ORDER PROHIBITING PUBLICATION AND RESTRICTING DISTRIBUTION OF THE REPARATION SCHEDULE ASSOCIATED WITH THIS DECISION

NOTE: THIS VERSION INCLUDES CORRECTIONS MADE TO THE JUDGMENT ISSUED ON 1 MARCH 2024

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-009514
[2024] NZDC 4119

WORKSAFE NEW ZEALAND
Prosecutor

v

WHAKAARI MANAGEMENT LIMITED
WHITE ISLAND TOURS LIMITED
VOLCANIC AIR SAFARIS LIMITED
AERIUS LIMITED
KAHU (NZ) LIMITED
Defendants

Hearing:	26 – 28 February 2024
Appearances:	K McDonald KC, S Symon, D Dow, L Dalton, S Forrest for WorkSafe New Zealand J Cairney and P Brash for Whakaari Management Limited R Raymond KC, G Nicholson and O Welsh for White Island Tours Limited F Pilditch KC, I Rosic and S Coupe for Volcanic Air Safaris Limited, Aerius Limited and Kahu (NZ) Limited
Judgment:	1 March 2024

NOTES OF JUDGE E M THOMAS ON SENTENCING

A. Whakaari Management Ltd is fined $1,045,000 and ordered to pay reparation of $4,880,000.

B. White Island Tours Ltd is fined $517,000 and ordered to pay reparation of $5,000,000.

C. Volcanic Air Safaris Ltd is fined $468,750 and ordered to pay reparation of $330,000.

D. Aerius Ltd is fined $290,000.

E. Kahu (NZ) Ltd is fined $196,000.

F. Publication of the reparation schedule associated with this decision is prohibited, and its distribution is limited to the parties.

REASONS

Whakaari

[1] Whakaari (White Island) lies 48 kilometres offshore in the eastern Bay of Plenty. It has a long eruptive history and is commonly referred to as New Zealand's most active volcano. There have been dozens of eruptive periods throughout its more recent history.[1] Many have produced multiple volcanic hazards including ashfall, debris avalanches, landslides, pyroclastic density currents and volcanic gases.

[2] Most of Whakaari's cone is beneath sea level. The visible portion of the volcano largely comprises its main crater. It is around two kilometres in diameter and is readily accessible by boat. The shape of the crater allows ready access on foot directly to the main crater. Commercial tourism has taken advantage of these features, with paying tourists being able to land by boat or helicopter and tour the crater on foot.

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[1] Between 1826 and 2019.

[3] On 9 December 2019 Whakaari erupted. At the time, 47 people were ashore. All were tourists or guides associated with licensed commercial tours. All were on the crater floor, at different locations along a circular route used by the operators for their tours.

[4] The eruption was a phreatic explosion which created a pyroclastic density current, also known as a base surge. 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.

The fallen, the survivors and the families

[5] I have heard from many survivors and families grieving the loss of loved ones. Very few managed to escape the eruption without any serious injury. For the remainder, the suffering has been immense. Those who survived suffered excruciating and traumatic injuries, usually burns. The treatment was often painful, arduous, disheartening. For many it remains ongoing. Many have endured multiple surgeries and will continue to do so. Many grapple with disfigurement of one kind or another. It is not simply the physical injury that has caused so much harm. It is the terrible nature of those injuries and their significant emotional consequences that deepens the suffering. That deepens the grief felt by those who lost loved ones.

[6] We acknowledge that harm. Even if it is difficult for someone who has not endured it to possibly imagine it. We admire and respect those who are so courageously learning to rebuild themselves, their lives, their families.

Whakaari Management Limited

[7] Whakaari is privately owned and has been owned by the Buttle family since 1936. In 2008 the Buttles established an ownership and management structure for Whakaari. Whakaari Trustee Limited (WTL) became the legal owner, holding Whakaari on trust for the benefit of the wider Buttle family. WTL leased the island to

Whakaari Management Limited (WML). WML managed the grants of access to Whakaari. It issued licences to tour operators. It did so through formal licence agreements which set out various terms and conditions. These included conditions relating to access as well as terms of payment. Under the licence agreements the tour operators paid WML a licence fee together with a commission for every visitor that accessed the island. WML generated significant revenue as a result.[2]

White Island Tours Limited

[8] White Island Tours Limited (WIT) had an exclusive agreement with WML enabling it to conduct tours to Whakaari by boat. It took approximately 17,000 passengers to Whakaari annually, representing approximately 80% of all visitors.

