he required access to the Hotel in order to inspect the damage. Mr Shaqiri said that he would call him back. Shortly afterwards, Mr Kutlesovski contacted Mr Magaldi, and informed him that the Hotel was unoccupied, however it was subject to a tenancy until 13 October 2016 and therefore Mr Kutlesovski was not prepared to grant Mr Magaldi access to the Hotel until that date. Following that conversation, Mr Magaldi sent a text message to the mobile phones of both Mr Shaqiri and Mr Kutlesovski confirming the conversation and indicating that he needed access to the Hotel to 'check if there are any structural issues in relation to the recent fire' and indicated that Thursday 13 October 2016 was suitable to him for the inspection. In the text message, he indicated that he wanted to know if the property was vacant and he asked what time he could meet with the owners. Having received no response to his text message, Mr Magaldi contacted Mr Shaqiri the following day. During the conversation Mr Shaqiri agreed to meet Mr Magaldi at the Hotel on Friday, 14 October 2016 at 10.00am.

10. On Friday, 14 October 2016 at 8.58am, Mr Magaldi attempted to contact Mr Shaqiri on his mobile phone in order to confirm the agreed meeting, however the phone rang out without answer. Mr Magaldi contacted Mr Kutlesovski to find out if either he or Mr Shaqiri would be attending the meeting. Mr Kutlesovski said he was unable to attend the meeting, but that he was attempting to arrange for an engineer to attend the Hotel later in the afternoon. Mr Magaldi told Mr Kutlesovski that he could not attend a meeting that afternoon, and so the meeting was re-arranged for 10.00am on Monday, 17 October 2016.

11. Without any further communication between Mr Shaqiri or Mr Kutlesovski and Mr Magaldi, at about 7.15am or 7.30am on 15 October 2016, the demolition of the Hotel commenced.

12. Machinery used to carry out the demolition was marked with the branding of SHAQ Industries Pty Ltd, a corporation of which Mr Shaqiri was at the time of the demolition a part owner, and of which he had been a director between 16 December 2009 and 24 May 2016. At the time of the demolition, Mr Shaqiri's father was a director of SHAQ Industries Pty Ltd.

13. The demolition works continued throughout the day, stopping briefly between 5pm and 6pm, before resuming again.

14. Tracie Laws, a neighbour living close by to the site, was an eye-witness to the demolition. She first observed demolition work at 7.15am on 15 October 2016. She continued to observe demolition work between 8.30am and 9:00am on 15 October 2016. Throughout the day Ms Laws continued to observe demolition work at the site.

15. According to Ms Laws, the demolition work stopped at about 5pm but resumed about an hour later and continued until about 7pm that evening. She states that by Saturday evening, 15 October 2016, the majority of the Hotel had been demolished.

16. Rosie Francis, is a neighbour who was living directly next door to the Hotel and a student at the Melbourne University Law School, which is directly across the street from the site. Ms Francis first observed the demolition occurring from approximately 7.30am to 9:00pm on 15 October 2016.

17. At about 7.15pm, Brett Sweetten, Senior Site Services Supervisor, MCC, arrived at the site, and observed that hoarding board had been erected around the permitter and ‘approximately 80 per cent of the pub had been demolished'. Demolition machinery was present and operating, including a large excavator which was loading a large white truck with building debris. He observed that the signage on the side of the truck and excavator reflected 'SHAQ 1300 69 DEM0’.

18. Mr Sweetten had a conversation with Mr Kutlesovski, who indicated he was the owner. In the course of the conversation, Mr Kutlesovski made a number of admissions, including admissions that there was no demolition permit and that the demolition started at 7.30am that morning.

19. At about 7.30pm, Mr Sweetten contacted Giuseppe Genco, Municipal Building Surveyor of the MCC and Mr Magaldi to report that he was on the site and that the Hotel had been demolished.

20. At about 8.30pm, Mr Magaldi arrived on site, and observed that: approximately 90 per cent of the building had been taken down; there was dust blowing around due to the high winds and rubble now in piles on the ground; the ground floor external wall on Pelham and Leicester Streets remained upstanding; the brick boundary fence along the laneway and wall of the Hotel abutting the adjoining property also remained; piles of demolition material and rubble remained on site; and an excavator was on site displaying the 'SHAQ' insignia on the machine together with a truck and trailer with 'SHAQ' insignia on the rear and sides.

21. Mr Magaldi had a conversation with Mr Kutlesovski during which Mr Kutlesovski indicated that his engineer told him that the building was dangerous and had to come

down and provided the details of engineer, a Mr Giancarlo. Mr Magaldi indicated that The Municipal Building Surveyor was on his way and was going to issue a Stop Work Order. Mr Kutlesovski said 'It's my site I can do whatever I want. Cleaning up the site isn't demolition works, so I'm going to clean up the site.'

