Land and Environment Court

Cessnock City Council v Quintaz Pty Limited; Cessnock City Council v McCudden [2010] NSWLEC 3 (11 January 2010)

Last Updated: 14 January 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Cessnock City Council v Quintaz Pty Limited; Cessnock City Council v McCudden [2010] NSWLEC 3

PARTIES: PROSECUTORCessnock City Council

DEFENDANTSQuintaz Pty LimitedAllan Leslie McCudden

FILE NUMBER(S): 50022 of 200950023 of 2009

CATCHWORDS: ENVIRONMENTAL OFFENCES :- clean up notice - corporate defendant - guilty plea - no actual harm to environment - fine imposed

ENVIRONMENTAL OFFENCES :- notice for information - failure to comply with notice without lawful excuse - guilty plea - individual defendant - fine imposed

LEGISLATION CITED: Crimes (Sentencing Procedure) Act 1999Fines Act 1996Protection of the Environment Operation Act 1997Occupational Health and Safety Regulations 2001

CASES CITED: Abdel Alameddine v R [2006] NSWCCA 317Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34; (2006) 145 LGERA 234Cabonne Shire Council v Environment Protection Authority [2001] NSWCCA 280; (2001) 115 LGERA 304Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority (1993) 32 NSWLR 683Environment Protection Authority v Hargraves (No 2) (2003) 124 LGERA 57Environment Protection Authority v Peters (2006) 153 LGERA 238EPA v Barnes [2006] NSWCCA 246Garrett v Freeman (No 5) [2009] NSWLEC 1; (2009) 164 LGERA 287Garrett v Williams [2006] NSWLEC 785; (2006) 160 LGERA 115 Gittany Constructions Pty Ltd v Sutherland Shire Council [2006] NSWLEC 242; (2006) 145 LGERA 189Graham v R [2009] NSWCCA 212Great Lakes Council v Mood (No 2) [2008] NSWLEC 68Hardie Holdings Pty Ltd v Director-General of the Department of Natural Resources [2007] NSWLEC 39; (2007) 151 LGERA 373Hoare v The Queen [1989] HCA 33; (1989) 167 CLR 348Keir v Sutherland Shire Council [2004] NSWLEC 754Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357Minister for Planning v Fancott Pty Ltd [2009] NSWLEC 170Oberon Council v Australian Game Meats Limited [2002] NSWLEC 96Pittwater Council v Scahill [2009] NSWLEC 12; (2009) 165 LGERA 289Plath v Chaffey [2009] NSWLEC 196Plath v Rawson [2009] NSWLEC 178R v Dodd (1991) 57 A Crim R 349R v Hammoud [2000] NSWCCA 540; (2000) 118 A Crim R 66R v Hoerler [2004] NSWCCA 184; (2004) 147 A Crim R 520R v Nichols (1991) 57 A Crim R 391SZ v The Queen [2007] NSWCCA 19; (2007) 168 A Crim R 249Veen v The Queen [1979] HCA 7; (1979) 143 CLR 458Veen v The Queen (No 2) [1988] HCA 14; (1988) 164 CLR 465

CORAM: Pepper J

DATES OF HEARING: 20-21 July 2009

JUDGMENT DATE: 11 January 2010

LEGAL REPRESENTATIVES

PROSECUTORMr T HowardSOLICITORSMallik Rees Lawyers

DEFENDANTSMr A DjemalSOLICITORSGadens Lawyers

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

PEPPER J

11 January 2010

50022 of 2009 Cessnock City Council v Quintaz Pty Limeted

50023 of 2009 Cessnock City Council v Allan Leslie McCudden

JUDGMENT

Introduction

1. **HER HONOUR**: Quintaz Pty Ltd ("Quintaz") and Allan Leslie McCudden ("Mr McCudden") (together the "defendants"), each pleaded guilty on 5 June 2009 to separate offences.
2. The circumstances of the offences are that Quintaz failed to comply with a clean up notice in relation to building demolition waste stockpiled on its property and that Mr McCudden failed to provide documents and information to the Cessnock City Council ("the council") as directed under a notice for information in respect of an investigation by it of the stockpiled waste.
3. This judgment concerns the sentence to be imposed consequent upon each defendant's guilty plea.
4. For the reasons set out below the Court fines Quintaz $112,500 and Mr McCudden $21,000. Both are also required to pay the prosecutor's costs of the proceedings.

