IN THE DISTRICT COURT
AT WHAKATANE

I TE KŌTI-Ā-ROHE
KI WHAKATĀNE

CRI-2020-004-009514
[2023] NZDC 2266

WORKSAFE NEW ZEALAND
Prosecutor

v

INSTITUTE OF GEOLOGICAL NUCLEAR SCIENCES LIMITED
Defendant

Date of Ruling:	10 February 2023
Appearances:	K McDonald KC, M Hodge and S Forrest for the Prosecutor R Reed KC and G Gallaway for the Defendant
Judgment:	10 February 2023

ORAL PRETRIAL RULING OF JUDGE E M THOMAS
[Severance]

The defendant's application for severance is refused.

REASONS

Introduction

[1] Worksafe, by filing the appropriate notice at the commencement of these proceedings, joined all defendants in a single trial. It is open to any defendant to seek severance.

[2] The Institute of Geological Nuclear Sciences Ltd (GNS) originally faced two charges, it now only faces one. The scope of that charge is relatively narrow. It relates only to the safety of helicopter pilots transporting GNS scientists to Whakaari. The last of those trips was several days before the eruption. GNS therefore seeks to have a separate trial. Worksafe opposes.

[3] The principles relating to severance are well settled.[1] They are uncontroversial for the purposes of this application. I have a wide discretion. Ultimately, what governs this application is the interests of justice.[2]

Is severance in the interests of justice?

[4] No.

[5] GNS points out that no defendant faces charges in the same terms as GNS. The charge it faces does not describe it being jointly charged with any other defendant. That is a useful starting point. Much of the evidence at a joint trial is either admitted by GNS or is not relevant to the charge against it. Therefore, a separate trial would be much shorter. It would occupy eight days as opposed to the several months required for a joint trial. GNS does not foresee that any other defendant needs to be tried with it for the charge against GNS to be determined.

[6] Understandably, GNS has approached this application from its own viewpoint. However, I must view the interests of justice as a whole. Although the charge is not

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[1] *Churchis v R* [2014] NZCA 281.
[2] S 138(4) the Criminal Procedure Act 2011.

necessarily expressed as one where GNS is jointly charged with anybody else, there are likely to be areas where the actions of GNS are important in any main trial.

[7] GNS is charged that it failed to properly co-ordinate or communicate with PCBUs over the safety of their helicopter pilots. It is inevitable that who failed where in any such respect might be examined. GNS may not be intending to do that. But it is open to those other PBCUs to do so given they have been charged with failing to properly co-ordinate or communicate with GNS over the same period.[3]

[8] Central to the main trial for many defendants will be what decisions they took based on the known risk. GNS is the lead Government agency for monitoring volcanic activity. It is inevitable that whether GNS failed in monitoring or advising risk may be a live issue for those defendants. Some defendants have already indicated their concern at this application. That of itself does not determine severance. It does demonstrate though that the actions of GNS are likely to be forensically relevant at the main trial to defendants other than GNS. Worksafe, too, has signalled that it would summons GNS witnesses at trial if severance were granted and those witnesses became compellable.

[9] Keeping a defendant in a trial just so they can be cross-examined is not a principled basis upon which to determine severance. However, I accept that there is a real likelihood of the actions or processes of GNS being relevant at the main trial. That those would apply to the same period and, importantly, the same risk.

[10] GNS argues that to open itself up to the possibility of cross-examination on charges that it does not face is prejudicial. That it would affect its decision to call witnesses on its behalf. That this is a live question for it because GNS has not yet been able to give a full explanation regarding the allegations on the one remaining charge against it.

[11] Prejudice to a defendant includes the effect on any election to give or call evidence. It is a relevant consideration but not of itself decisive.[4] GNS accepts that if

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[3] Distinguishing *R v Cobb* (HC Hamilton CRI-2006-019-4626, 14 December 2006).
[4] *Churchis v R* [2014] NZCA 281.

its charge were to be severed, its representatives would become compellable witnesses at the main trial. It seems likely that they would be summonsed. They then become subject to cross-examination by all other parties on any issues at all that may be relevant to any of those parties. So GNS is exposed to that in any event.[5]

[12] GNS accepts that it would be exposed in that way. However, it argues that it would be exposed without the spectre of its own charge being determined at the same time. This is not a jury trial, however. A judge should be well placed to be able to apply only relevant and admissible evidence to a particular charge.

[13] GNS argues that other defendants can still explore these issues in a main trial if GNS is not there. But, at the same time, it argues the trial judge could not make any factual findings adverse to GNS as it would not be a party, unless its witnesses testified about those matters. That is an understandable submission. It is naturally just that someone should have the opportunity to be heard before there are any adverse findings made against them. But what GNS argues for raises two possibilities that are unjust and artificial:

(a) I do not make factual findings which I otherwise might on issues where GNS has not been heard. However, that might deprive others of a just outcome.

(b) I do make those factual findings. However, those could be challenged and potentially altered at a second trial where affected defendants would not be a party.

[14] Both scenarios, in the context of this case, compromise fairness. Potentially significantly. I must balance the legitimate interests of a defendant, here GNS, with the *fair* and efficient dispatch of court business.[6] A judge must be able to make factual findings they consider to be founded on the evidence put before them, whether GNS witnesses testify or not. Any party, not just GNS, is fundamentally entitled to fair treatment.

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[5] Distinguishing *R v M* [2017] NZCA 72.
[6] *Churchis v R* [2014] NZCA 281.

[15] GNS points to the cost and time it would need to put to monitoring events in the main trial if it were part of it. It says much of that work would be unnecessary given the amount of evidence that it says would not be relevant to the charge against it.

[16] GNS will have to monitor at a main trial anyway:

(a) in case any evidence might impact upon its trial,

(b) in case it needs to prepare or produce witnesses compelled to testify, and

(c) in case anything emerges affecting how it conducts its core business in the future.

[17] Finally, it would not be practicable for any severed trial to immediately follow the main trial before I had issued a decision, as GNS suggests. The state of current court rosters in Auckland or Whakatāne means that a severed trial in Auckland would occur deep into 2024 and not at all in Whakatāne. After that, there is the coronial inquest. Everyone has already waited far too long.

Result

[18] I must refuse the application.

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Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/02/2023