22. At about 9.00pm, Mr Genco arrived on site and also had a conversation with Mr Kutlesovski, during which Mr Kutlesovski further admitted: that he was the owner of the site; that he did not have any kind of permit to demolish the building; that he had not obtained an asbestos report prior to demolition; and that it was decided to demolish the building, purportedly on the basis of an engineer's report, and without the authority of Council.

23. Mr Genco also observed no protection works to adjoining buildings or walls abutting. Further, some walls were at 90 degrees and had remnants of brick work.

24. Mr Genco considered that the building work associated with the demolition posed a danger to life, safety and health of members of the public and those carrying out the demolition for reasons including: the likely presence of asbestos on the site and the uncertainty about the manner in which the building being demolished was tied into the adjoining building.

25. Mr Genco determined to issue a Building Order to stop the demolition. He had a further conversation with Mr Kutlesovski, in which he said he was issuing a Stop Work Order and that Mr Kutlesovski could not do any further work.

26. Mr Genco and Mr Magaldi then returned to the offices of the MCC and between about 12.00am and 12.30am on 16 October 2016, a Building Order- Stop Building Work was made pursuant to s 112 of the *Building Act* 1993.

27. At about 1.20am, Mr Magaldi and Mr Genco returned to the site to serve the Stop Work Order. There were no people at the site at that time. Mr Magaldi posted the Stop Work Order on the timber hoarding on the Leicester Street side of the site adjacent to the gate entry.

28. The Stop Work Order was addressed to 160 Leicester Pty Ltd and provided, *inter alia:* 'The Owner and all other persons are required to stop the building work on the building immediately.'

29. At about 9:00am, in contravention of the Stop Work Order, the demolition work recommenced at the site.

30. At about 9.10am, Mr Magaldi returned to the site and observed three people who had been engaged in the demolition activities the night before, not including Mr Kutlesovski, continuing demolition work on the site. Mr Magaldi noticed that the Stop Work Order he had posted the night before had been removed from its place, and he served an additional copy on a male person working at the site, identified by him as 'Tim'.

31. The demolition works appeared to be suspended at 9.20am.

32. At 1.30pm, Mr Genco returned to the site and observed that further works had continued since the previous evening. Mr Genco also observed Mr Kutlesovski arrive in a truck with 'Shaq Demolitions' written along the side. Mr Genco had a conversation with Mr Kutlesovski, during which Mr Kutlesovski claimed that he had not received the Stop Work Order until 1.00pm.

33. The demolition started again at about 2.30pm and continued through to about 6:00pm, by which stage the entire structure of the Hotel had been demolished.

34. On 27 October 2016, Mr Shaqiri and Mr Kutlesovski sent a hand-signed letter on 160 Leicester Pty Ltd's letterhead to the Hon. Richard Wynne MP, Minister for Planning. The letter contains a number of admissions, including the following:

    - 'We apologise for having undertaken this demolition without the appropriate permits in place';

    - The decision to demolish the building is described as 'regrettable', 'erroneous', and 'the wrong course of action'; and

- They refer to reasons for the demolition, but say that those reasons 'in no way excuse' the demolition.

35. Attached to the letter was also a timeline document, an engineering advice, a file note appearing to contain a record of legal advice and a document containing weather forecasts.

The Environment Protection Authority Prosecution

36. On 18 October 2016, EPA Officer Hannon attended at the demolition site (Carlton Premises). While at the premises, Officer Hannon observed that the premises contained piles of rubble consisting of bricks, mortar, metal, and other general waste. He also noted the presence of ‘possible asbestos containing material’ (PACM). Samples of PACM were taken by Officer Hannon.

37. The PACM sample taken by Officer Hannon from the Carlton Premises was later confirmed to be chrysotile asbestos.

38. A number of statutory notices were issued by the EPA to 160 Leicester Pty Ltd in relation to the waste at the Carlton Premises through their solicitor. These notices related to the mitigation and control of asbestos and the covering of waste.

39. On 25 October 2016, seven days after the demolition of the Hotel, the EPA received notification about the deposit of demolition waste on land located at 93B Furlong Road, Cairnlea, Victoria (Cairnlea Premises).

40. The sole proprietor of the Cairnlea Premises is a company of which Mr Shaqiri and Mr Kutlesovski and are the sole directors.

41. In response to this notification, EPA Officers Hannon and Klein attended at the Cairnlea Premises on 25 October 2016. Officer Klein observed a pile of construction and demolition waste on the premises which was approximately 30 metres in length, 8 metres wide and 1.5 metres in height. She further observed that this pile contained

wood, corrugated iron sheeting, upholstery, bricks, carpet and insulating material, as well as bricks, rocks, and metal piping. On this same date, Officer Hannon also observed and took samples of PACM from the premises.

