IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-009514
[2022] NZDC 5627

WORKSAFE NEW ZEALAND
Prosecutor

v

INFLITE CHARTERS LIMITED
Defendant

Hearing:	31 March 2022
Appearances:	S Symon and D Dow for the Prosecutor Worksafe New Zealand D Darroch and S Lomaloma for the Defendant Inflite Charters Limited
Judgment:	31 March 2022

NOTES OF JUDGE E M THOMAS ON SENTENCING

Inflite Charters Ltd is fined $227,500 and ordered to pay prosecution costs of $40,000.

REASONS

Introduction

[1] Inflite Charters Limited has pleaded guilty to one charge laid under sections 36(2) and 48 of the Health and Safety at Work Act 2015. It is a charge that carries a maximum penalty of $1.5 million. Essentially the charge is that it failed to ensure that reasonably practicable steps to ensure the safety of visitors or tourists to Whakaari White Island were taken. It failed to:

(a) undertake an adequate risk assessment or itself implement appropriate controls to ensure the health and safety of tourists to Whakaari. This includes a failure to ensure that its subcontractors were ensuring that health and safety of its customers as far as that was reasonably practicable,

(b) monitor and review known hazards following the changes in volcanic alert levels and the issuing of a volcanic alert bulletin by GNS, and

(c) ensure that adequate risk information was available to its customers so they could make an informed decision about whether to visit the island.

[2] Its guilty plea today follows a sentence indication that I gave on 14 March. I do not propose to repeat what I said at that hearing. That decision will be reproduced in full (except where covered by the suppression order) in the written version of today's decision.

[3] I will sentence Inflite Charters based on that sentence indication decision, based on everything that we talked about during that sentence indication hearing and based on the reasons that I set out in that sentence indication decision.

Result

[4] Inflite Charters then is fined $227,500 and I order it to pay prosecution costs of $40,000.

Sentence indication given on 14 March 2022 (redacted to exclude reference to commercially sensitive financial information)

REASONS

Introduction

[5] Whakaari White Island erupted on 9 December 2019. At the time there were 47 people on the island. Twenty-two tragically lost their lives. The remainder were seriously injured. It was an event that left communities and families, here and around the world, deeply grieving, deeply hurt, deeply suffering. Many of those communities, many of the survivors, all the families, continue to suffer.

[6] In the weeks that followed Worksafe New Zealand investigated whether those connected to tourism services to the island had complied with their obligations under the Health and Safety at Work Act 2015. Inflite Charters Limited was one of those it investigated.

[7] Inflite promotes and sells and provides trips to those who wish to visit various New Zealand destinations. That includes trips to Whakaari. While it sells these excursions as its own, when it comes to Whakaari it engaged local subcontractors to conduct the tours.

[8] At the time of the eruption no Inflite customers were on Whakaari. However, Worksafe says that it failed in its obligations in the period leading up to the eruption. Inflite seeks a sentence indication, in other words it would like me to tell it what I would sentence it to if it decided to plead guilty today or in the next few days.

The failures

[9] For the purposes of this sentence indication it has agreed with Worksafe that these are its failures, grouped into three categories:

(a) Pre-activity: failing to undertake an adequate risk assessment or implement appropriate controls to ensure the health and safety of

tourists to Whakaari. This includes a failure to ensure that its subcontractors were ensuring the health and safety of its customers as far as that was reasonably practicable.

(b) Dynamic risk: failing to monitor and review known hazards following the changes in volcanic alert level and the issuing of a volcanic alert bulletin by GNS.

(c) Provision of information: failing to ensure that adequate risk information was available to its customers so that those customers could make an informed decision about whether to visit the island or not.

[10] Inflite faces one charge under ss 36(2) and 48 of the Act which carries a maximum penalty of $1.5M.

[11] The approach to sentencing in these sorts of cases is now very well settled, see *Stumpmaster v Worksafe*.[1] That case sets out the various steps that I would need to go through in a sentencing process.

Reparation

[12] Reparation does not arise here. There were no Inflite customers on the island at the time of the eruption. Worksafe raised the theoretical possibility that, under the Sentencing Act 2002, its customers in the period leading up to the eruption may potentially be entitled to emotional harm reparation. The authorities do not clearly state whether they would or they would not. Worksafe, in any event, does not seek emotional harm reparation for any Inflite customers. It does not provide any evidence to support any reparation award.