[9] Many of its customers were passengers from cruise ships, including those operated by Royal Caribbean Cruises Limited (RCCL). Bookings made by those passengers for tours with WIT were not made directly with WIT. WIT had an agreement with Tauranga Tourism Services Limited (TTSL) to act as its agent for those bookings. RCCL had an arrangement with ID Tours Limited to act as sole agent for providing tours to RCCL customers. RCCL passengers would therefore purchase the tour directly from RCCL, which would have been offered that tour by ID Tours New Zealand Limited, which in turn made bookings with TTSL for spots on the tours operated by WIT.

[10] At the time of the eruption four WIT employees were on the island. They had with them 38 people from *Ovation of The Seas*, a cruise ship operated by RCCL.[3]

Volcanic Air Safaris Limited

[11] Volcanic Air Safaris Ltd (VASL) had a licence with WML granting it the exclusive right to transport tourists to Whakaari from the Rotorua area via helicopter. It could take up to four passengers and one pilot on each tour and in peak season would

[2] Trial evidence established that to be approximately $1,000,000 per annum at the time of the eruption.
[3] Comprising 37 paying tourists and one *Ovation* crew member, present to assist with language interpretation.

operate up to five trips per day, taking approximately 2500 passengers to Whakaari annually. At the time of the eruption, it had one pilot and four customers on Whakaari.

Kahu (NZ) Limited

[12] Kahu (NZ) Ltd (Kahu) had a licence with WML granting it the exclusive right to transport tourists to Whakaari by helicopter from the Whakatāne area. It took approximately 4000 passengers to Whakaari annually. At the time of the eruption there were no Kahu employees or customers on Whakaari.

Aerius Limited

[13] Aerius Ltd (Aerius) had a licence with WML granting it the exclusive right to transport tourists to Whakaari by helicopter from the Bay of Plenty region (excluding Whakatāne). It took approximately 250 passengers to Whakaari per annum. At the time of the eruption there were no Aerius employees or customers on Whakaari.

The failures

WML

[14] WML failed to ensure adequate risk assessments of conducting tours had been undertaken, either prior to entering into licence agreements as well as throughout the charge period.[4] It failed to obtain the necessary advice both in relation to volcanic risk and in relation to its own obligations arising from that risk. Under the licence agreements it required tour operators to conduct the necessary risk assessments, but failed to recognise it had its own obligation to do so. It failed to properly ensure that tour operators had conducted the necessary risk assessments.

[15] It has been found guilty of breaching one charge under s 37(1) and 48 of the Health and Safety at Work Act 2015.

[4] 4 April 2016-10 December 2019. WML's liability for sentencing is necessarily limited to its failure during this period.

The tour operators

[16] The tour operators each did conduct risk assessments, but they were fundamentally inadequate:

(a) they were conducted without any formal input from volcanological experts,

(b) they did not consider how well, if at all, an eruption could be predicted, and

(c) they did not consider the type of eruption that could occur at Whakaari and so they each incorrectly assessed the suitability of their control measures to mitigate or prevent any risk.

[17] Additionally, and as a result, the safety information tour operators provided to their paying customers was wholly inadequate, not sufficiently informing paying customers about the hazards, the risk, the consequences of an eruption. Often information was not provided to customers until after they had paid for the tour, and once they were on site. WIT failed to adequately consult, cooperate, and coordinate with TTSL to ensure that appropriate information was being given to cruise passengers. RCCL passengers who were part of the WIT tour on 9 December 2019 received no health and safety information prior to the safety briefing on the island.