42. The sample taken by Officer Hannon from the Cairnlea Premises was later confirmed to be chrysotile asbestos, the same type of asbestos as was identified at the Hotel site.

43. The Cairnlea Premises is bordered by residential properties to the north and the west, and is bordered by Furlong Road to the south. Directly opposite the Cairnlea Premises on the other side of Furlong Road is the Cairnlea Town Centre shopping complex. A child care centre is located 350 metres from the Cairnlea Premises and a primary school is also located 350 metres from the Cairnlea Premises.

44. A number of items of industrial waste at the Cairnlea Premises were identified as being from the Corkman Hotel.

45. On 7 November 2016, EPA Officer Gubiani issued a Minor Works Pollution Abatement Notice under s 31B of the *Environment Protection Act* 1970. The Notice required the covering of the industrial waste, including any chrysotile asbestos, at the Carlton Premises by 6.00pm on the same day. It additionally required the waste to remain covered and required daily inspections of the site. The purpose of the notice, amongst others, was to ensure that any asbestos on site remained secure and could not be disturbed by high winds.

46. On 15 November 2016, inspection of the Carlton Premises by Officer Rayner observed that the tarpaulins were not covering the waste at the south-east and south-west corners of the premises, and that the tarpaulins were also torn. The appellants were notified of this breach of the notice.

47. In response to a report made to the EPA, on 28 December 2016 an inspection of the Carlton Premises by Officer Crawford observed that the tarpaulins over the waste had holes in them and that the tarpaulins on the north-east boundary were only just

hanging together and blowing around in the wind. Officer Crawford later called Mr Shaqiri to inform him of the non-compliance with the Notice. Mr Shaqiri informed Officer Crawford that he would 'get someone down to look at it'.

48. On 30 December 2016, an inspection of the Carlton Premises by EPA Officer Crawford observed that the tarpaulins on the premises had been taped back together and were no longer blowing around in the breeze.

49. In response to a report made to the EPA, on 3 January 2017 an inspection of the Carlton Premises by EPA Officers Crawford and Rayner observed that the tarpaulins covering the waste had come apart and were blowing around in the wind. The officers further observed that the bricks underneath the tarpaulins were exposed at the north-east boundary of the premises, that the waste at the south-east corner of the premises were not covered by tarpaulins, and that the tarpaulins were coming away and exposing the bricks at the western end of the southern boundary of the premises. Officer Crawford emailed Mr Shaqiri on the same day to inform him of the non-compliance with the Notice.

50. The Carlton Premises is bordered by residential properties to the south and east, by the Melbourne University Law School to the west, and by a public park known as University Square to the north-west.

Nature and gravity of the offending

The City of Melbourne and VBA offences

51. The Corkman Irish Pub was a hotel that was built in 1858 originally named the Carlton Inn. It was one of the oldest buildings in the Carlton area. It has been described as historically and aesthetically significant and as being a good example of the Victorian period. In recent times it attracted a large student cliental as it was within the Melbourne University precinct.

52. The demolition of the Hotel naturally evoked a significant public response. The community was outraged at the audacious manner in which the Hotel was demolished

by the owners without any consultation with the community and clearly without any regard to the various applicable laws governing building, demolition, planning and protection of heritage assets.

53. The Hotel was owned by the appellant company 160 Leicester Pty Ltd. On one view, 160 Leicester Pty Ltd is a faceless company. The reality is that it is a company controlled by two men – the other appellants in this appeal – Raman Shaqiri and Stefce Kutlesovski. It was their decision alone to demolish the Hotel. They clearly made that decision with forethought and planning as they needed to organise large excavation machinery, trucks, hoardings and employees in order to hastily bring down the Hotel over a weekend.

54. Both Mr Shaqiri and Mr Kutlesovski are experienced developers. Mr Shaqiri has been in the building industry for some 16 years and has held licences for demolition and domestic building. He is associated with Shaq Industries Pty Ltd, the company involved with the demolition. Mr Kutlesovski has worked as an industrial developer in relation to factories, warehouses and apartments.

55. It is self-evident that both Mr Shaqiri and Mr Kutlesovski were well aware of their responsibilities and the laws that would need to be complied with, before any building or demolition could take place on such a significant historical property on a prominent inner city corner. Therefore, the only reasonable conclusion that can be drawn from their decision, is that they made a commercial calculation. That is, they weighed up the potential penalties that they would face as result of the deliberate breach of the law, with the potential profit that would result from development of the site, before going ahead. Indeed, despite the litigation, delay, and any loss of reputation, ultimately, the development will go ahead and I was told on the plea that that will potentially be a 12 story building.

56. The result of the decision to demolish the Corkman Irish Pub is that the community has lost an important part of the built environment of Carlton and Victoria. Heritage buildings basically represent the past history and culture of a city and a community.

