IN THE DISTRICT COURT
AT WHAKATANE

I TE KŌTI-Ā-ROHE
KI WHAKATĀNE

CRI-2020-004-009514
[2023] NZDC 9065

WORKSAFE NEW ZEALAND
Prosecutor

v

WHAKAARI MANAGEMENT LIMITED
WHITE ISLAND TOURS LIMITED
ANDREW BUTTLE
JAMES BUTTLE
PETER BUTTLE
I D TOURS NEW ZEALAND LIMITED
INSTITUTE OF GEOLOGICAL AND NUCLEAR SCIENCES LIMITED
VOLCANIC AIR SAFARIS LIMITED
AERIUS LIMITED
KAHU NEW ZEALAND LIMITED
TAURANGA TOURISM SERVICES LIMITED
Defendants

Hearing:	12 May 2023
Appearances:	M Hodge, S Symon and D Dow for the Prosecutor D Neutze and P Hawkins for Whakaari Management Limited, Messrs Buttle and ID Tours New Zealand Limited (via AVL) G Nicholson and O Welsh for White Island Tours Limited J Lill for Institute of Geological and Nuclear Sciences Limited (via AVL) F Pilditch KC and S Coupe for Volcanic Air Safaris Limited (via AVL) L Castle for Aerius Limited and Kahu New Zealand Limited (via AVL) S Wroe for Tauranga Tourism Services Limited (via AVL) R Gowing as Counsel to Assist
Minute:	12 May 2023

MINUTE OF JUDGE E M THOMAS

Disclosure

[1] This continues on an ongoing basis. There are no issues that arise requiring my intervention.

Applications for mode of evidence filed by WorkSafe

[2] WorkSafe has filed the applications but they did not reach some defendants. Understandably those defendants are not in a position then to consent today to the applications. They are likely to be consenting to much if not all of what WorkSafe is seeking but require further opportunity to review and take instructions from their clients. That is a fair position to take.

[3] On the other hand, I would like an indication to be available to WorkSafe well ahead of the next scheduled case review hearing so that WorkSafe can begin to make the necessary logistic arrangements for attendance of witnesses.

[4] The defendants seeking further opportunity are Volcanic Air Safaris Limited, Aerius Limited, Tauranga Tourism Services Limited and Kahu New Zealand Limited. All other defendants do not oppose or abide any decision of the Court.

[5] Those defendants, namely Volcanic Air Safaris Limited, Aerius Limited, Tauranga Tourism Services Limited and Kahu New Zealand Limited, have agreed to file a joint memorandum together with WorkSafe by 19 May 2023. That memorandum will record the various positions those defendants take on the applications by WorkSafe. That will then allow WorkSafe to begin making the logistical arrangements it needs in the expectation that I will be making orders in accordance with that joint memorandum and on an unopposed basis in respect of the other defendants.

Expert briefs of evidence

[6] These were required to be served by defendants by 30 April 2023. Some defendants have signalled that they are yet to serve expert briefs. Those defendants are in breach of the timetable order. I can fully appreciate the complexities of this trial and the difficulties of trial preparation, particularly involving experts, for a conventional trial let alone one of this magnitude. I do not seek explanations today as to why there has been a breach of the timetable order.

[7] Having said that, the trial date is the trial date. There will be no possible adjournments to enable WorkSafe to consider the contents of any briefs of evidence that are filed with insufficient time for WorkSafe to be able to properly address them or deal with them. I simply urge defendants who are still contemplating filing expert briefs of evidence that the sooner they do so the stronger their position will be if there any issue regarding late service.

[8] I also encourage defendants to consider providing as much information as they can to WorkSafe ahead of a completed expert report or brief, if that is going to assist WorkSafe in its necessary planning.

[9] I mean at this stage no criticism at all of defence counsel. It took WorkSafe far, far longer to file and serve its own expert briefs of evidence. The conditions under which defendants are working are more pressured in that regard.

Agreed facts

[10] No facts have yet been agreed. I detect from counsel when we were discussing the time estimate for trial, that ultimately facts are likely to be agreed. I endorse WorkSafe's concern that these are agreed as quickly as possible. There appears to be no strategic advantage in delaying agreement.

[11] On the other hand, there are considerable logistical reasons why it would be useful for WorkSafe to know of agreed facts as quickly as possible. Again I urge everybody deal with this in a common sense way. Nobody is going to press anybody

for agreements when they do not have instructions to agree. However, please do not wait until you are able to agree everything you think you are going to agree to before you advise WorkSafe. As you come to positions on various issues, let WorkSafe know. As soon as they know they can start their planning, albeit knowing that there is further discussion ahead about other agreed facts.

Electronic courtroom

[12] WorkSafe has circulated its protocol. Only two issues arise that require some intervention today. The first is for the drivers of the electronic courtroom to provide the necessary undertakings to defence counsel. These are undertakings that are sought to preserve the integrity of those exhibits. It is fundamental that a defendant does not have to disclose material that it may be confronting a witness with. To enable us to maintain that right the drivers of the system, who will be Meredith Connell solicitors, are required to provide undertakings to defence counsel that they will not disclose or reveal the contents of any documents supplied to them. Those are appropriate undertakings for WorkSafe to suggest and they are appropriate undertakings for defendants to insist upon.

[13] The form of the undertaking needs to be consistent. To that end any defendant who wishes to have input into the form of the undertaking is to provide a draft undertaking to WorkSafe by 19 May. Thereafter I will leave it to WorkSafe and all defendants to settle upon the terms of an undertaking that is going to work for everyone. I need not be involved in that process. My only concern is to suggest that there is a single undertaking for everybody as opposed to different undertakings for different defendants.