Particulars of Charge: Quintaz

1. In relation to Quintaz, it has pleaded guilty to an offence that on and from February 2009 and continuing, it failed to comply with the

requirements of a clean up notice issued by the council on 13 February 2009 ("the Clean Up Notice"), pursuant to s 91(1) of the *Protection of the Environment Operation Act* 1997 ("the POEOA") ("the s 91 offence" or "the Quintaz offence"). As a consequence Quintaz committed, and continues to commit, an offence under s 91(5) of the POEOA.

2. The particulars of the summons issued against Quintaz are as follows:

1. An order that the defendant, Quintaz Pty Limited ACN 059 737 183 of "VBD Chartered Accountants, The Landmark", Suite C20, 215 Pacific Highway, Charlestown in the State of New South Wales, appear before a Judge of the Court to answer the charge that from 20 February 2009 to the date of this Summons, and continuing, it committed, and is continuing to commit, an offence against section 91(5) of the *Protection of the Environment Operations Act* 1997 (the "Act"), in that, without reasonable excuse, it has not complied with a clean-up notice given to the defendant pursuant to section 91(1) of the Act.

<u>Particulars</u>

By way of a notice in writing dated 13 February 2009, served on the defendant on 13 February 2009, the Prosecutor, being the appropriate regulatory authority for the purposes of the Act, directed the defendant, pursuant to section 91(1) of the Act, to take clean-up action as specified in the said notice within the periods stipulated in the said notice.

The defendant did not comply with the directions given under paragraphs 1, 2 & 6 of the said notice by the times specified in the said notice, namely:

The defendant failed to prepare and submit to the prosecutor by 5:00pm on 23 February 2009 a report and plan as specified in paragraph 1 of the First Schedule to the said notice.

The defendant failed to prepare and submit to the prosecutor by 5:00pm on 2 March 2009 a remediation action plan for the approval of the prosecutor as required by paragraph 2 of the First Schedule to the said notice.

The defendant failed to provide progress reports at 7-day intervals commencing 7 days from the date of the said notice as required by paragraph 6 of the First Schedule to the said notice.

As at the date of the filing of this summons, the defendant has still not complied with any of the said directions.

1. That the defendant be dealt with according to law for the commission of the above offence including by way of the imposition of a daily penalty pursuant to s91 of the Act.
2. An order that the defendant pay the prosecutor's costs.
3. Such order or orders under Part 8.3 of the Act as the Court sees fit to make, including an order or orders under sections 245 and/or 248 and/or 250 of the Act as the Court sees fit to make.

Particulars of Charge: McCudden

1. Mr McCudden is charged with committing (and continuing to commit) from 4.00 pm on 5 March 2009, an offence against s 211(1) of the POEOA in that he did, without lawful excuse, neglect or fail to comply with the requirement made of him under s 193 in Chaper 7 of the POEOA ("the s 211 offence" or "the McCudden offence"). The particulars of the charge are as follows:

1. An order that the defendant, Allan Leslie McCudden, of 72 Armidale Street, Abermain in the State of New South Wales, appear before a Judge of the Court to answer the charge that from 4:00pm on 5 March 2009 to the date of this Summons, and continuing, he committed an offence against section 211(1) of the *Protection of the Environment Operations Act* 1997 (the "Act") in that he did, without lawful excuse, neglect or fail to comply with a requirement made of him under Chapter 7 of the Act.

<u>Particulars</u>

The defendant neglected or failed to comply with the requirement under section 193(1) of the Act to furnish information and records to an authorised officer, namely Jenny LANGE, pursuant to a notice in writing dated 22 January 2009 served on the defendant in person on 23 January

2009, pursuant to which the said authorised officer required the defendant to furnish to the said authorised officer information and records as specified in the said notice, by the stipulated time and ate, namely by 4:00pm on 5 March 2009.

The defendant neglected or failed to provide any of the said information and records by the said time and date (ie, 4:00pm on 5 March 2009) and has continued to neglect or fail to provide any of the said information in the period after 4:00pm on 5 March 2009 to the date of this Summons.

1. That the defendant be dealt with according to law for the commission of the above offence, including by way of the imposition of a daily penalty pursuant to section 211 of the Act.
2. An order that the defendant pay the prosecutor's costs.
3. Such order or orders under sections 245, 248 and/or 250 of the Act as the Court sees fit to make.