They constitute the architectural heritage of an area and if a time comes to repair or develop an historical building, then planning and building laws dictate proper procedure before any change is made. The procedure involves community consultation and expert review. None of that occurred in relation to the Corkman Hotel despite the fact that Mr Shaqiri and Mr Kutlesovski were well aware of the regulatory procedures involved.

57. Mr Molesworth, who appeared with Mr Carr on behalf of the City of Melbourne and the VBA, outlined a number of matters that he submitted lead to the conclusion that the offences 'are calculated and contumacious breaches of the law, motivated by the prospect of large profits'.

58. Mr Papas who appeared with Mr Trood on behalf of the appellants, submitted that the offending ought not be described in that way but rather that the conduct was 'intentional and deliberate'. Further, it was submitted that there is no evidentiary basis to find that the decision to demolish the hotel was in order to make a large profit.

59. For the reasons that I have outlined above, there can be no other explanation - and none was provided - for the hasty conduct of demolishing the Hotel illegally but for the potential to rebuild on the site and therefore make a profit. I therefore accept the prosecution's characterisation of the offending.

60. Thus in all the circumstances in my view the conduct of Mr Shaqiri and Mr Kutlesovski and their entity 160 Leicester Pty Ltd, represents a serious example of breaches of the building and planning laws of Victoria.

The EPA offences

61. The EPA offences are separate from the City of Melbourne/VBA offences that relate to the demolition of the Hotel.

62. Once the building had been demolished and the damage done, the debris had to be removed. The rubble was moved to a site owned by another company of which Mr

Shaqiri and Mr Kutlesovski are the sole directors. The site was close to a shopping centre, a child care centre and a primary school. The rubble contained chrysoltile asbestos in the form of broken cement sheeting. However, according to reports later obtained, the quantity of asbestos located at the Cairnlea Premises was said to be the equivalent in size to a 'shopping bag'. Further, the EPA issued a Community Update in relation to the Cairnlea Premises stating that: 'The risk to the community is extremely low because the asbestos is contained within solid cement sheeting which means it is not easily airborne'.

63. Mr Russell who appeared on behalf of the EPA submitted that despite the fact that the risk in relation to the asbestos that was found in the rubble was assessed as low, nonetheless the risk posed by asbestos is reflected in the very strict controls in relation to the transport and depositing of such materials.

64. The risk that is associated with exposure to asbestos is the reason why the Minor Works Pollution Abatement Notice was issued in this instance. The Notice required the covering of the industrial waste at the Carlton Premises. The Notice required daily monitoring of the site by the duty holder. On three occasions the rubble at the site was not covered in accordance with the Notice. On the first of those occasions the appellants were notified and asked to remedy the fault however further non-compliance occurred on two separate occasions over a period of about six weeks. It was submitted on behalf of the appellants however that on various occasions throughout 2016 and 2017 airborne monitoring indicated a negligible health risk of asbestos to on-site contractors, surrounding land users, or the public. As such, it was submitted that no appreciable environment hazard or risk to health or public safety resulted from the offence.

65. I am mindful of the fact that the demolition of the Hotel just prior to the removal of the rubble to the Cairnlea Premises evoked an angry response from the community. However as noted, the removal of the rubble once the Hotel was demolished is a separate matter and in my view the objective seriousness of the offending must be

viewed in relation to the specific breaches of the *Environment Protection Act* and not through the lens of the demolition of the Hotel.

66. It was submitted on behalf of the appellants that in the circumstances, the offences relating to breaches of the *Environment Protection Act* should be categorised as medium to low in terms of seriousness. In all the circumstances, while accepting that exposure to any form of asbestos poses risk, I do not assess the offending as falling towards the high-end, but rather the offending in my view falls in the mid-range of offences of this nature.

Personal circumstances

67. 160 Leicester Pty Ltd was registered in June 2015 and purchased the Corkman Hotel. The Hotel is the sole asset of the company and it was said on the plea that is worth approximately $4.3 million. The company does not have any income.

68. Raman Shaqiri is 37 years of age and has one daughter. He has worked in the building industry for 16 years and has held licences for demolition and domestic building. As noted, he is associated with the demolition company that demolished the Hotel and carted the rubble.

69. A number of references were tendered on behalf of Mr Shaqiri. The references speak of his otherwise good character and genuine remorse for the involvement in the unauthorised demolition of the Hotel. The references also speak of Mr Shaqiri's involvement in the community, in local sporting clubs and that he has donated significant sums of money to the North Sunshine Eagles Football Club.

70. Stefce Kutlesovski is 43 years of age and married with three school-aged children. He has worked as an industrial developer in relation to factories, warehouses and apartments. References were tendered on the behalf of Mr Kutlesovski. One letter speaks of the effect his conduct has had in relation to his children being bullied at school and how he has had to leave the family home in order to protect his family from the continued harassment of media and others. Mr Kutlesovski's wife also provided a

reference. She remains supportive and notes that Mr Kutlesovski is an otherwise dedicated family man who contributes to his community. She too speaks of the harassment that her children have suffered as a result of the aftermath of the demolition of the Hotel. She notes that Mr Kutlesovski's demeanour has now changed and that he is remorseful for his part in the demolition of the Hotel.