Livestreaming

[14] There are various methods that the Ministry has worked hard to create that will allow access to justice for those who wish to follow these proceedings. Through a combination of VMR and controlled streaming, in other words streaming to identified receivers or participants, the Ministry is able to ensure access to the proceedings for

all interested parties including defendants, counsel, victims, their families, media and so on.

[15] The only remaining question is whether there should be a livestream to the public at large. To date that has not occurred in New Zealand or for that matter in Australia in respect of a criminal trial involving witnesses. It has for non-witness hearings. The consideration about streaming in witness trials is rather different because of the need to preserve the integrity of evidence to be given by any potential witness. There is a far greater need to be able to control the use or to be able prohibit use of material that is streamed in this sort of context as opposed to a non-witness trial. Some defendants oppose livestreaming to the public at large in the absence of that kind of regulation.

[16] I would have been prepared to consider livestreaming to the general public if there had been unanimous agreement to do so. In the absence of unanimous agreement, I agree with those concerned defendants that it is not for me to create for this trial a structure that has not had the necessary input from those charged with regulating exactly this kind of facility. I doubt that we will be able to have the necessary regulation in place or the necessary discussions and consultation done for a properly authorised protocol to be available for this trial. However, upon receiving advice that some defendants opposed livestreaming – and fairly so – I have referred the question to the appropriate authority. That is, the Chief Justice's office for consideration by her relevant committees.

[17] In the event that they report back in a way that allows us to reconsider livestreaming to the general public, we will reconsider it. But for now it does not appear to be an available option.

Cultural and tikanga considerations

[18] White Island Tours has begun discussions with Mr Gowing and WorkSafe around cultural or tikanga issues that may impact upon this trial and how they could be accommodated or incorporated. For the moment those discussions appear to be progressing positively. I leave it to those parties to consider their discussions and for

Mr Gowing, or those parties, to report back at the next case review hearing if there is any intervention required by this court.

[19] I simply say at this point that Mr Gowing has represented victims and interested parties expertly and sensitively and appropriately throughout these proceedings. I expect all discussions to include him. I will be calling for his comment if there are any recommendations that emerge from those discussions.

[20] I also want to acknowledge, because now is a good time to do so, the work that he and others, lots of others, have done to ensure that over the past two and a half years every hearing that we have conducted we have tried to do in a sensitive and appropriate way. From what I have seen they have been and what I have seen is the work that has gone on behind the scenes to ensure that that has occurred. I am indebted to those who have performed that work. I also consider that it is unlikely that we would run a trial any differently from any of the other hearings that we have conducted. However, that is not to say that we will look at what features can be incorporated to address any concerns that anyone might have about tikanga or cultural aspects not having been appropriately recognised to date. At this point nothing has been advised to me that it has not been, but we await the outcome of those further discussions.

Trial logistics

[21] WorkSafe has sent out its witness programme. Some defendants have made the point that it is pessimistic in terms of how long WorkSafe anticipates its case will take. I am pleased to hear that some defendants consider the time estimate to be conservative. However, WorkSafe has to take a conservative view when it does not know which facts are going to be agreed and the sooner all parties are able to advise WorkSafe the sooner WorkSafe will be in a clearer position to know how long its case is expected to take.

[22] It is important that it does know because this is a trial that will depend heavily upon logistics and arrangements for the attendances of witnesses running smoothly. We cannot afford at this point to lose time in the early stages of the trial because

WorkSafe has not got all the information it needs to be able to accurately calculate how long its case will take.

[23] At my suggestion the parties have considered how a four-day sitting week should look as opposed to a five-day sitting week. I anticipate the fifth day being a full working day that will involve counsel being able to sort out issues for the following week, have the necessary discussions about agreed facts and so on. It is also time designed to ensure that people can get home to their families as many people will be travelling for the purposes of this trial.

[24] WorkSafe has suggested a structure which has broad agreement. That structure is that we do not sit for the half day on Monday morning and we do not sit for the half day of each Friday afternoon. I can see the sense in that suggestion, so do most defendants. Some would prefer to have the entire day or a single entire day available and I can see sense in that as well. But for now I accommodate the views of the many and we will at least begin the trial with an understanding that court will begin on the afternoon of a Monday and finish at lunch time on the Friday of each week. We will keep that under review, however, and if it becomes more convenient to the greater number that we change that, then I will look at doing so.

Court adjournments

[25] We have already agreed a week when we are not sitting to accommodate the facilities being made available to the Supreme Court. That period is 13 to 23 August inclusive.

[26] I propose another which has the agreement of everybody. It is from Monday 16 to Monday 23 October inclusive (Monday 23 October being Labour Day). So we will not sit on the week of 16 October and we will resume again on 24 October.

Counsel attendance at trial

[27] I appreciate that not every witness will be germane to the case against every defendant. I also appreciate the length of the trial, the significant costs involved to

defendants and/or their insurers. I also acknowledge the need for counsel involved in the trial to maintain their practises to deal with other issues that arise from time to time and to be able to take breaks where necessary, particularly where evidence does not concern their client.

[28] Counsel will not need to attend on any given day for any given session or any given period if they do not wish to do so and the evidence does not affect their client. All that they need to ensure is that our court taker, Ms Johnson, knows so that we are aware enough to not begin any phase of the evidence without all interested counsel being present.

Further case review hearing

[29] We had previously settled on a date of 15 June. That remains, here in the Whakatāne District Court at 10 am.

_____
Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 16/05/2023