Background Facts

1. A statement of agreed facts was filed in relation to both sets of proceedings.

Agreed Facts: Quintaz

1. In relation to the charge against Quintaz the agreed facts are as follows:

(a) Quintaz is the registered proprietor of land comprising Lot 1 DP 82050 known as 1148 Old Maitland Road, Sawyers Gully ("the Property"). Quintaz purchased the Property on or about 18 February 2005;

(b) Mr Allan Leslie McCudden is, and at all relevant times has been, the sole director and secretary of Quintaz. He is also a councillor at the council;

(c) Quintaz is known under the following business names and businesses:

(i) Kurri Used Building Supplies (which recycles used building materials and sells them to the public);

(ii) Hunter Valley Asbestos Removal (which removes asbestos);

(iii) Kurri Demolitions (which is involved in building demolitions); and

(iv) Macs Kurri Hardware (hardware retail);

(d) the land is located in the local government area of the council and at all relevant times has been zoned Rural 1(a) pursuant to the Cessnock Local Environment Plan which applies to the Property;

(e) on 6 and 7 December 2007, Ms Jenny Lange, an authorised officer of Cessnock City Council inspected the Property with other council officers and a representative of Heggies Pty Ltd (asbestos analysts), together with surveyors from Evolution Engineering Surveyors. Ms Lange, and those present with her, observed piles of material on the Property. Amongst these piles were pieces of fibrous material which appeared to be asbestos. Eight samples of fibrous fragments were taken for the purpose of analysis. The samples were subsequently analysed by an accredited laboratory and on 20 December 2007 Heggies prepared a report setting out the results of the inspection and analysis of the samples. These indicated that asbestos was present in some of those samples;

(f) on 22 January 2009, the council served Quintaz with a notice of intention to serve a clean up notice under s 91 of the Act ("the Notice of Intention"). The Notice of Intention stated, amongst other things, that any representation in respect of the proposed clean up notice should be made to the council within 14 days following service of it;

(g) between 22 January 2009 and 13 February 2009, Quintaz did not make any representations, written or otherwise, to the council in respect of the Notice of Intention;

(h) on 13 February 2009, the council served on Quintaz a Clean Up Notice under s 91 of the Act ("the Clean Up Notice");

(i) between 13 February 2009 and March 2009, Quintaz did not submit a report and plan to the council as required pursuant to the Clean Up Notice. Nor did Quintaz provide a written response to the council in relation to the Clean Up Notice;

(j) on 4 March 2009, in response to a letter from the council to Quintaz dated 3 March 2009, Quintaz's solicitor, Mr Daryl Lawrence of Waller Fry & Faulkner solicitors, wrote to the council's solicitors stating that "it was the undisputed intention of our client to comply with any reasonable request made by the council to have this matter resolved at the earliest possible convenience and in a harmonious manner." He denied that his client had deposited asbestos on the site and stated that it "could not be reasonably expected to know if dumping of earlier owners had been made on the subject property" and that it would be "quite an expensive exercise to comply with council's first requirement";

(k) on 6 March 2009, Ms Jenny Lange and others from the council inspected the site and found a number of stockpiles had been disturbed and some material had been moved from the site. At least one of the stockpiles disturbed was known by council to have contained asbestos;

(l) on 9 March 2009, the council's solicitor sent a letter to Mr Lawrence enclosing a survey report and the asbestos report of Heggies. The letter stated that Quintaz had to comply with the council's first requirement in the Clean Up Notice and that "a failure to comply constitutes an offence for which significant penalties can be imposed". Mr Lawrence's suggestion in his letter to the council dated 6 March 2009 that the matter be mediated was rejected by the council. The letter concluded by noting that the council considered the non-compliance with the Clean Up Notice to be a "serious matter" and that any further delay would not be tolerated. In conclusion, the letter asked whether or not Mr Lawrence would be prepared to accept the service of a summons or statement of charge issued in relation to Quintaz's non-compliance with the Clean Up Notice;

(m) on 24 March 2009, the summons was served on Quintaz. The letter accompanying the summons drew to Quintaz's attention that council was seeking a daily penalty against it for each day that it failed to comply with the terms of the Clean Up Notice. The letter also invited Quintaz to plead guilty;

(n) on 7 April 2009, a further inspection of the site revealed that sedimentation control measures had been installed in some areas and that one of the stockpiles had been removed;

(o) on 14 April 2009, Quintaz's solicitors sent an email to Mallik Rees, the solicitors for the council, requesting a meeting. The solicitors met on 15 April 2009;

(p) on or about 21 April 2009, Mr McCudden terminated the retainer of Waller Fry and Faulkner and instructed Gadens Lawyers to act in relation to the charge against himself, but not in respect of the charge against Quintaz at that time;