71. Following the demolition of the Hotel and the intense media attention that then followed, both Mr Shaqiri and Mr Kutlesovski have been subjected to personal abuse on social media and in other forms. In November 2016, a flyer was distributed at Mr Kutlesovski's son's kindergarten levelling abuse at Mr Kutlesovski resulting in him needing to engage security for his personal residence for a period of five weeks at considerable cost. In late 2017 he and his family moved from the house.

72. The demolition of the Hotel has understandably also resulted in reputational damage to the company and the directors.

Sentencing considerations

73. A number of matters were raised in mitigation on behalf of all three appellants. Mr Trood submitted that the pleas of guilty were entered at the earliest practicable time. However due to complexities as a result of separate EPA, City of Melbourne/VBA prosecutions, the listings remained disjointed. In January 2018 there was an application for both sets of charges to be joined. I was told that at that stage all matters were still to be contested and thus the original contest date in relation to the VBA and City of Melbourne charges set for May 18 would have needed to be vacated in order to accommodate a larger contested hearing in relation to all matters.

Plea of guilty and remorse

74. On 1 March 2018 the EPA charges resolved and pleas of guilty were entered.

75. On 10 May 2018, Mr Shaqiri's City of Melbourne/VBA matters resolved and the company agreed to plead guilty however there was a dispute on the facts. Mr

Kutlesovski's charges were adjourned for contest on 29 January 2019 and his matters resolved immediately prior to the contested hearing. The City of Melbourne/VBA matters were finally determined on 20 February 2019.

76. Therefore while it might be said that the EPA charges resolved at an early stage, the same cannot be said in relation to the City of Melbourne/VBA charges and indeed in the early stages all matters were to be contested. However it was also fairly put by Mr Russell in relation to the EPA charges, that once there was a change of instructors and counsel, greater cooperation quickly resolved the EPA matters.

77. I accept however that the pleas of guilty have avoided lengthy and costly contested hearings. Further, the pleas of guilty reflect acceptance of responsibility for the conduct and have facilitated the course of justice.

78. It was submitted on behalf of the company and the directors that the pleas of guilty are to be taken as 'a further public expression of remorse'. A plea of guilty does not of itself demonstrate remorse but rather, may be indicative of remorse. As was noted in *Barbaro & Zirilli v The Queen*[1]:

> A distinction must be drawn between the anguish of being caught and punished, on the one hand, and – on the other – the determination to change one's behaviour and, to the extent possible, make amends. The first is not remorse at all. The second is.

79. Shortly after the demolition of the Hotel and the immediate public outcry, a letter was sent to the Minister for Planning, signed by Mr Shaqiri and Mr Kulesovski on behalf of the company which in summary apologises for 'having undertaken this demolition without the appropriate permits in place.' The letter refers to legal and engineering advice and supporting documents were attached. One of those documents was a letter from Giancario Brovedani, consulting engineer and is dated 14 October 2016, the day before the demolition commenced. He states that he inspected the Hotel on Friday, 14 October 2016 at 4pm. Mr Brovedani recommends demolition of the Hotel due to numerous structural defects. A second letter written by Mr Brovedani was

[1] [2012] VSCA 288 at [36].

tendered dated 6 December 2016, addressed to the Victorian Building Authority. Mr Brovedani states he attended the site on 13 October 2016 and spent an hour at the site. Tellingly, he notes that his report was 'urgently requested by the client' and hand delivered to Mr Shaqiri late on Friday, 14 October 2016.

80. Having reviewed the material and heard submissions, in my view the documents raise many questions and great deal of suspicion. No evidence was called at the appeal hearing in relation to the engineering opinion nor the legal advice. Further, as I have already found, the decision to demolish the Hotel was a deliberate, commercially informed decision which would have required a degree of pre-planning. Further, even if there was some truth to the views of the engineer, those views were conveyed to Mr Shaqiri late on the Friday afternoon when planning must have already been put in place to commence the demolition early the next morning. Thus in the circumstances I find that the letter to the Planning Minister was a cynical exercise in justification rather than a demonstration of remorse on behalf of the appellants.