[18] WIT and VASL have each pleaded guilty to:

(a) one charge under ss 36(1) and 48 of the Act relating to a breach of duty to their workers, and

(b) one charge under ss 36(2) and 48 of the Act relating to a breach of duty to tourists.

[19] Kahu and Aerius have each pleaded guilty to:

(a) one charge under to ss 36(1) and 49 of the Act relating to a breach of duty to their workers, and

(b) one charge under to ss 36(2) and 49 of the Act relating to a breach of duty to its tourists.

[20] The charges contain various particulars, but all breaches essentially flow from the failure to undertake adequate risk assessments.

Culpability generally

[21] Each defendant used an active volcano to make money.

[22] Whakaari is highly eruptive and has been for centuries. Previous eruptions have resulted in fatalities.[5] Eruptions are impossible to predict. The Institute of Geological and Nuclear Sciences Limited (GNS) is the public agency tasked with monitoring volcanic activity in New Zealand. It established a system of volcanic alert levels (VAL) and volcanic alert bulletins (VAB) which could broadly describe the state of volcanic unrest at any given time on Whakaari. The volcanic alert levels operated on a scale of 0 to 5. Throughout the relevant period Whakaari was either at VAL 1 or VAL 2. Those levels indicated unrest, and VAL 2 was the highest level short of an eruption. At the time of the eruption on 9 December 2019, Whakaari was at VAL 2.[6]

[23] Throughout, each defendant knew Whakaari was active, knew it had an eruptive history and appreciated that risk to tourists and employees needed to be managed. Each defendant did take some active steps to manage risk. For example, WIT generally made a preliminary decision about whether it was safe for a tour to go ahead the night before the tour was scheduled. This decision would be based on several factors:

(a) the conditions on Whakaari in the days prior indicated by the VAL and day de-brief forms filled out by guides after a day's tours,

[5] All 10 people present on the island were killed when it erupted in September 1914.
[6] GNS raised it to that level on 18 November 2019.

(b) the weather,

(c) the VAB's issued by GNS that provided information on levels of recent volcanic activity, and

(d) what was observed on seismographs and online webcams.

The helicopter operators made similar assessments.

[24] WML did not appreciate it had a duty in relation to risk assessment. It therefore did not conduct any risk assessment. It argues that it therefore is less culpable than if it had been aware of a duty and then deliberately ignored it. That is a fair submission, but I observe:

(a) had it deliberately ignored such an obligation, it would have faced a more serious charge with a higher penalty, and

(b) it did not take the simple and fundamental step of getting expert advice in relation to risk and its obligations relating to risk.

[25] All tour operators and representatives of WML attended user group meetings. These were also regularly attended by representatives of GNS. Among the topics discussed at those meetings would be the state of unrest and risk generally. The licence agreements themselves provided for all tour operators to ensure that the necessary risk assessment had been done. GNS conducted presentations from time to time, attended or received by WML and the tour operators, regarding the risk. During those presentations or discussions GNS would illustrate the risk by detailing its own risk assessments that it conducted for staff. The representatives of WML urged tour operators to consider getting the sorts of risk assessments that GNS could perform. Although tour operators did not do so, they did obtain audits or certifications of their procedures, including their health and safety procedures. No defendant sought to put any person in harm's way.

[26] However, properly assessing risk to tourists and employees caused by an eruption was blatantly fundamental. This was a unique operation, so there was little

in the way of established practice for the defendants to turn to. None of the defendants had any volcanology expertise. They had to get risk assessments done by the appropriately qualified people. If necessary, they needed to get advice on understanding their own obligations in relation to that risk. That failure compromised everything else they did. That failure exposed others to the risk of serious injury and death.

[27] The defendants clearly relied on GNS. And understandably so. However, the information GNS was providing to the defendants was limited, and insufficient for defendants to be able to properly assess their risk. GNS told them that. The defendants were aware that GNS could provide detailed risk assessments, customised for each operator. Any party seeking such a service had to pay GNS for it. No defendant did so.