(q) then on 30 April 2009, Gadens wrote to Cessnock City Council stating that it acted for Quintaz and that a report had been commissioned concerning the stockpiles of material on the Property that had been identified by council as containing asbestos. The letter further stated that the same experts would prepare a Remediation Action Plan ("RAP") and would submit both reports within seven days;

(r) on 7 May 2009, Mallik Rees wrote to Gadens stating that the person nominated by Quintaz to prepare the relevant reports specified in the Clean Up Notice was not a member of the Australian Institute of Occupational Therapists Incorporated and that this was an essential term of the Notice which had to be complied with. The letter also stated that any report was to specify which of the stockpiles identified by the council contained asbestos and ought not be limited to the stockpiles in which council had already found asbestos;

(s) on 13 May 2009, Gadens sent a fax to Mallik Rees indicating that Dr Jim Orr and Mr Andrew Russell of Hazmat Services ("Hazmat") had been engaged to provide the reports and that they were suitably qualified;

(t) on 14 May 2009, Mallik Rees faxed a letter to Gadens stating that the prosecutor was calling for a daily penalty and that this penalty would be sought for each day that the non-compliance continued including during the period in which the proceedings were adjourned;

(u) on 27 May 2009, Gadens wrote to the solicitors for the council to inform them that Dr Orr had made a site inspection and completed testing and that the council could anticipate receiving his report next week;

(v) on 9 June 2009, Dr Orr's report was sent to the council purportedly in

compliance with the Clean Up Notice;

(w) on 11 June 2009, another report was sent to the council purportedly in compliance with the Clean Up Notice. Also on that day the council's solicitors wrote to Gadens stating that the 9 June 2009 report was not in compliance with the Clean Up Notice because Dr Orr had only examined 24 of the total 41 stockpiles on the site and the stockpiles and their locations were not identified on a plan properly drawn to scale as required by the Notice. Further, the method used by Dr Orr to identify the stockpiles containing or likely to contain asbestos was not set out. In the circumstances, the council therefore did not accept that the report complied with the Clean Up Notice. Again, the council reiterated that it would be seeking a daily penalty in relation to non-compliance with the Clean Up Notice;

(x) on the same day, the council received a letter from the defendant's solicitor and a document entitled *Remedial Action Plan for the Removal of Asbestos Debris from the Premises of 1148 Old Maitland Road, Sawyers Gully, New South Wales*. Gadens asked for council's approval of the RAP as soon as possible so that work could commence in accordance with it; and

(y) on 15 June 2009, the council wrote to Gadens stating that the council could not approve the RAP as the initial report upon which it was based was flawed. Further, the council noted that the RAP did not identify which stockpiles were to be removed and which stockpiles were to be retained. The RAP also did not indicate how the site would be remediated. That is to say, by complete removal of the stockpiles or by visual pick of the asbestos observed in the stockpiles. Other deficiencies with the RAP were also identified. However, the council advised that it would be willing to meet with Dr Orr to clarify its concerns in order to ensure that the site was cleaned up in accordance with the Clean Up Notice. This was not, however, to be taken as any "relaxation of our client's requirement that your client fully comply with the terms of the clean up notice, nor should it be taken to mean that our client is not looking to a daily penalty for each day the non-compliance continues".

Agreed Facts: McCudden

1. The agreed facts in respect of the charge against Mr McCudden were as follows:

(a) on 23 January 2009, a notice was sent to Mr McCudden by the Council under s 193 of the POEOA requiring him to furnish to Ms Lange specified information and documentation in connection with her investigation into suspected dumping of material on the Property ("the Notice for Information");

(b) Mr McCudden was required to furnish the information and records to Ms Lange by 4.00 pm on 5 March 2009;

(c) as at 9 March 2009, Mr McCudden had not furnished any of the information or records pursuant to the Notice for Information. A letter of this date was forwarded to Mr David Lawrence at Waller Fry and Faulkner solicitors by the council's solicitors. The letter stated that the council "takes a very serious view of your client's non-compliance with the notice. Your client's non-compliance clearly frustrates our client's attempts to investigate any activities that have taken place on the land and clearly prevents our client from obtaining necessary evidence that our client might require for any prosecution. Our client will not tolerate blatant non-compliance with the notice as had occurred in this instance". The letter went on to warn that the council would shortly give instructions to commence proceedings against Mr McCudden for failure to comply with the Notice for Information;