81. Likewise, I find there is little, if any, evidence of genuine remorse on behalf of Mr Shaqiri and Mr Kutlesovski. The letters of reference speak of the extracurricular activities of the two directors and I do not question that they are family men who contribute to their respective communities. However the remainder of the letters speak of the great affect the adverse publicity has had on their reputations and credibility within the building industry. True it is that they may have miscalculated the degree of adverse sentiment directed to them from the community as a result of their conduct, but stress experienced as a result of loss of reputation and disruption to their businesses and home life is not remorse. Remorse in this instance may, for example, be an expression or appreciation of the loss to the community and social fabric of Carlton and Melbourne as a result of the destruction of the Hotel. Nothing was put on the plea that demonstrates such remorse. In any event, the appellants clearly did not see the Corkman Hotel in the same way the community did as the plan was to replace it with a multi-story development, which it appears, will now be achieved.

Extra curial punishment

82. While adverse publicity was to be expected following the demolition, in this instance as noted above, it extended to personal abuse and threats via social media directed at Mr Shaqiri and Mr Kutlesovski. Further, the conduct has also resulted in certain organisations, including financial institutions, ending their professional relationships with Mr Shaqiri and Mr Kutlesovski. As such I accept the submission put on behalf of all three appellants that there has been a degree of extra curial punishment experienced by each appellant in different ways following the demolition.

Totality

83. Totality was matter that was given some focus at the appeal hearing by all parties. The primary submission on behalf of the appellants was that the disjointed nature of the various proceedings resulted in the appellants being denied the opportunity of totality reasoning because different Magistrates' dealt with different prosecutions arising out of the same course of conduct. Further, the appellants submitted that even if a matter is heard on a separate occasion but connected to conduct that has been dealt with on a previous occasion, totality is a matter that must be, and should have been, be taken into account. I accept that submission. However as noted above, in relation to the very separate conduct between the EPA matters and the City of Melbourne and VBA matters, in my view totality has less application.

84. Nonetheless when considering all components of this case, ultimately at the end of process, totality reasoning must be applied. As was made clear in *Mill v The Queen*[2] when quoting from D A Thomas, Principles of Sentencing:

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to

[2] (1988) 166 CLR 59 at 63.

make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong'; 'when...cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.

85. Mr Molesworth conceded that totality has relevance however reiterated that the offending involved a determined course of conduct and noted that the application of the totality principle in a case in which fines are imposed may not have the same force as in a case of imprisonment.[3]

86. In *Chief Executive, Office of Environment & Heritage v Orica Pty Ltd; Environment Protection Authority v Orica Pty Ltd*[4] in dealing with totality in relation to an environmental offence, Preston CJ said:

> Because there are two offences arising out of the same incident, the totality principle needs to be considered. The effect of the totality principle is to require the Court, which has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed, to review the aggregate sentence and consider whether the aggregate is just and appropriate and reflects the total criminality before the Court. In the case of fines, adjustment may be made by reducing the amount of the fine for each offence. Care needs to be taken, however, to ensure that any adjustment of individual sentences does not cause the aggregate sentence not to reflect the total criminality of the offender's conduct or the sentence for any individual offence to become disproportionate to the objective gravity of that offence.

87. In my view totality is a relevant sentencing consideration in light of the fact that there have been a number of charges and separate prosecutions that have arisen from the conduct as a result of the involvement of different agencies. Therefore while keeping in mind that the EPA prosecution does represent distinct offending from that which relates to the City of Melbourne and VBA prosecutions, in my view the following matters must be taken into account to give proper effect to the totality principle:

- The City of Melbourne Prosecution;

[3] *EPA v Barnes* [2006] NSWCCA 246 at [46].
[4] [2015] NSWLEC 109 at [142].

- The VBA prosecution;
- The EPA prosecution;
- The VWA prosecution where on 15 February 2019, 160 Leicester Pty Ltd was convicted and fined $45,000 plus $6,879 costs in relation to two charges: failing to ensure the workplace was safe by failing to remove asbestos prior to demolition; and failing to produce documents;
- The costs in relation to each prosecution (including the VWA prosecution). The agreed costs are $127,510 in relation to the City of Melbourne/VBA, and $49,373 in relation to the EPA – noting that costs form part of the penalty;[5] and
- The fact that in addition to any fines imposed, an order pursuant to s 67AC of the *Environment Protection Act* 1970 will be made against 160 Leicester Pty Ltd. The order amounts to a contribution of $30,000 to a community project and requires a notice to be published in major newspapers.

Double punishment

88. It was submitted that as Mr Shaqiri and Mr Kutlesovski are the two directors of 160 Leicester Pty Ltd, where substantial fines are to be imposed on the company, the fines to be imposed on the directors should be moderated in order to avoid double punishment. The appellants rely on general sentencing principle and specifically, in relation to circumstances where directors are fined in addition to the company in relation to the same conduct, the appellants referred to *Leichhardt Council v Geitonia Pty Ltd (No 7)*[6] where Biscoe J said:

> Where an individual offender and the company that he owns are each being sentenced for the same offence, the fines to be imposed should be such as to avoid double punishment of the individual arising from the diminution in the individuals valuable interest in the company to the extent of the fine imposed on

[5] *Environment Protection Authority v Orica Australia Pty Ltd* [2014] NSWLEC 103 at [209]; *Sentencing Act* 1991 s 3 – definition of 'fine'.
[6] [2015] NSWLEC 79 at [52].

the company.

