Case # J12443071

Case # J12323243

IN THE MAGISTRATES COURT OF VICTORIA

AT BENDIGO

CRIMINAL JURISDICTION

Informant David Witenden - Department of Jobs, Precincts and Regions

V

Sandy Mining Pty Ltd and Douglas Wakely Cahill

Appearances	Counsel	Solicitors
Prosecution	Mr A Sim	Dept. of Jobs, Precincts and Regions
Sandy Mining	Mr G Moloney	Cahills Solicitors
D W Cahill	Mr S Burt	Cahills Solicitors

Hearing of evidence: 11, 12 and 15 July 2019

Decision: 26 September 2019 – sitting at Melbourne Magistrates Court

Magistrate Fanning

REASONS FOR DECISION

Introduction

1. Located on Crown Lands at Shepherds Flat in the State of Victoria is a mine operated by the first named defendant, Sandy Mining Pty Ltd (Sandy Mining), a registered company with the Australian Securities Commission (ASIC). The company directors are Dr Michelle Lynne Gibson (Dr Gibson) and the second named defendant, Mr Douglas Wakely Cahill (Mr Cahill).

2. Sandy Mining holds a Mining Licence, number MIN4230 granted under the Mineral Resources (Sustainable Development) Act 1990 (the Act). The Mining Licence covers an area of 4.40 hectares (the mine site).

3. Commencing in 1990 various planning permits and mining permits were sought and obtained, the most recent licence renewal having been granted in May 2015 for 3 years and remains in operation until the renewal has been finalised (and may have been finalised at the time of this hearing).

4. A "work plan" was approved under the Act for works to be carried out mining under MIN4230 on 3 March 1993 with a further variation and extension approved on 29 June 1995. A further variation was lodged by Sandy Mining on 25 July 2018.

4. From time to time the relevant regularly body has changed its name, the most recent and current name being the Department of Jobs, Precincts and Regions. Nothing turns on the change of title and the regulatory body will be henceforth referred to as the Department.

5. In January 2017, inspectors from the Department and Work Safe Victoria visited the mine site.

6. Certain works were undertaken by Sandy Mining on the mine site in late 2017 and early 2018 in what for convenience will be called the "old shaft" as distinct for the "existing shaft", also referred to as the "Spa shaft".

7. During 2017 and up to mid 2018 there was correspondence and oral communication between the Department, Sandy Mining and Mr Cahill regarding the works referred to above.

8. For completeness it should be stated that at no time during the hearing of this case was it contended that Mr Cahill acted in any way that was inconsistent with the decisions of the Board of Sandy Mining.

The Allegations

9. There being two accused – Sandy Mining and Mr Cahill - there are two sets of charges but with some significant overlap. In short summary, the charges fall into three categories and can be conveniently summarised as follows: Firstly, the actions by Sandy Mining in carrying out works between 1 November 2017 and 31 January 2018 were undertaken …*other than in accordance with the approved work plan*. Secondly, the actions of Sandy Mining and Mr Cahill whereby it is alleged that on 18 June 2018 did make a statement to an inspector from the Department knowing it to be false or misleading, namely that the works were carried out: i) at *the direction of Work Safe*; ii) as …*strongly recommended* by Department officers on 16 January 2017 and 15 February 2018; and iii) that Work Safe had given …*full approval…* to return to mining activities on 21 April 2017. Furthermore, on 20 July 2018, both accused are alleged to have made a further statement knowing it to be false or misleading by again asserting that the mine licensee acted …*at the direction of Work Safe* in *opening of a second mine shaft*. Thirdly, Mr Cahill is alleged to have attempted to intimidate the Informant on 11, 18 and 20 July 2018.

The work plan offence – Charge 1, Sandy Mining

Mens Rea

10. All the charged offences against both accused are criminal, not civil and the standard of proof must be at requisite criminal standard of beyond reasonable doubt.

