THE HIGH COURT OF NEW ZEALAND
TE KŌTI MATUA O AOTEAROA

27 February 2025

MEDIA RELEASE

***Whakaari Management Ltd v WorkSafe New Zealand* [2025] NZHC 288**

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Introduction

Whakaari White Island is an active volcano currently owned by the Buttle family. The Island is owned through a trust, through which it is leased to a company called Whakaari Management Ltd ("WML"). WML was and is currently owned and directed by Andrew, James and Peter Buttle.

From 2008 to 2019, WML granted licences that allowed commercial tour companies to run guided walking tours on the crater floor of the Island. On 9 December 2019, Whakaari erupted. There were 47 people on the Island at the time: 42 paying tourists and five tour guides. As a result of the eruption, 22 people died. The remaining 25 were all seriously injured.

After the eruption, WorkSafe New Zealand brought charges under the Health and Safety at Work Act 2015 ("HSWA") against WML, those companies that operated guided walking tours on the Island, and other parties.[1] WML was charged with an offence under s 48 of HSWA for failing to comply with a duty under s 37 as a person that managed or controlled a workplace or, alternatively, for a duty under s 36, as a person that had a duty to ensure the health and safety of those on the Island because

[1] These other parties included the Institute of Geological and Nuclear Sciences Ltd and the National Emergency Management Agency.

of its business.[2] WorkSafe alleged that either failure exposed individuals to a risk of death or serious injury/illness. (See [106] to [110]).

Following a Judge-alone trial, Judge Thomas in the Auckland District Court found WML guilty of an offence under s 48 for breaching its duty under s 37 of HSWA. The Judge separately considered and acquitted WML of any offence for a breach of s 36. He fined WML $1,045,000 and ordered it to pay reparation of $4,880,000 to the victims of the eruption. (See [131]-[140]).

WML's appeal

WML appealed against its conviction to the High Court. It argued (see [141]-[145]) that it:

(a) did not have a duty under s 37 of HSWA because it did not "manage or control" the workplace where walking tours took place ("the walking tour workplace") for the purposes of the Act;

(b) did not breach any duty – if it had any such duty – and

(c) any breach of duty – if there was such a breach – did not expose individuals to a risk of death or serious injury.

The issues for the High Court were therefore (see [145]):

(a) did WML have a duty under s 37 (and what did it mean to "manage or control" for the purposes of the provision);

(b) if so, did WML breach that duty; and

(c) if so, did WML's breach expose any individual to a risk of death or serious injury?

Decision

Did WML have a duty under s 37? No

The Court held that WML did not have a duty under s 37 to ensure, so far as reasonably practicable, that the walking tour workplace was without risks to the health and safety of any person.

[2] Person is used as shorthand to refer to a "a person conducting a business or undertaking" – a "PCBU".

The central issue for the Court was the meaning of the words "who manages or controls a workplace" in s 37 of HSWA. This required interpreting s 37 as a whole bearing in mind the words, purpose and context of the Act. (See [158]).

The Court concluded that in enacting s 37 of HSWA, Parliament wanted to impose the s 37 duty on persons with the ability to "actively" manage or control a workplace in a practical sense, as opposed to those who simply had some element of management or control through, for example, ownership. (See [161]-[173]). The Court acknowledged that a sweeping interpretation of s 37 risked being either under or over inclusive of those persons that Parliament intended to be captured by the provision, and that the reach of the provision should therefore be determined incrementally on a case-by-case basis, as different cases come before the Courts in the future. (See [174]-[190]).

Nevertheless, the Court considered it necessary to focus on three factors in determining whether a person owed a duty under s 37 (see [191]-[193]):

(a) first, the particular workplace that the person is alleged to have actively "managed or controlled";

(b) secondly, what it would mean for a person to have the power to actively "manage or control" that workplace; and

(c) finally, whether the person in fact had that power as part of their own business or undertaking.

In this case, the Court considered it significant that the walking tour workplace was bare land. This meant that there was nothing for WML to manage or control on the walking tour workplace other than granting access in the first place, beyond the work taking place there itself. Therefore, in order for WML to have had active management or control of the workplace in a practical sense, it had to have necessarily had management or control of the work taking place there. (See [209]-[211]).

In light of that test, the Court concluded that WML did not manage or control the walking tour workplace for the purposes of s 37. The Court acknowledged that WML had some degree of management or control because it granted access to the Island to the walking tour operators. However, the Court considered that merely granting access was insufficient to impose a duty under s 37, given that Parliament had clearly intended for the duty not to be imposed on landowners simply because they permitted others to carry out activities on their land. (See [209]-[214]).

The Court further rejected that WML had a duty under s 37 because of the terms of its licence agreements, because of its actions after granting access or because it received money for allowing the walking tour operators to carry out walking tours on the Island. The Court concluded that there was nothing in the licence agreements which gave

WML the ability to direct and control what was happening on the Island day-to-day, or which gave it an active or practical ability to demand corrective action to ensure safety. (See [215]-[226]).

Furthermore, the Court considered it wrong in principle to find that WML had a duty under s 37 simply because it responsibly imposed obligations on the walking tour operators to carry out their own businesses safely. The Court concluded that if that were so, WML could have escaped liability by electing not to act responsibly. (See [226]). The Court also rejected WorkSafe's argument that WML had actual, practical management or control of the walking tour workplace after granting access. The evidence showed that WML carried out its role as an interested and engaged landowner, but it did not show that WML had the ability to direct or control what happened on the Island – in a practical sense – itself. Rather, the Court's review of the evidence led it to the conclusion that it was the walking tour operators and others, like the Institute of Geological and Nuclear Sciences Ltd ("GNS") who took the leading role as to what happened on, and whether to allow visits to, the Island (See [233]).