[13] The rest of this sentencing indication is predicated no emotional harm payable by Inflite.

[1] *Stumpmaster v Worksafe* 2018 NZHC 2020.

What is the appropriate fine?

[14] *Stumpmaster* identified different factors that I need to consider. There is no authority for the proposition that any of these factors is any more important than any of the others. We have spoken a lot this morning about different cases. Both sides have referred to different cases in their written submissions. When it comes to setting a fine, in each case a judge will have weighed up each of these factors and come to a determination about the appropriate fine in each case. Ultimately, each case is determined on its own circumstances because the factors that apply in each case will always be different, will always be different relative to each other, will always be different relative to other cases.

What clearly identified practicable steps did Inflite not take?

[15] There is no real argument about these.

[16] Inflite failed to ensure that adequate risk assessments had been done. It did not carry out any risk assessment on Whakaari itself. It did not have safety management systems or safe operating procedures itself for tours to Whakaari. It did not necessarily have to do either of those. It says it relied on its subcontractors to do that. It can rely on others better placed to carry out those tasks. However, it cannot contract out of its obligations under the Act. Those obligations still exist under s 28 of the Act. The obligation remains always on an operator, if there are others it has engaged to do this work, or others upon whom it is relying to do this work, to ensure that it has been done. To ensure that it continues to be done. That it has satisfied itself that it has been done properly. It needs to ensure that the subcontractors involved have the appropriate systems and processes in place to ensure that regular and thorough risk assessments are being done. Inflite did not have systems or processes in place to manage that. To check that. To monitor that. To satisfy itself that risk assessments were being done. I do acknowledge that it was removed from those who directly were carrying out the tours on Whakaari, and I will come back to that point because it is material to the fine.

[17] Ultimately, though, there were gaps in the necessary measures that should have been in place on the island. There was a lack of appropriate emergency response planning. The only emergency shelter, for example, was a metal container unit used

to store some emergency supplies. There was, otherwise, inadequate shelter in the event of an eruption of the island. This was all part of inadequate emergency response planning. There was no back-up plan for evacuating customers who had travelled by helicopter to the island off the island in the event of an eruption. There was no plan about how that should happen if the helicopters were damaged in an eruption. As events on 9 December were to graphically demonstrate, that was a contingency that needed to be prepared for.

[18] There was no verification that Inflite customers would be provided with appropriate personal and respiratory protective equipment. Inflite failed to adequately consult, co-ordinate and co-operate with other operators to make sure that adequate assessments, protections and controls were in place. It left others to it and that was not enough.

[19] Despite receiving updates about the volcanic alert levels and volcanic alert bulletins Inflite took insufficient steps to closely monitor what that might mean for its ability to conduct tours or continue to sell them. It did not have any processes in place to do that monitoring and review of a change in volcanic activity. The updates had indicated that the risk had changed on 19 November, due to increased volcanic activity on the island.

[20] Inflite failed to provide its customers with adequate information about the risk of visiting Whakaari at the booking and pre-booking stages. It did not provide any of its subcontractors' safety declaration documents to customers at the time of booking. It did not ensure that subcontractors provided adequate information about risk, as well as health and safety information to Inflite customers prior to the tours. It had no processes on place to make sure that was being done.

Nature and seriousness of the risk

[21] Obviously, the seriousness of the risk was extremely high. The eruption demonstrated that graphically. Whakaari could have erupted at any time during the charge period. The risk of an eruption was even higher during periods of volcanic unrest. GNS raised the alert level on 19 November and issued volcanic alert bulletins

on 25 November and 3 December 2019. This heightened risk remained until the eruption on 9 December.

[22] As a matter of common sense, the riskier a situation, the more care an operator needs to take. As with any dangerous activity, customer and worker safety must be the operator's top priority.

Realised risk

[23] The risk was realised with the eruption. Inflite, through luck only, had no customers on the island at that time. It has escaped the reparation consequences of that.