11. It is clear and it was not in dispute that proof of *mens rea* is required for all charges except for Charge 1 against Sandy Mining. The prosecution contend it is a strict liability offence but not one of absolute liability whereas it is contended by the defence that *mens rea* applies.

12. In contending that mens rea applies, the Court has been referred to the well known authority of *He Kaw Teh v The Queen* (1985) 157 CLR which endorsed an earlier decision of the Privy Council in *Gammon Ltd v Attorney-General (Hong Kong)* [1985] AC 1 where the approach to be adopted by a Court in deciding whether or not a charge is one of strict liability is considered.

13. Firstly the existence of a mental element *(mens rea*) within a statutory offence as contained in Charge 1 against Sandy Mining is not reliant upon the offence explicitly stating that mens rea is required as there is a presumption that the mental element is required for any criminal offence.

14 Three considerations are formulated by Chief Justice Gibbs in *He Kaw Teh* when approaching the task of deciding if the presumption is displaced, namely, at pages 529 and 530 … *the words of the statute…*, …*the subject matter with which the statute deals., …the promotion of the observance of regulations…* and the possible draconian consequences for an accused if the mental element was displaced (citing *Lim Chin Aik v The Queen* [1963] AC 174.

15. Gibbs CJ went on to state *The expression mens rea is ambiguous and imprecise. The passage which I have cited from Sherras v De Rutzen (44) suggests that it means evil intention, or knowledge of the wrongfulness of the act.*

16. The words of s 39(1)(ab) in the Act are of no great assistance other than to conclude that the absence of words such as knowingly or willfully, leaves the question open.

17. The subject matter of s 39(1)(ab) needs to be considered. Both the Purpose and Objectives of the Act set out the subject matter for which the Act seek to address. The Act seeks to cover several seemingly competing interests, including encouraging exploration and extraction of minerals and at the same time seeking to ensure the environment is protected and risks to the public are identified, eliminated or minimised as far as possible. The words of the statute are enabling in character and therefore suggests a regulatory framework and not one of an offence that was *criminal in any real sense.*

18. The strongest and most compelling reason for viewing the offence as one of strict liability is the need by the community for the observance of the section or, as referred to in *Gammon - an issue of social concern.* There was a time when mining

was not a matter of any great social concern. The community now places great importance on the need for the protection of the environment generally, protection of waterways, clean air, protection of flora and fauna as well as the importance of safety for both employees and members of the public where mining is to take place or is taking place. The Purposes and the Objectives of the Act set these out in the clearest of terms, in stark contrast to the Mines Act (1958) Vic for example; earlier legislation which sought to regulate much the same subject matter as the current Act including s 39(1)(ab). The earlier Act is almost silent on any of these issues of social concern. The current Act leaves in no doubt the social concerns held by the community.

19. The consequences for the any breach of s 39(1)(ab) must be examined when determining if the presumption is to be displaced. The maximum penalty is that of a fine and not a term of imprisonment. Simply because the penalty is a fine does not in itself answer the question of whether the presumption is displaced. However, the penalty of a fine does lend itself towards an interpretation of a displacement of presumption especially when the maximum penalty is 1000 penalty units. The higher the penalty the greater it weighs against the displacement of the presumption and this includes the amount of a fine.

20. The penalty in s 39(1)(ab) extends over a wide range of corporations, from small companies such as Sandy Mining to large multi national corporations. The maximum penalty reflects this wide range. In reality, a major corporation has greater potential to contravene s 39(1)(ab) in a far more egregious manner than a breach by a small operator such as Sandy Mining. Furthermore a major corporation has a much greater capacity to pay a substantial fine. However this is a less relevant consideration that the potential harm a major corporation might inflict upon the community as compared to a small operator. Yet both the major corporation and a small operator are subject to the same maximum penalty. These, along with other relevant sentencing considerations, would exercise the mind of any Court upon a finding of guilt. These considerations would inevitably significantly mitigate against the imposition of a penalty anywhere near the upper end of the range for a small operator other than perhaps in the more extreme deleterious of breaches. In other words, it is highly unlikely that a small operator is ever likely to face a penalty anywhere near the maximum amount. The maximum penalty will most likely only ever apply to a large corporation. The Court does not consider the consequences

to an accused to be so significant, whether it be a large corporation or a small operator such as Sandy Mining, that it weighs in favour of the presumption - quite the contrary.