(d) on 20 March 2009, the council filed a summons against Mr McCudden. It was served on 23 March 2009;

(e) on 3 April 2009, the council's solicitor received a phone call from Mr John Wormington calling on behalf of Mr McCudden. Mr Wormington was advised by the council's solicitors of the council's concerns over Quintaz's failure to comply with the Clean Up Notice and the failure of Mr McCudden to comply with the Notice for Information;

(f) on 14 April 2009, Waller Fry and Faulkner sent an email to the council's solicitors requesting a meeting in relation to the charges against Mr McCudden and Quintaz. On 15 April 2009, the solicitors met in relation to the charges;

(g) on or about 21 April 2009, Mr McCudden terminated the retainer of Waller Fry and Faulkner and instructed Gadens Lawyers to act for him;

(h) on 24 April 2009, the matter was before the Court for the first return of the summons;

(i) on 14 May 2009, the council's solicitor faxed a letter to Gadens stating that the prosecutor was calling for a daily penalty and would continue to call for that penalty for each day that the non-compliance continued in relation to the charge;

(j) on 27 May 2009, the council's solicitors forwarded a letter to Gadens stating "once again we suggest that your clients promptly comply with their respective notices to minimise their exposure to further daily penalties for the commission of the offences";

(k) on 15 May 2009, the matter was before the Court for a second callover;

(l) on 3 June 2009, information and records were provided to Ms Lange in response to the Notice for Information; and

(m) on 5 June 2009, the matter was before the Court for the third callover and a plea of guilty was entered by Mr McCudden.

Legislative Framework

1. Quintaz was served with the Clean Up Notice pursuant to s 91 of the POEOA. This section relevantly states:

91 Clean-up by occupiers or polluters

(1) Notices

The appropriate regulatory authority may, by notice in writing, do either or both of the following:

(a) direct an occupier of premises at or from which the authority reasonably suspects that a pollution incident has occurred or is occurring,

(b) direct a person who is reasonably suspected by the authority of causing

or having caused a pollution incident,

to take such clean-up action as is specified in the notice and within such period as is specified in the notice.

...

(5) Offence

A person who, without reasonable excuse, does not comply with a clean-up notice given to the person is guilty of an offence.

Maximum penalty:

(a) in the case of a corporation—$1,000,000 and, in the case of a continuing offence, a further penalty of $120,000 for each day the offence continues.

1. Mr McCudden was served with the Notice for Information pursuant to s 193 of the POEOA which provides that:

1. **Requirement to provide information and records (authorised officers)**

(1) An authorised officer may, by notice in writing given to a person, require the person to furnish to the officer such information or records (or both) as the officer requires by the notice in connection with any matter within the responsibilities and functions of the regulatory authority that appointed the officer.

(2) In the case of authorised officers appointed by the EPA, this section is not limited to matters in respect of which the EPA is the appropriate regulatory authority.

1. It is an offence pursuant to s 211 of the POEOA to fail to comply with the s 193 Notice for Information served on Mr McCudden:

211 Offences

(1) A person who, without lawful excuse, neglects or fails to comply with a requirement made of the person under this Chapter is guilty of an

offence.

...

Maximum penalty (subject to sections 204 and 208):

...

(b) in the case of an individual—$250,000 and, in the case of a continuing offence, a further penalty of $60,000 for each day the offence continues.

Prosecutor's Evidence

Lay Evidence

1. In addition to the agreed facts, the prosecutor relied on the evidence of Ms Jenny Lange.

Jenny Lange

1. Ms Jenny Lange is the environmental health coordinator for the council who was assigned the role of investigating the pollution incident at the Property and ensuring that the Clean Up Notice served on the defendant was complied with.
2. In her affidavits sworn 24 and 26 June 2009 and 13 July 2009, Ms Lange deposed that she attended the Property on 6 and 7 December 2007 and obtained samples from various stockpiles of material on the site. Ms Lange deposed that the subsequent analysis of the samples taken revealed asbestos at five stockpiles and at two other areas on the Property.
3. Ms Lange stated that during her visit to the Property she also noticed various waste and materials in the stockpiles which included:

(a) construction waste, such as: fill material containing asphalt, soil, bricks, broken terracotta, tiles, used steel pipe, used car batteries, rusty drains, used galvanised iron guttering, timber, broken asphalt, broken concrete, used galvanised purlins and used sandstone blocks;

(b) miscellaneous waste, such as: a large number of old chicken coups and

drums, some of which upon further inspection, contained the residue of an oily substance similar to motor oil and a pile of burnt material; and

(c) green waste.