89. Mr Molesworth relied on the more general principles in relation to double punishment by making reference to the separate and distinct offending that supports the separate charges. As such he submits that the risk of double punishment only arises where there is a criminal act that is common to multiple offences. The general principles in relation to double punishment have some overlap with totality, however double punishment strictly speaking is the error of sentencing an offender twice for the same conduct.

90. I have already noted above that the EPA and City of Melbourne/VBA prosecutions are quite separate. However the submission becomes more difficult when dealing with the charges that flow directly from the demolition of the Hotel.

91. The act of bringing down the Hotel breached planning and building laws which serve different purposes as do the breaches of the Local Law. I accept that submission generally, however specifically, in relation to the concept of double punishment as it relates to the directors and the company charged with similar offences, the principle in my view still has application.

92. I do however accept that the breach of the Stop Order did involve further criminality that is not subsumed by the initial conduct that gave rise to the breach of the building and planning laws and may be viewed as separate offending by the company. The Stop Order required the demolition to cease immediately. Even if there is some debate about Mr Kutlesovski not becoming aware of the order until 1 pm on 16 October 2016, after that time, when he admitted knowledge, the demolition continued until 6pm that evening in complete defiance of the order.

Other relevant sentencing principles

93. It was submitted by both Mr Molesworth and Mr Russell that general deterrence, denunciation and just punishment are prominent sentencing considerations in this instance and apply to all appellants. I agree.

94. As to specific deterrence, none of the appellants have any prior criminal history. Further, it is clear that the response to the conduct has been very public and humiliating and I accept, that response has sent a clear message to Mr Shaqiri and Mr Kutlesovski. However in my view specific deterrence, while not prominent in the sentencing equation, still has some role to play. Despite the public reaction the charges and consequent prosecution, the development of the property will ultimately go ahead and it is apparent that Mr Shaqiri and Mr Kutlesovski are continuing their vocations at developers. Thus it is possible that similar circumstances will arise in the future in relation to other properties that Mr Shaqiri and Mr Kutlesovski are developing.

Maximum penalty and the sentence imposed in the Magistrates' Court

95. This matter comes before the court as an appeal against sentence from the Magistrates' Court pursuant to s 254 of the *Criminal Procedure Act* 2009. As such, the appeal must be conducted as a rehearing, or a hearing *de novo*.

96. However because this matter has attracted an enormous amount of public attention in my view reference to the penalties imposed by the Magistrates' Court and proper sentencing principles needs to be addressed in order to explain the sentences that I will ultimately impose.

97. It is trite to say that an appellant brings a matter before the County Court as an appeal against sentence because the view is taken that the sentence imposed by the Magistrates' Court is excessive. Again, while the hearing is a hearing *de novo*, once consideration is given to proper sentencing principles, in my view it is clear that the sentences that were imposed in the Magistrates' Court in relation to both prosecutions are excessive.

98. When one considers the fine imposed in relation to the City of Melbourne and VBA prosecutions, the fine together with costs is approximately 90 per cent of the available maximum in relation to each of the three appellants. The s 6AAA statement made by the Magistrate is that 'but for the pleas of guilty the maximum fine would be imposed'.

Thus it would seem that not only did the Magistrate consider the offences as the worst possible example of the proscribed conduct, other than the pleas of guilty which attracted approximately a 10 per cent discount, no other sentencing principle such as totality or double punishment played a part in relation to any of the three appellants.

99. As to the EPA prosecution, while the fine is not at the same percentage level of the fine imposed in relation to the City of Melbourne/VBA prosecutions, for other reasons, in my view it too is excessive given the categorisation of the offending which I have found to be in the mid-range.

100. The maximum penalty is of course a matter to which the court must have regard as one of the s 5(2) *Sentencing Act* criteria. Further, as was made clear by the High Court in *Markarian v The Queen:*[7]

> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

101. In *DPP v Aydin*[8] Callaway JA noted in relation to the maximum penalty:

> It is sometimes said that a judge, in obedience to s 5(2)(a), "steers by the maximum". It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering *by* the maximum and aiming *at* the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid.

102. While Mr Molesworth helpfully made reference to a number of authoritative cases from the NSW Land and Environment Court in relation to relevant sentencing principle, he did not provide comparative cases in relation to penalty. However, it was common ground that the penalties imposed in relation to the City of Melbourne and VBA charges were one of the highest if not the highest imposed in this State for the

[7] (2005) 228 CLR 357 at [31].
[8] [2005] VSCA 86 at [12].

relevant conduct.

