

**IN THE DISTRICT COURT  
AT AUCKLAND**

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

**CRI-2020-004-009514  
[2023] NZDC 18939**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**ANDREW BUTTLE  
JAMES BUTTLE  
PETER BUTTLE**  
Defendants

Hearing: 31 August – 1 September 2023  
Appearances: M Hodge, S Symon, D Dow and L Wright for the Prosecutor  
J Cairney and P Brash for the Defendants  
Judgment: 5 September 2023

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**ORAL TRIAL RULING 5 OF JUDGE E M THOMAS  
[S 147 applications]**

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**The applications by Andrew Buttle, James Buttle and Peter Buttle are granted  
and the charges against them dismissed.**

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## **REASONS**

### **Introduction**

[1] At all times that matter in this case, Whakaari Trustees Limited owned Whakaari. Whakaari Management Limited (WML) is a separate entity incorporated to manage Whakaari. WML entered into licence agreements with tour operators. Those agreements covered rights of access, the costs of that access and placed obligations on tour operators in respect of safety and risk management.

[2] WML is one of those entities that is itself facing charges under the Health and Safety at Work Act 2015. Whether it had or breached any duty under that Act is for another day.

[3] Andrew, James, and Peter Buttle are the directors of WML. They, too, have been charged. Each of them has been charged under s 44 of the Act with failing to exercise the necessary due diligence as a director of WML. That is particularly in relation to getting expert advice about risk.

[4] WorkSafe has called its witnesses and closed its case. The Buttles argue that evidence is insufficient to establish a case to answer. They seek that each of the charges against them be dismissed. WorkSafe opposes those applications. It says the evidence it has led is enough for the charges to remain.

[5] These applications are not about whether any of Andrew, James or Peter Buttle are guilty or not guilty. It is not about whether I would find any of them guilty. It is about whether there is even enough evidence to continue with the charges at this stage. I must look at WorkSafe's evidence taken at its highest and consider in respect of each of the Buttles whether I would reasonably convict on that evidence. If I could not, I would then dismiss the charge or charges.

### **What is the prosecution evidence at its highest?**

[6] For the purposes of this application only:

- (a) the Buttles accept WML had duties under ss 36 and 37 of the Act, and
- (b) the Buttles do not challenge the admissibility of WML's interview with WorkSafe, either against WML or against each of the Buttles personally.

[7] In WML's interview, the Buttles accepted they were WML's directors. They admitted WML did not obtain a quantitative risk assessment from GNS or from anybody else.<sup>1</sup> The Buttles say WML still took advice in different forms, however, for example:

- (a) from GNS in an informal way, such as through the GNS presentations and their communications with GNS, and
- (b) from GNS in more formal ways, such as through the Volcanic Alert Bulletins or VABs.

[8] Expert evidence from Mr Gibson has been that WML needed to do much more in terms of risk assessment. One example would have been to have obtained quantitative risk assessments of the kind that GNS did for its own workers. Another would have been to obtain other expert advice on what was required in terms of risk assessment from volcanology and/or health and safety experts. Mr Gibson further testified as officers, the Buttles failed in meeting the necessary due diligence standard.<sup>2</sup>

[9] WML had no employees. The Buttles were WML: all three were directors, nothing WML did or did not do could occur without them. They held all WML's decision making power. There is no evidence this was not joint power. There is evidence showing each of them at different times being present at or contributing to meetings or correspondence relating to tours on Whakaari. There is no evidence that they were not acting together or in a unified way.

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<sup>1</sup> 40000C126 at page 54.

<sup>2</sup> Trial transcript/notes of evidence from page 682 line 20 (T682:20); T704:7; T706:26; T707:1; WSE.008.02505 at [11.13] and following.

### **Could I reasonably convict any of the Buttles on that evidence?**

[10] No.

[11] I could reasonably infer the actions or inactions of WML reflect the action or inaction of the Buttles as a group. They are the directors, there is no evidence of any other actor on behalf of WML.

[12] But each are charged separately. Each are separate legal entities. While the actions or failures of WML may be attributable to the board of directors as a whole, that is not enough. They are charged and the charges must be proved against them individually. For example, I return to the evidence of Mr Gibson. He testified that the compliance by the Buttles with their officer duties was insufficient. But he was considering them as a group, as a board. He did not look at their individual acts or admissions. I, however, must do so.

[13] A director must exercise due diligence to ensure a PCBU complies with any duty that PCBU may have.<sup>3</sup> For the charges in this case, that means each director of WML had to exercise due diligence to ensure WML complied with the duties that WML had. For the directors in this case, that is limited. It is limited to exercising due diligence to ensure that WML had available for use and used appropriate resources to eliminate or minimise risks to health and safety from WML permitting access to Whakaari by obtaining expert advice on how WML could ensure that guided tours of Whakaari were conducted safely. WorkSafe's allegations are the Buttles failed as directors to exercise the necessary due diligence exhibited by WML failing to obtain that expert advice.<sup>4</sup>

[14] What then is due diligence? The Act tells us that it is the care, diligence, and skill that a reasonable officer would exercise in the same circumstances. That includes looking at factors such as the nature of the business, the position of the officer and the nature of the responsibilities undertaken by that officer.<sup>5</sup> The test is not what a director considered to be reasonable. The test is not whether a board or group of directors as a

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<sup>3</sup> S 44(1).