21. The Court may have taken a different view if, say, the penalty was 1000 penalty units for a corporation of less than 20 employees, 5000 for a corporation with 20 to 100 employees and 10000 penalty units for corporations with more than 100 employees. Even if a sentencing regime of this kind existed, the presumption is unlikely to overcome the strong case for a displacement of the presumption based on the issue of social concern previously addressed.

22. Furthermore a 'P' Plate driver failing to affix and display the 'P' plates has been held to be a strict liability offence with absolute liability, more accurately described as an absolute liability offence – see *Stanojovic v DPP* [2018] VSCA 152. However the consequences for the driver in committing this offence may well result in a loss of licence resulting in a loss of a capacity to earn a livelihood and these consequences go well a beyond fine, even a substantial fine. Notwithstanding these potentially significant dire consequences for an offender, the Court held in *Stanojovic* that the issue of social concern, namely road safety, outweighed other considerations in determining the offence to be an absolute liability offence.

23. As is evident from the discussion of these considerations, the Court has concluded that s 39(1)(ab) is an offence of strict liability but not that of an absolute liability offence.

Was any work done required to be done in accordance with an approved work plan?

24. The answer to this question goes to the heart of the ingredients of the charge laid under s 39(1)(ab).

25. There was overwhelming evidence that work was undertaken on the "old shaft"; the fact that this occurred is not in dispute. It was variously described but in summary, work was undertaken by Mr Brooks and Mr Graham Cahill on the "old shaft" over a number of months whereby materials were removed from the "old shaft" and various new materials were placed in the shaft itself which including lining timbers and bracing as well as back filling with sand. There was also work done on and in the immediate vicinity of the entrance to the "old shaft". It does

not matter if the work was directly or indirectly related to any future use that the "old shaft" might be used for – be it an access shaft or 'drive' to the "existing shaft" or as a ventilation shaft for same, or, even for the extraction of minerals.

26. It was submitted by the defence that the work done could not be construed as work done under the Act as the work that was undertaken to make safe the site and for the protection of wildlife. Whilst these may have been outcomes of the work, the Court is not persuaded that these were the principal reasons for undertaking the extensive and no doubt expensive work done over months on the "old shaft". The work undertaken went well beyond what might reasonably be expected to be done to make safe the site or for the protection of animals.

27. The evidence of both Mr Brooks and Mr Graham Cahill was that the works took *many months,* not hours, days or even week and this mitigates against the work being done for these limited purposes.

28. The Court finds that the work done on the "old shaft' was done with a view that a ventilation shaft would be connected to "the existing shaft" – a drive - at some later unspecified time when the necessary approval had been obtained to undertake the specific work of connecting the two tunnels. There is no other plausible explanation for the extent of the work having undertaken by Sandy Mining other than for this purpose.

29. The extent of the work is also evident is Exhibit A, these being photographs of the works done on the "old shaft".

30. Mr D Cahill himself asserts in a letter to Mr Lionel Woodford dated 18 June 2018 (Exhibit L) that the purpose of the work was done to provide *…a secondary egress/ventilation shaft.*

31. The Court finds that the extensive work on the "old shaft" was primarily for the purpose of allowing for a ventilation shaft to be constructed between the two shafts at some later stage.

32. The definition of work set out in s 47(7) in the Act is applicable only to s45. Nonetheless, it does provide some guidance. The Court is of the view the works would fall within the definition of work under s 47(c) of the Act and arguably under s 47(a) as the ventilation shaft was to aid the extraction of minerals (i.e. mining) from the "old shaft".