[24] Worksafe has provided a case supporting the proposition that this should not greatly affect their calculation of culpability. In other words, the blameworthiness of an operator, for the purposes of setting a fine, should not be altered much by whether the event happened or whether it did not.[2] But here we are talking about a wholly different set of circumstances. Where the harm could be so devastating, that it resulted must be a significant factor to consider. Breaches that are directly connected to significant loss of life must result in penalties significantly higher than breaches that do not result in any harm whatsoever, even if it is only luck that separates the two.

Degree of departure from standards prevailing in the industry

[25] There is no specific standard that applies to operators conducting tours on Whakaari or similar volcanic or geological destinations. Worksafe has referred to various other instruments that could inform an operator. The messages contained in those standards, though, are essentially common sense. The failures that we are talking about in this case depart not only from common sense but from many of the standards contained in these other instruments.

[26] Inflite has, not unfairly, pointed to what it says was the work being done by others. Others more qualified than itself to asses risk. Others more qualified than itself to make decisions about whether to visit the island on any given day. It argues that

[2] *Jones v Worksafe New Zealand* [2015] NZHC 781.

what it did was no different from what was happening elsewhere in the industry. However, that is not an excuse. If other players in the industry are falling short of what is required then that is the price, too, that Inflite must pay. The standard that it has to be judged against today is not what others were doing in the industry but what was the standard that should have been prevailing in the industry. What is the standard that, both as a matter of advice and as a matter of common sense, should have been dictating what everybody should have been doing.

The obviousness of the hazard

[27] The hazard was obvious. Alerts had been issued. Even without those alerts operators had been aware that there was always a risk that Whakaari could erupt. GNS had said that in the volcanic alert bulletins. Steps always needed to be in place, not just when an eruption was imminent. When an eruption could take place appears to be, from the material in front of us today, impossible to predict. GNS had identified consistently that there was always a risk of an eruption no matter what the current thinking was about the activity on the island.

[28] A stark reminder was issued to everyone in April 2016, when a similar eruption occurred. It was only through good fortune on that occasion that it occurred at night and no people were on the island. The consequences would have been very similar otherwise. All of that placed everybody on notice that catastrophic consequences were potentially not far away. The 2016 eruption served as a recent and very timely reminder that mother nature does not play by our rule book. We need to be prepared for consequences that we may not have been anticipating but which we know are possible. Those obligations are easily pinned to operators who conduct these sorts of tours at these sorts of locations. There can be no doubt that they needed to be ready for anything.

Availability, cost, effectiveness and current state of knowledge of the means necessary to avoid the hazard

[29] The sorts of measures that we have been talking about were nothing radical, nothing new. They would have been known to everybody. Inflite does not argue with that. It accepts that it had the means to do more. It accepts that it has now done more

and there was no impediment to it doing so. It accepts that the most obvious means, if there was unacceptable risk, was to stop tours until that risk had abated or until it had satisfied itself and its customers that it was a manageable risk and an appropriate risk to take.

Where does that place the fine?

[30] Worksafe accepts that because no Inflite customers were on the island at the time of the eruption it is in a different category when it comes to sentence than those whose actions may be shown to be more closely connected to the death or serious injury of customers. For that reason, Worksafe places Inflite's culpability not in the high category but in the medium culpability category. Worksafe argues that with that concession, though, the fine should be at the upper end of that category, at least $400,000. That is not unfair.

[31] However, there is some force in Inflite's submission that, to a large extent, there was not much it could have done to improve the risk assessments being done by others. To do more than others were doing to decide whether tours to Whakaari should be going ahead. It says that its liability comes primarily from failing to ensure that others have done that properly. It questions what more it could have done to add to what was being done by others. It questions what it could have done to effectively audit whether the work they were doing was sufficient.

[32] The difficulty for Inflite is that it did very little, if anything. It delegated those responsibilities to others and it largely simply relied on those others to advise if it were unsafe to sell a tour or take a tour on a particular date. Yes, that would justify coming back from the $400,000 starting point, but not significantly.