<sup>4</sup> *WorkSafe v Buttle & Ors* [2023] NZDC 12076.

<sup>5</sup> S 44(2).

whole has acted in a way that is reasonable. I would need to assess each director separately. In respect of each, I would need to ask:

- (a) what were the relevant circumstances, including those of WML and those of the particular director, including the nature of the responsibilities undertaken by that director; and
- (b) given those circumstances, did that director exercise the care, diligence, and skill that a reasonable officer would exercise?

[15] There is no evidence in this case of what happened behind the boardroom door at WML. There is no evidence of what discussions there may have been among the Buttles that touches on their circumstances and their responsibilities. Without that evidence, I cannot assess what a reasonable director would have done had they been placed in that director's shoes.

[16] If WML had one director only, it would be straightforward to sheet any failures back to that one director. If there was evidence that the constitution of a PCBU required the actions and decisions of all directors to be unanimous and informed, you could perhaps sheet any failures of the PCBU back to each of the directors.

[17] But in the ordinary course of business, boards do not operate that way. They discuss, they negotiate, they disagree at times, they vote. The will of the board as a whole drives a company forward. How a company presents itself to the rest of the world reflects the will of the board as a whole, not the will of individual directors.

[18] It is not enough for WorkSafe to rely on the interview the Buttles gave on behalf of WML. That was WML's interview, not the individual directors. WorkSafe points to an email sent by the Buttles' solicitor to WorkSafe on 1 October 2020. In that email, their solicitor advised the Buttles adopted what they said on behalf of WML as their own statements. That is the interpretation WorkSafe want me to put on that email. Taking the need to look at WorkSafe's case at its highest, I could do that. That email was in response to a request to give individual director interviews. The response

from the Buttles was to decline on the basis that they did not know what more they could add to what WML said in that interview.<sup>6</sup>

[19] That email can certainly be read as possible acceptance by the directors, but only as a group. It cannot be read as acceptance that the actions of WML reflect the actions of individual directors. There was no focus in WML's interview on whether all directors were unified when it came to WML's decision making, or whether there had been any delegations. Inferring that would be wrong in principle. Also, there was no request prior to the WML interview for any individual information that would have put the Buttles on notice that their own individual responsibility was in the spotlight.

[20] Nor is it enough for WorkSafe to rely on the various actions and communications we have seen in the evidence over the charge period. Those are the actions and communications taken on behalf of WML.

[21] When it comes to looking at individual due diligence, I would have to ask questions such as:

- (a) did they as a board agree that all three of them should have the responsibility for looking into whether and what expert advice WML should take?
- (b) or did they agree that one in particular was more able to perform that role than the others, or two of them?
- (c) Did they argue or disagree about how much should be done?
- (d) Was anyone outvoted on that?
- (e) Did that person do all that they could but was simply outnumbered?

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<sup>6</sup> WSE.007.00371.

- (f) If sourcing expert advice had been delegated to a particular director, were any of the others acting under a reasonable misapprehension about what that director was doing or not doing?

[22] There is no evidence that any of these things occurred, but that is the point: there is no evidence of what happened at all among the directors behind the scenes at WML. WorkSafe could easily have got this information. All they needed to do was ask for it. They did exactly that, for example, in relation to White Island Tours. Sensibly and understandably, they asked for all the documents pointing to all the inner workings of White Island Tours in relation to health and safety and risk management. That included board minutes, for example.

[23] The only specific requests here were in relation to WML and focusing more on their external dealings with tour operators and others.<sup>7</sup> Neither of the two requests sought board or management meeting minutes relating to the internal decision making of or at WML. These are critical documents. This is critical information. Without it, I cannot assess the minimum necessary circumstances. Without that, I cannot judge what a reasonable officer would then have done.

[24] Nor can I infer here that the Buttles must have done nothing. There is some evidence that WML did engage with GNS, tour operators and others about safety and risk management.

[25] It appears clear during the investigation, WorkSafe were focused far more on primary duty holders than directors. That is understandable given that you need to show that a primary duty holder has failed in its duty before you can hold the directors accountable. As late as October or November 2020, the active recommendation within the WorkSafe investigation was for no enforcement action to be taken against the directors of WML. That was based on there being insufficient evidence. WorkSafe decided very late to prosecute the Buttles as directors. It did not appear to have enough time to further investigate before its self-imposed charging deadline.

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<sup>7</sup> 40000C3 and 40000C29.

### **Should I amend or substitute a charge or charges?**

[26] No party has suggested that I should. No other charge appears to be available; however, I record here that there was no formal argument on this point.

### **Result**

[27] Each of the charges against Andrew, James and Peter Buttle is dismissed.

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Judge EM Thomas

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 08/09/2023