1. Under cross examination Ms Lange agreed that the asbestos was contained in fragments on top of or within stockpiles and was not present in the soil.
2. Ms Lange further stated that the reason for the council waiting almost a year between its inspection of the Property and the issuing of the Clean Up Notice was because:

(a) the tenant had left the property in 2008, and therefore, any adverse risk to humans posed by exposure to the asbestos had been diminished;

(b) the council was engaging in further surveillance over the Property due to the ongoing nature of the investigation; and

(c) there were a number of staffing resource issues.

1. Ms Lange agreed that on 4 June 2009 a bundle of documents was delivered to the council on behalf of Mr McCudden in response to the Notice for Information.

Compliance With the Notice For Information as at 16 July 2009

1. A bundle of further correspondence passing between the solicitors for the council and Mr McCudden was tendered. This correspondence indicated that as at 16 July 2009, all of the information and records requested by the council had been provided by Mr McCudden pursuant to the Notice for Information.

Expert Evidence: Agreed Issues

1. Upon conferral of the parties' experts, Ms Lisa Malloy (of Heggies) on behalf of the council, and Dr Jim Orr (of Hazmat) on behalf of the defendants, the following matters were agreed:

(a) that the stockpiles that contain, or are reasonably likely to contain,

asbestos were inspected, reported upon and identified in the initial Hazmat report and further explained in correspondence to the council's solicitors;

(b) that the two plans showing the location of the stockpiles supplied were adequate;

(c) that the method used by Dr Orr to identify the stockpiles was properly set out in the Hazmat report dated 3 June 2009; and

(d) that accordingly, the only issue which remained was whether the RAP was adequate. This in turn depended on whether or not the burnt stockpiles which contained asbestos material contained bonded or friable asbestos material. If the former, then the RAP was adequate and if the latter, the RAP would require adjustment and the stockpiles would have to be "emu picked" to remove the asbestos.

Expert Evidence

1. The prosecutor's expert evidence comprised of an affidavit of Ms Lisa Malloy sworn 14 July 2009, an Occupational Hygienist at Heggies.

Lisa Malloy

1. In Ms Malloy's opinion, the asbestos material contained in the burnt stockpiles was friable pursuant to the Workcover NSW publication *Working With Asbestos Guide 2008*, which stated that burnt asbestos was friable asbestos. Friable, according to these guidelines, meant material that could easily be crushed up and broken by hand. Ms Malloy stated that friable asbestos posed a much greater risk to the health of humans because the fibres could become loose and airborne and thus more easily ingested. Thus if the material on the site was friable, then air monitoring would need to be done and greater care would need to be taken in removing it.
2. Ms Malloy agreed under cross examination that she did not notice any friable material on the top of the stockpiles, rather she had assumed that there would be friable material within the stockpiles by reason of the surface ash and other burnt material that she had

observed. Ms Malloy conceded, moreover, that she had only looked at one of the two burnt stockpiles. Ms Malloy agreed that the soil that was tested at the stockpiles was negative for asbestos. Ms Malloy conceded that she had not looked at any of the fragments taken by Dr Orr for analysis from the top of the stockpile. However, she stated, that she would still class the material as friable because it was fire damaged.

3. Ms Malloy, however, did concede that pursuant to cl 257 of the Occupational Health and Safety Regulations 2001 ("the Regulations") the material would not be classified as friable and that the POEOA had a relevantly similar definition of friable material to that contained in the Regulations.
4. Ms Malloy also conceded that if asbestos was exposed to fire but not damaged, it could be classified as bonded.
5. Significantly, Ms Malloy agreed that she would need to inspect the asbestos and make a proper analysis of it in order to properly classify it and that she had not done this in relation to any of the fragments taken from the burnt stockpile. Thus she stated that she would defer to Dr Orr's analysis in this regard given his reputation and experience in this field.

Defendants' Evidence

Lay Evidence

1. The defendants relied on lay evidence from:

(a) Mr Daryl Lawrence, Mr McCudden's former solicitor; and

(b) Ms Christina Schumacher, an employee of Quintaz and the daughter of Mr McCudden.

Daryl Lawrence

1. In an affidavit sworn 16 July 2009, Mr Daryl Lawrence, principal of Waller Fry and Faulkner solicitors, gave evidence to the effect that on 20 January 2009, Mr McCudden attended his office with both the Clean Up Notice and the Notice for Information. Mr McCudden told Mr Lawrence that he needed more time to comply with the Notices.