33. The Mining Licence pertaining to the mine site at Shepherds Flat MIN4230 (Annexure B, Agreed Facts and Annexures) – the area of the renewed licence - is an area of 4.40 hectares. There is no reference in MIN4230 to the "existing shaft" or "Spa shaft". MIN4230 includes the whole of the land and therefore includes the "existing shaft", the "old shaft" and every other part of the land. The whole of the land may not be a *mine* as referred to in the defence submissions but the whole of the land is the subject the licence and therefore s 39 applies. To interpret it otherwise would require a licensee to seek and obtain a new licence for any new mining activity on land for which there is an existing licence.

34. S 39 seeks to regulate the activities on land for which a licence has been granted. However a person must *not do any work under a licence otherwise than–(ab) in accordance with the approved work plan.* There was no approved work plan for this work. It was common ground in the running of the case that neither (a) or (b) of s 39 were applicable to this case.

35. There was no approved work plan to cover the work undertaken by Mr Graham Cahill and Mr Brooks.

36. It is worth noting that nothing in the findings of this Court are intended to suggest or imply that either of these persons acted in any way that was contrary to law or dishonest. In fact the Court was impressed by their candor and the straightforward manner when giving evidence.

37. It was a matter of contention as to whether a workplan was required under s 40 as the works were said, by the defendants, not to be of a kind requiring a work plan since the works did not come within the definition set out in s 40(2)(b)(ii), and, particular emphasis was placed on the absence of any *underground operations*. The remaining words of s 40(2)(b)(ii) were not applicable to the work undertaken. It was the contention of the prosecution that the works came within the scope of *underground operations* and therefore a work plan was required.

38. The word *underground* is clear and requires no consideration as it speaks for itself but the word *operation* does require attention.

39. It was open to the Parliament to use the word *mining* in s 40(2)(b)(ii) but it did not do so. If the word *mining* was used then it would restrict the applicability of the sub-section to *extracting minerals* (s 4). Parliament has used the much wider and

more expansive word *operations*. Clearly then the requirement to lodge a work plan is not limited to the extraction of minerals, it is much broader.

40. It is also of note that the Act does not refer to the term *exploration* in s 40(2)(b)(ii) as it does in s 40(2)(a) which grants an exemption for *low impact exploration work* from the requirement to obtain a work plan.

41. The term *exploration* is defined in s 3 as:

''exploration" means exploration for minerals and includes—

(a) conducting geological, geophysical and geochemical surveys; and

(b) drilling; and

(c) taking samples for the purposes of chemical or other analysis; and

(d) extracting minerals from land, other than for the purpose of producing them commercially; and

(e) in relation to an exploration licence, anything else (except mining) that is specified in the licence;

42. In contrast to the definitions in the Act of both *mining* and *exploration*, the word *operations* has a much wider meaning. The Oxford Dictionary defines the word operation, as, inter alia *an active process; a discharge of a function* and *an organised activity involving a number of people*. The definition is wide and inclusive and tends to the interpretation of the sub section to include all organised activity that involves work underground and not limited to *mining* and *exploration*. It is evident that there was a great deal of well organised *underground operations* by Mr Graham Cahill, Mr Brooks as well as his son over *many months* to clear the debris from the "old shaft" and to shore up the sides of the shaft, putting in place bracing timbers as well as back filling with sand. This is very clearly shown in Exhibit L – in particular, photograph # 12.

43. In the opening submission by Mr Maloney of counsel stated the "old shaft" extended down some 55 feet. During the course of the hearing, the Court was told

that this shaft went down 50 feet. In Exhibit G, the shaft is said to be 65 feet deep. Whatever the precise depth is, it is of no consequence other than to know it was a deep shaft, and, the Court has no doubt that undertaking the work as shown in photograph #12 required many *months of work* by up to three men.

44. The fact that the work was said to be of a high standard (and not challenged) is not relevant to the consideration of the actus reus of the offence.