Finally, the Court rejected that WML had management or control of the walking tour workplace because it was paid for its licences or because the general risk of allowing the public to visit the Island necessitated imposing such a duty. The payment of money was given in exchange for the grant of access to Whakaari and for the acceptance of the terms of WML's licence but those factors did not give WML management or control. (See [234]-[235]). Furthermore, while it was important to understand the risks associated with allowing the public to visit the Island, the question for the Court was whether it had management or control of the walking tour workplace, as opposed to whether the walking tour workplace had a hazard that needed hazard management in the first place. (See [236]-[239]).

Accordingly, the Court concluded that WML's appeal should be allowed on this first ground of appeal, and that WML's conviction should be quashed on that basis.

If WML had a duty under s 37, did it breach it? No

Notwithstanding its earlier conclusion, the Court went on to consider whether WML breached any duty under s 37 if it did have such a duty.

WorkSafe's case in the District Court against WML centred on WML's failure to obtain a risk assessment for its business of granting licences for walking tour operators to conduct walking tours on Whakaari for the fee. WML accepted that it never obtained such a risk assessment but argued that it was not reasonably practicable for it to have done so. (See [243]-[254]).

The Court agreed that it was not reasonably practicable for WML to have obtained its own risk assessment. First, the nature of WML's business was that it permitted other

companies to undertake walking tours on the crater floor of Whakaari themselves subject to the terms of a licence agreement, in consideration for payment. It responsibly required the walking tour operators to inform visitors of the risks of visiting Whakaari, to provide visitors with appropriate personal protective equipment and to obtain independent advice on whether it was safe to visit the Island. As a landowner who was permitting others to undertake their own activities on its land, it was difficult to see what more could reasonably have been expected of WML. (See [263]-[279]).

Secondly, it was not unreasonable for WML to have relied on government stakeholders such as Emergency Management Bay of Plenty ("EMBOP"), or a plan authored by EMBOP to manage the hazards and risks of Whakaari ("the Whakaari Response Plan"), in lieu of obtaining its own risk assessment. Under the Whakaari Response Plan, the EMBOP was responsible for informing the public of the risks associated with the Island and making decisions about restricting access to the Island. The EMBOP also had statutory obligations to identify, assess and manage the hazards and risks associated with the Island. Accordingly, it was reasonable for WML to assume, given the EMBOP's role and expertise, that the EMBOP would be the body to have obtained such a risk assessment. (See [280]-[291]).

Furthermore, reliance on the Whakaari Response Plan following an earlier eruption in 2016 was not unreasonable. The evidence showed that all the relevant government agencies (including WorkSafe, and the Ministry of Civil Defence) considered the then statutory framework to provide adequate protection for the public. Furthermore, the Whakaari Response Plan was updated after the 2016 eruption occurred and shortly before the 2019 eruption took place. (See [292]-[294]).

Finally, the Court concluded that it was not unreasonable for WML to have relied on the fact that the major tour guide provider to Whakaari – White Island Tours Ltd – was approved under the Health and Safety at Work (Adventure Activities) Regulations 2016 to conduct walking tours at Whakaari. While there were serious deficiencies with how White Island Tours Ltd came to be an approved adventure activities operator, it was accepted that WML did not know of those deficiencies prior to the 2019 eruption. (See [295]-[302]. See also [303]-[304] for a general conclusion).

WorkSafe also argued that WML failed to take further reasonably practicable steps because it failed to obtain a risk assessment. WorkSafe argued that WML consequently failed to consult with GNS and the walking tour operators as to the hazards and risks of allowing tours on Whakaari; monitor and review known hazards; ensure that workers and tourists were supplied with appropriate personal protective equipment; and to ensure that there was an adequate means of evacuation from the Island. The District Court Judge agreed and found WML to have failed to carry out those further steps as a consequence.

The Court agreed with WML that it did not breach any duty under s 37 because of a failure to carry out these further allegedly reasonably practicable steps. The basis for the District Court's conclusion that these were reasonably practicable steps was that they would have been identified by a risk assessment had WML obtained one, or ensured that one was undertaken. Given its conclusion that such a risk assessment was not reasonably practicable to obtain, it followed that it was not reasonably practicable for WML to have taken the further steps said to arise from that risk assessment. (See [308]-[309]).

Accordingly, the Court concluded that had WML had a duty under s 37, it did not – on the evidence – breach that duty in any event.

Would compliance with its duty have prevented risks of death or serious injury? Yes

Finally, the Court went on to consider whether, if WML breached its duty under s 37, compliance with that duty would have prevented risks of death or serious injury. WML argued that, in any event, none of the steps which WorkSafe alleged WML should have taken would have made a difference and thus that no offence was made out under s 48 of HSWA. (See [310]-[311]).

The Court disagreed. The Court considered the inquiry under this ground of appeal to be whether any failure to take the alleged reasonably practicable steps exposed any individual to a risk of death, serious injury or illness. The Court concluded that if it was reasonably practicable for WML to carry out the reasonably practicable steps alleged, this would have reduced the risks that tourists were exposed to. In particular, the Court noted that had WML been under an obligation to obtain particular risk assessment information from GNS, that it would have appreciated the heightening risk of an eruption in the lead up to the 9 December 2019 eruption, and that this would have informed its decision-making as to whether to continue to permit tours on the Island. (See [312]-[316]).

Accordingly, the Court concluded that had it not allowed WML's appeal on its first two challenges to the District Court's decision, it would not have allowed the appeal on this third and final basis.

Result

WML's appeal was allowed, and its conviction for an offence under s 48 of HSWA was quashed.