[28] Significantly, public bodies and organisations were involved with Whakaari.[7] This appears to have been driven by promoting and expanding commercial and tourism opportunities in the area, but also included emergency response and management components relating to Whakaari. Perhaps remarkably, none ever appears to have questioned what risk assessment was being done. The defendants point to their understandable comfort in those powerful agencies being involved and raising no concern regarding their activities or approach to them. That is particularly so in respect of WorkSafe-contracted audits done of WIT. None of these audits raised any issue about risk assessment. WIT and others could rightly assume their risk assessment was adequate. Astonishingly, the audits did not cover assessment of volcanic risk, the very risk that made the audits necessary in the first place.

[29] WorkSafe rightly points out under the Act if you have a duty, you always have a duty, regardless of what others are doing. If you put people at risk by what you are doing, you need to make sure they are safe. It is not someone else's job. However, if you have taken safety measures and then been successfully audited by WorkSafe, you should not need to do anything else. That is the whole point of a safety audit. If that is where this all ended, the culpability of all defendants would have been significantly

[7] *WorkSafe New Zealand v Whakaari Management Ltd* at [67] et seq.

reduced by these sorts of factors. WorkSafe accepts there must be some reduction in culpability to reflect these factors, and I agree.

[30] However, the extent of that reduction is limited. On 27 April 2016 Whakaari erupted. That involved a pyroclastic density current bearing similarities to the eruption that occurred on 9 December 2019. Thankfully it happened at night when there were no tourists on the island. Had there been, tragic consequences would have been likely.

[31] That was a key moment in the management of risk. Whatever procedures were in place, whatever audits had been done, whatever agencies were involved in Whakaari, whatever everyone's understandings or misunderstandings about who was doing what, everything in place had failed. That there were no casualties was luck of timing and nothing more. At that point all defendants should have paused and recognised they could not rely on whatever they understood was in place. Instead, tours simply continued as scheduled. If a defendant did not fully appreciate - or take steps to fully appreciate - the significance of that eruption, that represents a gross failure in risk assessment. Nature does not often provide us with this kind of valuable warning. The defendants' failure to properly heed it has very directly and significantly contributed to the tragedy that occurred on 9 December 2019.

[32] Failing to undertake adequate risk assessment and implement appropriate controls (including obtaining the necessary expert advice), failing to properly consult with GNS on an ongoing basis about hazard and risk, and failing to provide adequate risk information to customers are significant and fundamental failures. The risk of harm arising from these failures was significant and ever present. The realised risk was catastrophic. The hazard was obvious. Even without alerts issued by GNS, the defendants knew there was always a risk that Whakaari could erupt at any time. That had been the consistent advice given by GNS. That placed all parties on notice that terrible consequences were potentially never far away. As a matter of commonsense, all duty holders needed to be ready for anything.

[33] Walking tours on an active volcano was a unique activity. There were therefore no specific standards or practices that applied specifically to it. However, that highlights how critical it was for every operator to ensure they were certain of their

obligations in relation to risk and, if necessary, take the necessary expert advice. Having said that, tour operators did seek and obtain various audits and compliance certifications. In respect of WML, the advice issued from time to time by WorkSafe to landowners was inconsistent and difficult to navigate. The degree of departure from industry standards or practices is not a factor increasing culpability in this case.

Approach to sentencing

[34] I must bear in mind:[8]

(a) the need for accountability, denunciation and deterrence;

(b) protection of the community;

(c) the gravity of the offending;

(d) the culpability of the offender;

(e) the general desirability for consistency with appropriate sentencing levels;

(f) the effect of offending on victims;

(g) an offender's particular circumstances; and

(h) the need to impose the least restrictive outcome that is appropriate in the circumstances.

[35] I also bear in mind the purpose of the Act. A sentence should reflect the Act's stated intention of providing a balanced framework to secure the health and safety of workers and workplaces, and the principle that workers and others should be given the highest reasonably practicable level of protection against harm arising from hazards and risks.

[8] Sections 7 and 8 of the Sentencing Act 2002.

