

IN THE DISTRICT COURT
AT WELLINGTON

CRN 11018500187 –
CRN 11018500198

Between **Ministry of Business, Innovation and Employment**
Informant
And **Peter William Whittall**
Defendant

MEMORANDUM OF COUNSEL FOR DEFENDANT

Dated: 12 December 2013
Judicial Officer: Judge Farish

MinterEllisonRuddWatts

LAWYERS

P O BOX 2793 WELLINGTON
TELEPHONE 04 498 5000
FACSIMILE 04 498 5001
SOLICITOR ACTING: STACEY SHORTALL
stacey.shortall@minterellison.co.nz

COUNSEL INSTRUCTED: STUART GRIEVE QC
O'CONNELL STREET BARRISTERS
PO BOX 4555 AUCKLAND
TELEPHONE 09 358 1716
FACSIMILE 09 358 1718

May it please the Court:

1. The purpose of this memorandum is to provide the Court with additional information relevant to the dismissal of charges brought by the informant against Peter Whittall.
2. Mr Whittall has always maintained his innocence.

Background

3. As Your Honour knows, the informant laid 12 charges against Mr Whittall under the Health and Safety in Employment Act 1992 on 10 November 2011.
4. Between December 2011 and October 2012, the informant provided initial disclosure. The informant advised that full disclosure would be provided in tranches and relevant disclosure would be identified from approximately 600,000 documents.
5. On 25 October 2012, Mr Whittall entered a not guilty plea to the charges.
6. Subsequently, from 20 December 2012 to 30 October 2013, the informant provided six tranches of full disclosure, comprising approximately 36,000 documents.
7. On 30 October 2013 and 1 November 2013, the informant provided the defendant with 91 briefs of evidence. 32 of the briefs are unsigned and could not be admitted in evidence. A significant proportion of the unsigned briefs are also incomplete.
8. As details of the prosecution case were made available over this lengthy period, fundamental evidentiary deficiencies and flaws were identified by defence counsel. These were notified to counsel for the informant and, with respect to some issues, identified for the Court in memoranda dated 22 May and 22 August 2013.
9. Initial preliminary reviews of the briefs revealed serious concerns such that counsel wrote to the prosecutor on 8 November, 2013 setting out those concerns in some detail.

Fundamental deficiencies and flaws in the informant's case

10. The briefs of evidence contain:
 - (a) numerous and extensive hearsay quotations from the statements of other witnesses;
 - (b) inadmissible opinion evidence;
 - (c) submissions and conclusions on matters of law
 - (d) assumed and misstated facts;
 - (e) reliance on the content of documents the admissibility of which would be disputed; and
 - (f) speculative conclusions.
11. Of the 91 briefs of evidence provided by the informant, a significant number made little or no mention of Mr Whittall and it is not apparent from the briefs of evidence or the full disclosure how the informant would have intended to establish Mr Whittall's alleged acquiescence or participation in the various failings alleged.
12. Moreover, many of the witnesses who have provided briefs of evidence have not been employed at or connected in any way with Pike River Coal Limited (in receivership) (the **Company**)'s coal mine for months or years before the explosions.
13. The informant's case was largely contained in a single brief of evidence of an Investigations Manager in the Health and Safety Group at the Ministry of Business, Innovation and Employment (**Investigations Manager Brief**).
14. The Investigations Manager Brief contains substantial inadmissible hearsay, opinion evidence about mining matters as to which she lacks the requisite expertise and legal submissions or conclusions of law.
15. At least three of the informant's expert witnesses state in their briefs of evidence that they have relied at least in part on the content of the Investigations Manager Brief.

16. The admissibility of the Investigations Manager Brief, and many of the informant's other briefs of evidence, would have been the subject of pre-trial admissibility challenge. If the content of the Investigations Manager Brief were ruled inadmissible, the informant would be unable to establish most of the facts that underlie the charges against Mr Whittall.
17. There also were significant problems with the informant's disclosure. Specifically:
 - (a) A large number of the full disclosure documents were provided in a native form and with altered metadata such that the authenticity and integrity of those documents could not be established.
 - (b) Disclosure indices provided by the informant list a significant number of files that have not been reviewed and in respect of which relevance has therefore not been determined. The informant has advised that some of the files are in formats that are not supported at the Ministry of Business Innovation and Employment, and have not been opened notwithstanding that they relate to matters such as ventilation (in relation to which at least one charge has been brought).
18. In addition, various issues arise from the informant's investigation process. In particular:
 - (a) The Ministry did not obtain any data stored to desktop local hard drives and the Police did not clone any Company desktops or laptops.
 - (b) The Ministry did not receive data from Mr Whittall's desktop when it was obtained by the Police during the Royal Commission process from the Company's receivers.
 - (c) Notwithstanding that laptops were widely used by Company staff and contractors (including the Mine Manager, Technical Services Manager, Project Manager, Safety Manager, Technical Services Coordinator and Engineering Manager), the Ministry only obtained data from one laptop (which was issued to a contractor and was not used by Mr Whittall).

- (d) The Ministry did not obtain all of the Company's server data collected by the Police.
 - (e) The Ministry did not collect data from any mobile devices (such as iPhones or Tablets).
 - (f) The Ministry did not collect any data from portable storage devices (such as memory cards or CDs).
19. The informant refused to explain:
- (a) why it chose not to receive data from Mr Whittall's desktop which had been obtained by the Police;
 - (b) what, if any, efforts were made by the informant to obtain or receive data from Mr Whittall's laptop or, if not, why no such efforts were made;
 - (c) whether and, if so, on what date, the informant asked the Police why they did not forensically copy any desktops or laptops at the time they cloned servers at the mine site and the Company's corporate office in Wellington;
 - (d) what the Police told the informant in response to the question at the preceding paragraph and, if the informant did not ask this question, why not;
 - (e) whether the informant considered forensically copying any Company desktops or laptops and, if so, why this did not happen;
 - (f) if the informant did not consider copying any Company desktops or laptops, why not; or
 - (g) why the informant did not obtain from the Police the Company's workstation data.

The \$3.41 million voluntary payment

20. As a consequence of the informant's decision not to proceed, funds which would otherwise have been used for the costs of the hearing have become available to enable a voluntary payment to be made to the families of the 29 men who died and the two survivors.

21. As has been mentioned by the informant the voluntary payment will be made on behalf of the directors and officers of the Company at the time of the 19 November 2010 explosion.
22. For the purpose of ensuring a clear record of the basis on which the payment is being received by the Court counsel suggests that Your Honour might consider it appropriate to stipulate that the \$3.41 million comprises allocations of \$110,000 for each of the families of the 29 men who died and the two survivors in the amount calculated by Your Honour when ordering that they be compensated with a reparations order for the significant loss and ongoing trauma that Your Honour found had been caused by the actions of the Company.
23. Mr Whittall wishes to reiterate his heartfelt sympathy for the families and friends of those men who lost their lives in the Pike River coal mine in November 2010. He has offered to meet with the families to convey these sentiments in person.

Conclusion

24. The defendant supports the informant's decision not to offer evidence on the charges against Mr Whittall and the informant's invitation that he be discharged.

Dated at Auckland this 11th day of December 2013



S B W Grieve QC
Counsel for the defendant