103. It may be that the community - and possibly the sentencing Magistrates in this instance - regard the available maximum penalties in relation to this conduct as inadequate. However, unless and until Parliament increases the penalties available, Courts are bound by the proscribed penalty and must sentence in accordance with proper sentencing principle.

104. I have already concluded that the conduct in relation to the demolition represents serious breaches of the building and planning laws and calls for a very high penalty. However for the reasons outlined above including the application of proper sentencing principles, in my view, the sentence imposed in relation to the City of Melbourne/VBA charges will be reduced from that which was imposed by the Magistrates' Court.

105. As to the EPA prosecution, the appellants provided a chart of a number of recent sentencing decisions in relation to the dumping of asbestos and other waste materials prosecuted under the *Environment Protection Act* 1970. I have read those summaries. In the cases provided, there were examples of conduct which was objectively more serious than the conduct in this in this instance but resulting in fines which in some cases were a fraction of the fine imposed by the Magistrates' Court in this case. While comparative cases always have limitations, it is clear that in consideration of what I have determined to be mid-range offending, the penalty imposed on each of the appellants by the Magistrates' Court in relation to the EPA charges was excessive and will be reduced.

106. Further while I have considered, where possible, comparative cases in relation to both prosecutions, I am mindful of the principles outlined in *DPP v Dalgliesh*,[9] that current sentencing practices is only one of a number of matters to which the court must have regard.

107. Finally, it was submitted that in relation to the *Building Act* charges any fine should be

[9] (2017) 262 CLR 428.

separate to that imposed in relation to the other charges due to an administrative issue in distributing the fine to the correct entity. As such there will be two aggregate fines in relation to the City of Melbourne/VBA prosecutions and one aggregate fine in relation to the EPA charges together with the s 67AC Order.

Sentence

108. Would the representatives of the company and the directors please stand.

109. I formally set aside the orders of the Magistrates' Court at Melbourne on 20 February 2019 and the Magistrates' Court at Sunshine on 12 September 2018.

110. Dealing first with 160 Leicester Pty Ltd in relation to the City of Melbourne/VBA matters.

111. On Charge 4, failing to comply with a building order contrary to contrary to s 118(1) of the *Building Act* 1993 and Charge 5, carrying out building work without a permit contrary to s 16 of the *Building Act* 1993, the company will be convicted and fined an aggregate of $450,000

112. On Charge 1, being an owner of land, using that land in contravention of a planning scheme contrary to s 126(2) of the *Planning and Environment Act* 1987; Charge 2, carrying out building work without notice contrary to Local Law 9.1; and Charge 3, carrying out building work outside hours contrary to Local Law 9.5, the company will be convicted and fined an aggregate of $100,000. Thus the total effective fine imposed on 160 Leicester Pty Ltd in relation to the City of Melbourne/VBA charges is $550,000.

113. Turning to Mr Shaqiri and Mr Kutlesovski, in relation to the City of Melbourne/VBA charges. On Charge 1, being an owner of land, using that land in contravention of a planning scheme contrary to s 126(2) of the *Planning and Environment Act* 1987, they will each be convicted and fined $60,000. On Charge 2, carrying out building work without a permit contrary to s 16 of the *Building Act* 1993, they will each be convicted

and fined $25,000. Thus the total effective fine in relation to the City of Melbourne/VBA charges is $85,000 in relation to each director.

114. Turning to the EPA charges as they relate to 160 Leicester Pty Ltd. On Charge 1, deposit industrial waste of a particular kind at a site not licensed to accept industrial waste of that kind contrary to s 27A(2)(a) of the *Environment Protection Act* 1970; and Charge 2, failing to comply with a Minor Works Pollution Abatement Notice contrary to s 31B(6) of the *Environment Protection Act* 1970, 160 Leicester Pty Ltd will be convicted and fined an aggregate of $100,000. As to Mr Shaqiri and Mr Kutlesovski in relation to the EPA charges will each be convicted and fined an aggregate of $40,000.

115. Further, I make an order pursuant to s 67AC of the *Environment Protection Act* 1970 against 160 Leicester Pty Ltd in the terms outlined in the draft order provided on the appeal.

116. I further order costs jointly and severally against 160 Leicester Pty Ltd, Mr Shaqiri and Mr Kutlesovski in the amount of $127,510 to the City of Melbourne and the VBA and $49,373 to the EPA.

117. Thus the total effective fines in relation to both matters is $900,000 in addition to the s 67AC Order.

118. The total costs in relation to both matters is $176,883.

119. Pursuant to s 6AAA of the *Sentencing Act* 1991, if not for the plea of guilty, on the City of Melbourne and VBA charges I would have fined 160 Leicester Pty Ltd $700,000, and the directors $100,000 each. On the EPA charges, I would have fined 160 Leicester Pty Ltd $130,000, and the directors $55,000 each. I would have also made the s 67AC Order against the company.