[36] The Act contains further sentencing criteria, including the risk of and potential for injury or death, whether serious injury or death occurred, the degree of departure for prevailing industry standards and a defendant's financial capacity to pay a fine.[9]

[37] Here, there are three steps in the sentencing process.[10]

Step 1: reparation

[38] The emotional harm caused by the offending is significant. The awards I consider to be appropriate for emotional harm will stretch the resources of those able to pay them. While those awards will be significant, the practical reality also means that we cannot consider other possible forms of reparation, such as consequential loss. It also means I cannot consider awards in respect of the many who were not on the island at the time of the eruption yet suffered emotional harm.

[39] WorkSafe, appropriately, seeks reparation in respect of the 25 people who were on Whakaari at the time of the eruption and survived (survivors) and family members of the 22 who died (family of deceased).

[40] There is no way to measure the emotional harm survivors and affected families have endured and will continue to endure. Reparation in a case like this can be no more than token recognition of that harm. What has emerged clearly from the accounts they have provided is the extent, depth, intensity, and endurance of their suffering, physically, mentally, and emotionally. Some specific effects include, but are certainly not limited to:

(a) physical scarring from injuries and skin grafts, and the deep psychological consequences flowing from that,

(b) psychological trauma and deep impacts on mental health, including diagnoses of post-traumatic stress disorder,

[9] Health and Safety at Work Act 2015, s 151(2).
[10] *Stumpmaster v WorkSafe New Zealand Limited* [2018] NZHC 2020, [2018] 3 NZLR 881. WorkSafe does not seek any ancillary orders.

(c) the impact of injuries on livelihood, with consequential impacts upon confidence and the guilt of heavy reliance upon others,

(d) the impact upon careers, with the emotional cost of lost pathways and feelings of worth,

(e) the length of the recovery process, which for many has involved excruciating pain, multiple surgeries and other treatment, much of which will continue for many years to come,

(f) the distress from the sudden death of a family member, and in some cases multiple family members; that is particularly acute for survivors who not only had to cope with their own injuries, but also witnessed the death of family members,

(g) experiencing extreme pain before receiving adequate medical care, often several hours later,

(h) witnessing the suffering of others,

(i) some families of deceased being unable to view the bodies of loved ones due to the extent of the injuries they sustained,

(j) the bodies of two victims were never recovered, so their families have not been able to give them the farewells they deserve, and

(k) for most, the injuries and deaths occurred far away from home.

[41] Those features justify significant awards. None of the cases referred to by any of the parties considers emotional harm of the scale and nature that is present in this case. No review of prevailing reparation levels conducted by any other court contemplates emotional harm of the scale and nature that is present in this case. Greater awards are appropriate.

[42] I do not attempt to quantify the emotional harm suffered by any person, nor do I seek to compare the suffering of one person against that of another. I draw no distinction between survivors and families of deceased. To do any of that would be both artificial and insulting to the harm and loss that people have endured.

[43] I adopt an individual general sum of $250.000. I make certain adjustments to recognise:

(a) those who died leaving behind dependent children, who are plainly going to feel that loss more than others,

(b) other families whose children suffered serious emotional stress,

(c) families who lost more than one loved one,

(d) those survivors who also lost family members,

(e) the few who were fortunate enough to escape without any serious injury,

[44] That calculation provides for total reparation of $10.21 million, comprising $9.55 million in respect of those associated with WIT and $660.000 in respect of those associated with VASL.

[45] I make no adjustment in respect of any survivor or family who has reached a civil settlement with any other party. While in general terms such settlements may include a component representing emotional harm:

(a) the settlements themselves are confidential, and

(b) there is still time for any survivor or family to bring a claim.

[46] Based on the comments I have made about culpability, there is no reason to distinguish between WML and WIT in terms of relative culpability. Similarly, between WML and VASL.

[47] WorkSafe argues that reparation should be jointly and severally payable. However, survivors and families have suffered now for over four years. It is time for some certainty and finality to be injected into at least this aspect of their recovery.

[48] Reparation will be split evenly between WML and White Island Tours in respect of that category of reparation, and evenly between WML and VASL in respect of the remainder. I address the financial ability of defendants to pay later in this decision.

