

**IN THE DISTRICT COURT  
AT AUCKLAND**

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

**CRI-2020-004-009514  
[2024] NZDC 11804**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**ID TOURS NEW ZEALAND LIMITED  
TAURANGA TOURISM SERVICES LIMITED**  
Defendants

Judgment: 27 May 2024

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**CHAMBERS DECISION OF JUDGE E M THOMAS  
[Costs applications]**

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**The costs applications by ID Tours New Zealand Limited and Tauranga Tourism Services Limited are refused.**

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**REASONS**

**Introduction**

[1] On 9 December 2019 Whakaari erupted. Ashore at the time were 47 people as part of commercial tours. Twenty-two tragically lost their lives and most of the remaining 25 were seriously injured.

[2] Among the commercial operators conducting tours to Whakaari at the time was White Island Tours Limited (WIT). Its paying customers were passengers from a cruise operated by Royal Caribbean Cruises Limited (RCCL). Those passengers had purchased the tour through RCCL, which offered the tour as an onshore excursion available to its passengers.

[3] WIT had an exclusive agency agreement with Tauranga Tourism Services Limited (TTSL), which organised bookings on its behalf. RCCL had an exclusive agency agreement with ID Tours Limited (ID Tours) which had the sole rights to offer various onshore excursions operating out of Tauranga to RCCL. The four entities therefore operated as a single supply chain between the tour operator and RCCL passengers.

[4] Among the defendants charged in the aftermath of the eruption were WIT, TTSL and ID Tours.<sup>1</sup> RCCL was not prosecuted as it was beyond WorkSafe's jurisdiction. WIT pleaded guilty shortly before trial.<sup>2</sup> TTSL and ID Tours were both charged with failing to meet a duty owed to tourists under s 36(2) of the Health and Safety at Work Act 2015 (HSWA). They defended the charges, which I ultimately dismissed under s 147 of the Criminal Procedure Act 2011 at the conclusion of the prosecution case at trial.<sup>3</sup>

### **The applications**

[5] TTSL and ID Tours each apply for costs under the Costs in Criminal Cases Act 1967 (the Act). WorkSafe opposes the applications. I deal with both applications together as the factors determining each are common to both.

### **Are either TTSL or ID Tours Limited entitled to costs?**

[6] No.

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<sup>1</sup> Charges were laid on 30 November 2020, just short of the 12-month limitation period.

<sup>2</sup> On 15 June 2023. The trial commenced on 10 July 2023.

<sup>3</sup> *WorkSafe New Zealand v ID Tours New Zealand Ltd and Tauranga Tourism Services Ltd* [2023] NZDC 19521.

[7] The Court has a discretion as to whether to order costs.<sup>4</sup> Costs do not automatically follow the event.<sup>5</sup> There is no presumption that a successful defendant is entitled to costs under the Act.<sup>6</sup>

[8] The supply chain scenario in relation to s 36(2) liability was previously untested in New Zealand. Both defendants raised early objections with WorkSafe that they did not consider that s 36(2) applied to their operations or actions. Neither TTSL nor ID Tours ever had workers on Whakaari, nor was Whakaari ever their workplace. Both therefore relied upon this Court's decision dismissing the charges against National Emergency Management Agency (NEMA) on those grounds.<sup>7</sup> However, the NEMA decision is distinguishable. It did not involve an entity participating in a commercial supply chain. This was one of the reasons why a pre-trial application by ID Tours Limited under s 147 was dismissed.<sup>8</sup>

[9] Also critical to my refusing that application was evidence available to WorkSafe and which it intended to call at trial detailing the operation of supply chains such as the one involving TTSL and ID Tours Limited.<sup>9</sup> Based on that intended evidence, one possible interpretation depending on how the evidence emerged at trial was that a supply chain would have the effect of effectively diminishing the duty owed by a tour operator such as WIT. I held that this could not have been Parliament's intention in passing HSWA given the clear purpose of that Act. Whether the scenario would have that effect would partly be based on the testing of the evidence at trial. For example, in respect of ID Tours, WorkSafe had evidence that ID Tours had held itself out as having the responsibility to pass health and safety information to RCCL.<sup>10</sup>

[10] When the evidence emerged at trial, however, it became apparent that the supply chain would not necessarily have that effect. I came to that conclusion based partly upon the cross-examination of WorkSafe's expert on tourism supply chains, Dr

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<sup>4</sup> S 5(1) of the Act.

<sup>5</sup> S 5(4) of the Act.

<sup>6</sup> S 5(3) of the Act.

<sup>7</sup> *WorkSafe New Zealand v National Emergency Management Agency* [2022] NZDC 8020.

<sup>8</sup> *WorkSafe New Zealand v ID Tours New Zealand Ltd* [2023] NZDC 4627.

<sup>9</sup> *WorkSafe New Zealand v ID Tours New Zealand Ltd* [2023] NZDC 4627 at [16]-[19]. Formal Statement of Carolyn Deuchar dated 1 March 2022.

<sup>10</sup> *WorkSafe New Zealand v ID Tours New Zealand Ltd* [2023] NZDC 4627 at [11]-[12].

Deuchar, as well as other evidence.<sup>11</sup> Until that evidence was given and tested, WorkSafe had a properly arguable case. It acted in good faith in bringing and prosecuting the charges. It appropriately investigated. It had evidence sufficient to support the charge in an area where there were different possible interpretations open to the court in respect of the relevant legislative provisions. It was entitled to have its evidence tested at trial and make formal submissions at its end regarding how previously untested provisions could be interpreted. At no time did it do so in an unreasonable or unfair manner. The charges were not dismissed on a technicality, but on the evidence as it emerged at trial.

[11] It follows then that WorkSafe could properly charge both TTSL and ID Tours and maintain the prosecutions after NEMA's successful application. There was a high public interest in holding to account all who may have breached a duty where such tragic consequences resulted. There was also a high public interest in determining whether entities within a single supply chain, now common in the tourism industry, held duties to adventure tourism customers under HSWA.

[12] Worksafe withdrew its appeal against my 147 ruling prior to argument. It was entitled to do so. That does not amount to a concession material to these applications.

[13] WorkSafe agreed to costs for NEMA following its successful application. That is not material to this application. I must determine each application on its merits, and the grounds for dismissing the charges were different.

[14] TTSL and ID Tours incurred significant costs in successfully defending the prosecution. While that is not of itself grounds for an award of costs under the Act, no defendant can be refused costs by reason only of the fact that the proceedings were properly brought and continued.<sup>12</sup> In respect of TTSL, without an award of costs it is unable to pay the full extent of its legal bill. However, TTSL must assume some responsibility for failing to insure itself against possible litigation of any kind, let alone

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<sup>11</sup> See for example the cross-examination of Dr Deuchar by ID Tours at transcript p1099 lines 1-14 (T1099:1-24); questions from the bench to Dr Deuchar at T1116:1-1121:30; evidence of Mr Patrick O'Sullivan of WIT at T452:25-453:16; and questions from the bench to former ID Tours employee Mr Alexander Howard at T914:23-919:10. Mr O'Sullivan only became a compellable witness for WorkSafe once WIT had pleaded guilty shortly prior to trial.

<sup>12</sup> S 5(5) of the Act.

arising out the adventure tourism sector in which it was partly involved. That its legal team were prepared to assume the fiscal risk of representing a defendant through to trial should not mean that WorkSafe pays for that assumption of risk consequent upon the result of an otherwise fairly and reasonably brought prosecution.

## **Result**

[15] The applications are refused.

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Judge EM Thomas

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 28/05/2024