45. The works undertaken over the *many months* went well beyond work done to ensure *public safety* as required under 6.1 of MIN4230 or for any conceivable reasons that could be construed as being necessary to protect wildlife. The evidence of Mr Graham Cahill was to the effect that the entrance to the "old shaft" was secured soon after it was discovered in early 2017 and this would have protected the wildlife and made it safe for the purposes of *public safety*.

46. Similarly the works went well beyond any conceivable measures that could have been required to ensure adequate drainage and avoid subsidence. The unchallenged evidence of Mr Witenden was the "old shaft" was *roughly 20 metres* from the "existing shaft". There was an absence of any cogent evidence that the extensive work done in the "old shaft" was required as a matter of urgency and in the absence of a work plan to mitigate any likelihood of subsidence in the "existing shaft" or more generally on the site. As has been stated, the entrance and area around the "old shaft" was secured. If there was to be any subsidence in that vicinity, the Court has no doubt that Mr Graham Cahill would have widened and secured the area around the "old shaft".

47. Accordingly, it is the finding of the Court that a work plan was required for the work done on the "old shaft" and the work came within the scope of s 40 of Act. The Court is well aware that there was already in existence a work plan that did not cover these works; hence it is a variation to the existing work plan that was required but for convenience, the Court has referred to the requirement for a work plan and not a variation to the existing work plan.

Defence of honest and reasonable mistake

48. Sandy Mining, it is accepted, would be acquitted of the charge if the Court was satisfied that it had an honest and reasonable belief of fact. It may also include a mix of fact and law. The evidentiary burden lies with the accused.

49. The Court finds that Sandy Mining had an 'honest' belief that a work plan was not required for the extensive works undertaken during the months from March to late 2017. It did believe a variation to the work plan was required to construct a 'drive' between the "old shaft" and the "existing shaft" and it would seem, to engage in any mineral extraction using the "old shaft", not that this latter option ever seems to have been contemplated.

50. In making this finding the evidence of Mr Cahill and Dr Gibson is largely accepted.

51. However the Court is not of the view that it was a mistake of fact but squarely a mistake of law; Sandy Mining believed it was lawful to undertake the extensive works in the absence of a work plan. The employees went about undertaking months of work at the direction of Sandy Mining. There was never any suggestion that the employees deviated from their instructions or went beyond their instructions from Sandy Mining. In the absence of a mistake of fact, the defence of honest and reasonable mistake must fail and the charge is proven.

52. Having come to this conclusion, it is not necessary to consider if the actions of Sandy Mining were reasonable. However if the Court was required to examine the reasonableness of Sandy Mining, it is highly unlikely a Court could come to the conclusion that the actions of Sandy Mining were reasonable particularly in the light of its failure to follow up or respond to the emails of Bessie Smith and Colin Byrant on 30 March 2017 and 12 April 2017 respectively. It was very clear from the email of Bessie Smith (Exhibit I), that a work plan variation was necessary for the works to be undertaken. She stated: *The works are outside the scope of the current work plan for MIN4230 dated 31/3/2006*. If this was not clear enough, she went onto state: *For any works to proceed as described, a work plan would be required.*

53. As to the reasons there was no follow up was puzzling to the Court. However the Court is inclined to the view, having heard the evidence of Mr Cahill and Dr

Gibson, that Mr Cahill held a firm and unwavering view that a work plan was not required and his opinion that no response was required prevailed.

The four false statement charges against both Sandy Mining and Mr Cahill

54. These charges are offences for which the prosecution must establish the actus reus of the charged acts as well as the mens rea to the requisite criminal standard.

55. All eight charges relate to the representations by Mr Cahill for and on behalf of Sandy Mining on two separate occasions, thrice on 18 June 2018 and one instance on 20 July 2018.

56. It is convenient for the first set of charges –Charge 2 and 5 with respect to Sandy Mining, and, Charge 1 and 7 with respect to Mr Cahill can be dealt with together as they all relate to an allegation of a false or misleading statement made to *an Inspector* that Sandy Mining was acting under a *direction* from Work Safe to undertake the works on the "old shaft".