Step 2: fines

[49] The comments I have made already about culpability place each defendant around the cusp of high and very high culpability. Where there is anything to add to those comments, I detail those below.

WML

[50] The maximum penalty in respect of the charge WML faces is $1.5 million.

[51] While WML did not conduct tours, it enabled the entire industry of tours to Whakaari.

[52] I set the starting point at $1.1 million.

WIT

[53] WIT faces two charges, each carrying a maximum penalty of $1.5 million. I treat the charges effectively as one. They merely differentiate between workers and non-workers, an artificial distinction in the context of this case.

[54] WIT accounted for 80% of tourists to Whakaari. It therefore exposed more people to risk than anyone else. At the time of the eruption its customers and crew accounted for all but 5 of those on the island.

[55] I set the starting point at $1.1 million.

VASL

[56] The maximum penalty in respect of each charge VASL faces is $1.5 million. As with the others, I consider them as one.

[57] To reflect the significantly lower numbers VASL exposed to the risk compared with WIT, I set the starting point at $750,000.

Aerius and Kahu

[58] Aerius and Kahu face charges carrying a maximum penalty of $500.000. That reflects that none of their customers were exposed to the eruption. Both however had taken tours to Whakaari that day, and there is some force in WorkSafe's submission that it was purely luck that has saved both Aerius and Kahu from facing far higher penalty.

[59] I set the starting point for each at $375.000.

Guilty pleas

[60] Those who acknowledge their wrongdoing and plead guilty are entitled to recognition. WIT pleaded guilty four weeks prior to trial. VASL, Aerius and Kahu the day before trial.

[61] The maximum reduction is 25%. Different factors will impact upon the extent of the reduction. The maximum is usually reserved for those who acknowledge wrongdoing immediately, depending on what is reasonable in the circumstances. Given that charges were laid in late 2020 and meaningful disclosure completed well ahead of trial, no defendant falls into that category.

[62] I acknowledge the complexity of this case. The need to consider voluminous disclosure and take expert advice. The reduction for WIT is 15%. For VASL, Aerius and Kahu, 7 ½%.

Co-operation and remedial action

[63] Some defendants seek reductions for co-operating with WorkSafe during the investigation. To the extent that any co-operation and/or remedial action was a legal obligation under the Act, I make no reduction. However, WorkSafe accepts that all defendants met their obligations quickly and fully, important given the tight timeframe for laying charges. Additionally, WIT made Mr O'Sullivan available to testify for WorkSafe at trial.

[64] Reductions for WML, VASL, Aerius and Kahu are 5%. For WIT, 7 ½%.

Remorse and related factors

[65] We always recognise genuine remorse, which must be demonstrated, not merely stated. There is some overlap between a claim for remorse and steps that are effectively a demonstration of that remorse. Examples will include providing support to victims and their families, conducting remembrances, efforts to make amends and so on.

[66] All those who have pleaded guilty have expressed genuine remorse. I give Aerius and Kahu reductions of 5%. Each of WIT and VASL have taken additional steps to support and assist victims, including taking out insurance for reparation. Their reduction is 10%.

Previous good character

[67] Several defendants claim a reduction for previous good character. Absence of previous convictions is one indicator of previous good character. However, that may be offset by the length of time the defendant is shown to be in breach of its obligations under the Act.

[68] WML has no previous convictions, nor has it received any notices of any kind from WorkSafe requiring it to take any steps. However, for the entire period of its existence it was failing its duty. I make no reduction.

[69] WIT similarly was in breach through its existence. I make no reduction.

[70] VASL, Aerius and Kahu have long unblemished records. For that there must be a reduction of 5%.

Actions in the aftermath of the eruption

[71] We often say what a person did next is important. Several representatives of some of the defendants responded to the disaster by selflessly flying to Whakaari and placing their own lives at immediate risk to help. Their actions are likely to have saved lives and are a moving reflection of the quality of their character. They have been separately recognised for their bravery, but it is appropriate that there is some recognition of their response in the fine.