Mr Lawrence told Mr McCudden that he would contact the council to discuss a compromise and to see if more time could be obtained. At this conference Mr McCudden told Mr Lawrence that he was prepared to clean up the site and that he didn't want to jeopardise his justice of the peace status, his position as councillor, or obtain a criminal record.

2. Mr Lawrence deposed that throughout his retainer he maintained the view that the matter ought to have been resolved by negotiation with the council. However, despite his attempts neither the council nor its solicitors were interested in achieving this outcome. At all times, he stated, Mr McCudden had instructed him that he did not want to be prosecuted and that he wanted to "sort the matter out". Mr Lawrence insisted that it was he who encouraged the incorrect belief that the matter could be resolved informally.
3. Under cross examination Mr Lawrence agreed that he was told by the council that if the information was not provided in time pursuant to the Notice for Information that prosecution would result. Mr Lawrence also agreed that he was told by council that it would not agree to a without prejudice meeting with him and Mr McCudden, but Mr McCudden could make a voluntary statement, however, Mr McCudden had declined to do so. Mr Lawrence agreed that he had been told by the council that because his client was a councillor a formal response was required.
4. Mr Lawrence further agreed that Mr McCudden was an experienced business man, a former police officer and councillor and therefore had had some experience with the law and ought to have appreciated the gravity of his situation. Mr Lawrence conceded that he had drawn to Mr McCudden's attention the warning on the Notice for Information and the consequences of non-compliance. He agreed that Mr McCudden was aware that failure to comply with the notice could have serious consequences.
5. Mr Lawrence, however, thought that his client required more time to comply given the breadth of material asked for in the Notice. Mr Lawrence also stated that it was his policy to provide the material not in a piecemeal fashion but in a complete package. However, he agreed that as at 20 April 2009 none of the material had been provided.
6. It is not in dispute that Mr Lawrence was diligent in his efforts to

contact the council and pursue mediation. It is also not in dispute that Mr McCudden contacted Mr Lawrence on several occasions asking what progress had been made. Mr Lawrence frequently told Mr McCudden to "leave it with me".

7. At the beginning of February Mr Lawrence's firm moved office and was short staffed. Mr Lawrence admitted that he did not, at that time, have the capacity to fulfil his professional obligations to his client. Thus on 21 April 2009 Mr McCudden contacted Mr Lawrence and told him that he was terminating his retainer and appointing another solicitor.
8. Mr McCudden agreed that he had "let my client down".
9. Whilst I accept that some blame for the events resulting in the commission of the s 211 offence can be attributed to the inaction of Mr Lawrence, nevertheless, as Mr Lawrence stated in evidence, at all times he had kept his client informed of the serious consequences of failure to comply with the Notices. Accordingly, at a point much earlier than 21 April 2009, Mr McCudden ought to have taken further steps to ensure compliance with the Notices and avoid breaching the law. That Quintaz was suffering from a staffing shortage or Mr McCudden was too busy to attend to this task is no excuse.

Christina Schumacher

1. Mr McCudden's daughter, Ms Christina Schumacher, swore two affidavits in the proceedings, dated 16 and 17 July 2009. She also gave oral evidence of her knowledge of the financial affairs of Quintaz.
2. Ms Schumacher stated that she was employed by Quintaz. She stated that she handled all of the paperwork, paid the invoices and did the bookkeeping for the company's quarterly BAS statements. Accountants, however, did the tax returns. She stated that she had access to the bank accounts and as at 17 July 2003, Quintaz was approximately $73,000 in debt; Macs Kurri Hardware was $12,000 in credit; the loan repayments from Quintaz to ANZ for the Property were $750,000 and that Quintaz would have an approximate tax liability of $70,000 at the end of July 2009 for its quarterly BAS payment. In addition, the Hazmat consultancy fees had not been

paid.