57. It was not in dispute that Mr Cahill did state that the works were undertaken at the direction of Work Safe in his letter to Earth Resources Regulations (Exhibit L). In that letter he states: *2. The opening of the old site was done at the direction of Worksafe* (sic)… The Court is satisfied that the word direction from Work Safe was again used on 20 June 2018. In fact Mr Cahill accepts that he did use the term *direction*.

58. The Courts finds that no such *direction* was ever given by Work Safe or any words remotely approaching this word.

59. It is difficult to conceive of a stronger more compelling word than *direction* to impart to the reader or listener that the author was required to undertake or not undertake a course of action. It is vastly different to words such as *recommendation* and *advise* and even further removed from the words *general discussion* - words Mr Cahill used in his evidence to endeavor to explain the sentiments he was attempting to convey.

60. It may be that Mr Cahill was overstating the views of Work Safe to give impact and effect in his case against any assertion that Sandy Mining had engaged in any unauthorised activity concerning the "old shaft". However Mr Cahill is a very

experienced legal practitioner and mining director. He well knows the power of words and their use. The use of the term *at the direction of Worksafe(sic) …* was purposeful and intentional.

61. The Court finds that in using the words *at the direction of Worksafe(sic)…*, Mr Cahill did so fully expecting that the words be relied upon knowing that the statement was false or misleading.

62. Accordingly, the Court finds Charges 2 and 5 against Sandy Mining and Charges 1 and 7 against Mr Cahill are proven.

63. Charge 3 against Sandy Mining and Charge 2 against Mr Cahill relates to an allegation of Mr Cahill of making a further false or misleading statement to an inspector that Departmental officers had *…strongly recommended …that a secondary egress/ventilation shaft be constructed*.

64. Again, as with the *at the direction to Worksafe(sic)…* statement, these words are contained in the letter of Mr Cahill dated 18 June 2018 (Exhibit L).

65. Having heard and considered the evidence of Lionel Woodford and Bessie Abbott, the Court concludes it is highly unlikely that they gave such advice. Both Mr Woodford and Ms Abbott were impressive witnesses. However the Court cannot exclude the real possibility that other Department officers may have responded positively to Mr Cahill's idea on 17 January 2017 and again at the meeting on 15 February 2017 of having a secondary egress/ventilation shaft.

66. It is conceivable that Mr Cahill construed what was being said as a recommendation, even if this word was not used by any Departmental officer. Moreover, Mr Cahill impressed the Court as a person who views are very much shaped by his preconceived ideas and beliefs. He entered the discussions and came away from the meeting of 15 February 2018 as having reinforced his already formed view that "the old shaft" should be used as an opportunity to open a 'drive' to the "existing shaft". As time passed, particularly when writing the letter 18 June 2018 (Exhibit L) Mr Cahill decided to give extra flourish to his belief that it was the Department's recommendation by adding the word *strongly*.

67. In so doing, Mr Cahill may be guilty of using extravagant language, engaging in an excessive level of advocacy on behalf of the company and at times not taking sufficient care to understand what people are saying to him, this does not amount

to the use of the words *strongly recommended* as constituting a criminal act. It is in stark contrast to the words *at the direction of Work Safe*.

68. Accordingly Charge 3 against Sandy Mining and Charge 2 against Mr Cahill are dismissed.

69. Charge 4 against Sandy Mining and Charge 3 against Mr Cahill relates to an allegation of Mr Cahill having made a false or misleading statement to an inspector on 18 June 2018 that Work Safe officers *…had given full approval to return to mining activities … following inspection on 21 April 2017.*

70. As with the above charges, the words which are alleged to be false or misleading are set out in Mr Cahill's letter of 18 June 2018.