[72] In respect of VASL, that reduction is 10%. In respect of Kahu, which had no-one it was responsible for on the island, that recognition is 25%.

Step 3: further adjustments

[73] I must consider the appropriateness and proportionality of imposing the reparation and fines I have arrived at. That necessarily also involves considering the financial position of each defendant. WorkSafe accepts that it cannot materially argue with what the defendants say about their financial positions. I acknowledge that generally there will be a public interest in avoiding penalties that may cripple or end a company's ability to trade.

Reparation payable by WIT

[74] WIT has insurance cover for up to $5,000,000 to cover reparation. That is the most reliable source of funds for reparation. We should maximise that. Presently WIT's share of reparation is below that cap by $225,000. I increase reparation to be paid by WIT to $5,000,000. I make a corresponding reduction of $225,000 to its fine, and the reparation payable by WML.

WML

[75] WML claims to have no assets. It says it never had a bank account so never held any funds. WorkSafe accepts it cannot argue with that claim. That must be difficult for survivors and families to stomach. WML was the contracting party under the licence agreements. The substantial amounts operators paid under the licence agreements should have gone to WML. WML's shareholders at all material times were Andrew, James, and Peter Buttle. WML had no apparent overheads. The Buttles therefore appear to have profited handsomely from tours to Whakaari. This case, like many others, sadly reveals how simply corporate structures can be used to thwart meaningful responses to safety breaches. I cannot make orders against shareholders, only WML.

[76] However, I do not relieve WML from any of its reparation or fine obligations. There is nothing to stop the Buttles, as WML's shareholders, from advancing the necessary funds to cover that obligation.[11] There may be no commercial basis for doing so, but many would argue there is an inescapable moral one. Some defendants responded to the tragedy with a preparedness to put their lives at risk to help others. We wait to see what the Buttles will do. The world is watching.

WIT

[77] WIT is no longer trading. It has no assets or ongoing income. It has insurance allowing it to make reparation payments totalling $5.000.000, so that is covered. It will likely soon go into liquidation. It argues there is no social utility in imposing a fine.

[78] I disagree. There is an overwhelming public interest in fines for serious breaches being imposed and visible. If WIT does indeed go into liquidation, the fine will simply be a debt that follows it and remains payable like any debt. I leave it to shareholders and/or liquidators to deal with.

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[11] *Mobile Refrigeration Specialists Ltd v Department of Labour* (2010) 7 NZELR 243 at [54]-[55].

VASL

[79] VASL is in liquidation. It has insurance covering reparation up to $300.000. Its remaining reparation and fine liability appear unlikely to be covered by its remaining assets. The same considerations apply here. This was a serious breach. Reparation and fine liability should follow the company, whatever direction it may head in.

Aerius and Kahu

[80] Aerius and Kahu are each in a weak financial position. They have no assets immediately available to pay a fine. They materially differ from each of the other defendants in that they are still trading and face smaller financial penalties, reflecting their lower culpability.

[81] Fines can be paid over time. The fortunes of a business can change over time. The means of companies to raise finance can change over time. The fines I have identified for each of Aerius and Kahu, if paid over 5-year terms, are not so onerous to defeat the public interest in imposing them.

Reparation schedule

[82] I have set out the individual sums payable as reparation in a schedule to be released with this decision. It contains sensitive details of each individual recipient. There is no public interest in that information being published or publicly available. Publication of that schedule is suppressed. Distribution of that schedule is restricted to the parties to this hearing. Any other person considering they are entitled to access will need to make a formal application.

Result

[83] WML is fined $1,045,000. It is to pay total reparation of $4,880,000.

[84] WIT is fined $517,000 ($258,500 on each charge). It is to pay total reparation of $5,000,000.

[85] VASL is fined $468,750 ($234,375 on each charge). It is to pay total reparation of $330,000.

[86] Aerius is fined $290,000 ($145,000 on each charge) payable within 5 years.

[87] Kahu is fined $196,000 ($98,000 on each charge) payable within 5 years.

_____
Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 06/03/2024