[33] Ultimately, Inflite was the face of the tour as far as the customer was concerned. Inflite was taking the customer's money. Inflite was selling the tour as its own. Inflite was the one-stop shop for the customer to satisfy themselves that it was safe to go. Once customers pay their money they are invested in a tour. They may be able to get a refund but that is not how tourists work. That is not how tourists think. To leave it to the operator to tell a tourist arriving for their pre-booked and pre-paid tour that they need to now make their own assessment about whether to go on the

island is wholly unrealistic. It is a very unfair and unacceptable delegation of its responsibilities to somebody else. If you sell the tour as your own, if you hold yourself out as the provider of the venture, you are the person who needs to satisfy the customer that it is safe for them to purchase that tour. You are a lot more than a booking agent in those circumstances.

[34] I would take a starting point of $350,000.

Can the fine come down?

[35] From that starting point Inflite would be entitled to certain reductions. It has never had an issue with Worksafe, or in the industry, involving safety before. If it were to plead guilty today or in the next few days that would be early enough to get something close to the maximum reduction available for that. If it did so that would be a fair representation of the remorse that it says it has.

[36] It seeks a reduction for remedial steps that it has taken since the investigation exposed these failings. I cannot give a reduction for those steps. It cannot be the position that if you finally take the steps that you should have taken all along that you get a lesser sentence for it. If, on the other hand, Inflite has gone above and beyond, if it has responded in a way that is extraordinary, in a way that is designed to do a lot more than simply remedy what was wrong before then it may be that that is something we can come back to. For the moment, though, it has not demonstrated that any of the steps that it has taken would justify a separate and discrete reduction.

[37] For the factors that I have identified I would make a reduction of 35 per cent.

Are any further orders required?

[38] The only one of these discussed by the parties was prosecution costs. It is the usual course that, upon sentence, a defendant would make a contribution to the costs of a prosecution. These costs awards vary greatly from case to case. They are not designed to repay the prosecution its costs. Very rarely would they actually cover the prosecution's costs. They are effectively a contribution, sometimes just a token contribution.

[39] There has developed something of a rule of thumb that it might be somewhere around 50 per cent of the actual costs of a prosecution. Sometimes that is applied, sometimes it is not, it depends on the circumstances. This case, however, is an extraordinary case in its complexity. In the difficulties that the prosecution will have in fully investigating and fully putting together material that will support the charges that it has laid. Particularly given that we are dealing with many international connections. Particularly that we are dealing with the restrictions of a COVID-19 environment, both internationally and domestically. Ultimately, I expect the costs of this prosecution to be very high. The prosecution have provided a summary of the costs to date. Already they are high, but understandably and justifiably so. The prosecution has apportioned an amount to Inflite and accepts that the Court cannot and should not make an aware that would be that high. It simply could not cover the costs that have been incurred by the prosecution to date, pro-rated among all 13 defendants.

[40] In the more serious cases we have seen come before our courts costs awards of around $20,000 have been made. This case is far more significant in its scope and in the costs incurred so far than any of those. The prosecution seeks an aware of at least $40,000. That is fair. It still represents a very small proportion of the prosecution's costs to date.

Is the overall result proportionate and appropriate?

[41] The only possible adjustment to the fine and costs award would be if there was something about Inflite's financial position that made it inappropriate for awards of that size. Both sides have filed written material addressing Inflite's financial position. In a closed hearing I heard submissions from counsel to supplement those written submissions. The material contained both in the oral submissions and in the written materials is commercially sensitive so I will not be referring to it.

[42] In the end, if it is appropriate for a defendant to pay a penalty, a defendant should pay a penalty. It would only be in very difficult circumstances that we would adjust that. A defendant would need to show that it should be adjusted. Inflite has not been able to demonstrate, here, that it should be.

Result

[43] After allowing for the reductions I have spoken about, I would impose a fine of $227,500 payable by instalments over five years. I would order costs to the prosecution of $40,000.

[44] Ordinarily, Inflite would have five working days to come to a decision about whether to accept that sentence indication and plead guilty. Mr Darroch, I am prepared to allow it 14 days. That would take us to 28 March for Inflite to advise its decision.

[45] My thanks to all counsel. The submissions, both written and oral, were of a high quality. They were appropriate. They were sensitive. My compliments and thanks to you all.

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Judge EM Thomas
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 06/04/2022