

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU**

**CRI-2020-004-009514
[2023] NZDC 23224**

**WORKSAFE NEW ZEALAND
Prosecutor**

v

**WHAKAARI MANAGEMENT LIMITED
Defendant**

Trial: 11 July – 21 September 2023

Appearances: K McDonald KC, M Hodge, S Symon, D Dow, L Dalton, L Wright and S Forrest for WorkSafe New Zealand
J Cairney and P Brash for Whakaari Management Limited

Judgment: 31 October 2023

TRIAL JUDGMENT OF JUDGE E M THOMAS

A. The charge under s 37 of the Health and Safety at Work Act 2015 is proved and WML is convicted.

B. The charge under s 36 is dismissed.

5th

REASONS

Whakaari

[1] Whakaari (White Island) is an active offshore volcano in the eastern Bay of Plenty. It has a long eruptive history and is commonly referred to as New Zealand's most active volcano.¹ On 9 December 2019, it erupted. There were 47 people ashore: 42 paying tourists and their five tour guides employed by commercial tour operators. All were on the crater floor, at different locations along a circular route used by the operators for their tours.

[2] The eruption was a phreatic explosion which created a pyroclastic density current, also known as a base surge.² Essentially, the erupting column collapsed in on itself, resulting in a flow of ash, steam, volcanic gases, and rocks that surged across the crater floor. It engulfed everyone on the island, with tragic consequences. Twenty-two people lost their lives from injuries they sustained in the surge. The remaining 25 were all injured, most seriously. Many continue to suffer. Families and communities in New Zealand and around the world were and continue to be deeply affected.

[3] I pay special tribute to the survivors who gave evidence during this trial:

- (a) Lauren and Matthew Urey,
- (b) Annie Lu,
- (c) Brian Depauw,
- (d) Jesse Langford, and
- (e) Stephanie Browitt.

[4] Each was remarkable. Each showed great strength, insight, poise, and dignity. They were a powerful and respectful voice for all the victims. Their contribution to

¹ Formal statement of Professor Noel Procter, exhibit WSE.008.02504 at para 7.5.

² Formal statement of Sir Stephen Sparks, exhibit WSE.008.02501 at paras 6.16–6.23.

[86] However, these are all pre-cursors to access. Individual tour operators could determine all aspects of their operations on Whakaari once they met these pre-conditions. The evidence established that, in practice, this was also true.¹⁰⁰ In a fundamental sense then, WML did not influence or direct the tour operators' activities in carrying out work.

Did WML's failure to comply with its s 37 duty expose any individual to a risk of death or serious injury?

[87] Yes.

[88] Had WML complied with its duty and obtained the necessary expert advice on risk and health and safety, it would have fully understood the risk. It would have had two options:

- (a) stop tours entirely.¹⁰¹ The failure to do so exposed any individual to a risk of death or serious injury; and
- (b) implement effective controls if that were possible. Such controls, to be effective, would have eliminated or minimised the risk. The failure to do so resulted in tours occurring to Whakaari without adequate controls, exposing individuals to a risk of death or serious injury.

[89] The tragedy of 9 December 2019 bears that out.

[90] A breach of a duty does not need to have caused the harm suffered by workers or other persons. But there needs to be a causal link between the failure and the risk to which an individual was exposed.¹⁰² WML knew tours would take place on Whakaari. That was the whole purpose of the licence agreements. That activity continued throughout the charge period. It grew to substantial levels with thousands

¹⁰⁰ Evidence of Patrick O'Sullivan, T457:13.

¹⁰¹ Dr Peace considered this the only reasonable outcome: formal statement of Christopher Peace, exhibit WSE.008.02502 at paras 7.23 and 7.26.

¹⁰² *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37 at para [130]; *Simpson Design and Associates Pty Ltd v Industrial Court of NSW* [2011] NSWCA 316 at para [115].

of tourists per annum visiting Whakaari each year.¹⁰³ It was the entity that permitted access and could refuse access. Without WML's work activity there would have been no tours to Whakaari.

Q [91] WML's breach, its failure to undertake the necessary risk assessments, was a significant and substantial cause of an individual being exposed to risk of death or injury. Its breach was not, and does not need to be, the sole cause of the exposure to the risk of death or serious injury. Other causes contributed. However, it is enough to amount to "substantial". It was more than a minimal causal factor, making it also "significant".¹⁰⁴

Result

P [92] The charge under s 37 is proved and WML is convicted.

[93] The charge under s 36 is dismissed.

Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 31/10/2023

¹⁰³ Evidence of Sir Stephen Sparks, T305:8.

¹⁰⁴ *WorkSafe v Centreport Limited* [2019] NZDC 3155 at para [15].