71. The Court has considered the words used by Mr Cahill and finds the words … *full approval...* had no basis in fact. The words used by Mr Cahill in his letter of 18 June 2018 were of course made to support his contention that there was no unauthorised shaft in the licensed area.

72. Mr Walscholts gave evidence on this matter but even leaving aside his oral evidence, the Work Safe Entry Report of 21/4/2017 (Exhibit F) states this: *As a result of today reviewing the further information received I am satisfied as this time that the MHHs and the hand written notations by Michelle Gibson satisfy*(sic) *that a review of all mining hazards and current controls has occurred given that the mine is not currently operating and is in care and maintenance.* It goes onto state: *Further review of hazards should occur during restart of mine activities.* And later: *I believe that Improvement Notice … has been complied with.*

73. The words used by Mr Cahill were not as precise or accurate as they could be with respect to the outcome of the review by Work Safe. The words could be described as 'stretching the truth'. Nevertheless the use of imprecise and inaccurate language do not amount to a criminal charge of making a false or misleading having been made out.

74. Accordingly Charge 4 against Sandy Mining and Charge 3 against Mr Cahill are dismissed.

The three charges if attempting to intimidate Inspector David Witenden in the exercise of his powers or in the discharge of his duties

75. Charges 4, 5 and 6 against Mr Cahill allege he did attempt to intimidate Inspector David Witenden on three occasions, namely on 11 July, 18 July and 20 July 2018. This was done by way of leaving telephone voice messages on the telephone message bank of Mr Witenden, these having been played in Court and tendered as Exhibit S.

76. Mr Cahill does not dispute having left the voice messages and that they were intended for Mr Witenden but denies that he was attempting to intimidate Mr Witenden; rather he contends that he was being *robust* in an effort to resolve a situation that he considered to be *out of control*.

77. Mr Cahill was not able to provide a satisfactory or remotely plausible reason for referring to an IBAC investigation that he well knew was not even tenuously connected to Sandy Mining. It was gratuitous and the only possible reason such reference was included in the voice messages to Inspector Witenden, in the finding of the Court, was to aggravate him, cause him discomfort and to engender apprehension in the mind of Mr Witenden that he was the subject of an IBAC investigation. It was unpleasant and unnecessary. It went beyond *robust* advocacy.

78. It is of course another matter altogether to ascribe the words as falling within the ambit of s 95R(1) of the Act which sets out the offence for which it is alleged Mr Cahill was charged. In the section, it begins: *A person not willfully…* The word *willfully* not only leaves in no doubt that the offence is not one of strict liability and requires mens rea, it also imports into the offence the unequivocal requirement of a deliberate and calculated action by an accused to knowingly engage in an act that is prohibited by law, in this instance to attempt to intimidate Mr Witenden.

79. It is of no relevance as to whether Mr Witenden believed or did not believe there was an attempt to intimidated him by Mr Cahill. It is the willful intentions of Mr Cahill that are relevant to the charge being proven.

80. The Court has concluded that whilst Mr Cahill was careless and even reckless in the words he used which were both gratuitous and disagreeable, he was motivated by frustration and dissatisfaction with what he perceived to be the poor handling of the matter and not truly motivated to attempt to intimidate Mr Witenden.

81. Accordingly, Charges 4 ,5 and 6 against Mr Cahill are dismissed.

83. In summary, where Sandy Mining is the accused Charges 1, 2 and 5 are proven. Charges 3 and 4 are dismissed.

84. In summary, where Mr Cahill is the accused, Charges 1 and 7 are proven. Charges 2, 3, 4, 5 and 6 are dismissed.

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Upon the delivery of this decision on 26 September 2019, the Court was advised by the parties that at an earlier hearing and before the matter was in the control of the Court constituted by this judicial officer, an application was made to the Court by the Prosecution for Charge 6 against Mr Cahill to be Withdrawn. Apparently, the Court stated the charge would be marked Struck Out/Withdrawn in accordance with the application. No entry to this effect had been entered into the computer based Court record. This has now been rectified.