3. However, under cross examination it was revealed that Ms Schumacher knew very little about the actual financial affairs of Quintaz. For example, the $750,000 loan from ANZ that she referred to did not involve the Property the subject of these proceedings, which was owned outright by Quintaz. Likewise, the company owned various plant assets by way of trucks, excavators and a forklift. Ms Schumacher was not aware of this. Ultimately Ms Schumacher conceded that she could not tell the Court what the asset position of the company was in relation to its plant and equipment.
4. Ms Schumacher similarly agreed that the company was growing in terms of size. This was demonstrated by the fact that in the 2007/2008 financial year $56,000 was paid in wages, whereas in the 2008/2009 financial year approximately $206,000 was paid in wages.
5. Ms Schumacher was unable to tell the Court what the company's turnover was in relation to asbestos removal.
6. Ms Schumacher did indicate that there had been considerable staffing issues with Quintaz from the end of 2008 to the beginning of 2009.
7. In relation to the remainder of the evidence contained in Ms Schumacher's affidavits, I place very little, if any, weight on it, consisting as it does of second hand hearsay material and speculative beliefs.

Testimonials and Newspaper Articles

1. Various testimonials and newspaper articles were tendered evidencing Mr McCudden's good standing in the community. Reading them, I have no doubt that Mr McCudden is a man of good character and standing in the community. The relevance of this finding is discussed below.

Expert Evidence

1. The defendants' expert evidence comprised of Dr Jim Orr, an Occupational Hygienist with Hazmat.

Dr Jim Orr

1. In his affidavit sworn 10 July 2009 attaching his report dated 3 June 2009, Dr Orr expressed the following opinions:

(a) that the RAP satisfied the requirements of the s 91 Clean Up Notice;

(b) that he did not witness any evidence that there had been wholesale dumping of asbestos waste at the Property;

(c) that whilst some asbestos pieces were recovered from some stockpiles, the amount recovered was minimal;

(d) that the asbestos was bonded and not friable; and

(e) that given its limited extent and bonded nature, the asbestos contamination presented a minimal hazard to persons accessing the Property and could be easily removed by emu pick using a contractor with an appropriate asbestos removal licence.

1. Dr Orr stated that he examined all of the stockpiles but that due to problems of inaccessibility, not all of them were sampled and excavated. Very few stockpiles, however, were only viewed. Dr Orr stated that in any event some of the stockpiles were homogenous in the sense that they were all one material, and therefore, it could easily be ascertained that there was no asbestos contained within them.
2. However, under cross examination Dr Orr conceded that trucks could have been transporting both asbestos and other waste, either as separate loads, resulting in possible residue contamination, or together in which case asbestos could be located deep inside a load of waste. Thus it was possible that some homogenous piles where assumptions had been made that no asbestos was present could have contained asbestos waste.
3. Dr Orr confirmed that the amount of asbestos found was, in his opinion, minimal. Only 50 to 60 small pieces of asbestos had been located and these pieces were consistent with bonded material. This was because although fire damaged, the asbestos was not able to be crushed. In relation to the burnt piles, Dr Orr stated that there was no asbestos found in any of the associated ash. Accordingly, the issue of whether the asbestos was friable or not simply did not arise.

4. Dr Orr stated that he was using the definition of bonded and friable contained in the Regulations. In his opinion, the use of the Workcover Guide was not appropriate in relation to this site because of its small area and the small amount of asbestos material located on it. In Dr Orr's words, "a reality check is needed on this site" due to its small size.

Conclusion on Whether the Asbestos was Friable or Bonded and in What Quantity

1. I accept the evidence of Dr Orr in relation to the classification of the fragments if for no other reason than the fact that Ms Malloy did not examine the fragments either within or on top of the relevant stockpiles, but rather made an assumption as to the state of the fragments based on other burnt material that she had observed on the stockpiles. Absent any actual examination by her I prefer the evidence of Dr Orr.
2. Accordingly, I find beyond reasonable doubt that the asbestos contained in the stockpile was bonded and not friable and that therefore the RAP is satisfactory.
3. I also find beyond reasonable doubt that the presence of asbestos on the site was minimal.

Sentencing Considerations

Purpose of Sentencing

1. The purposes of sentencing are stated in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSPA") as:

3A Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and the community.

Approach to Sentencing

1. It is a basic principle of sentencing law that the sentence imposed by the Court for an offence must both reflect and be proportionate to the objective circumstances of the offence and the personal or subjective circumstances of the defendant (*Veen v The Queen* [1979] HCA 7; (1979) 143 CLR 458 at 490 and *Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465 at 472).
2. Section 21A of the CSPA further identifies matters which the Court must take into account when sentencing, including those in aggravation (s 21A(2)) and those in mitigation (s 21A(3)).
3. Further, the POEOA also provides the following matters for consideration in the imposition of penalty under s 241:

241 Matters to be considered in imposing penalty

(1) In imposing a penalty for an offence against this Act or the regulations, the court is to take into consideration the following (so far as they are relevant):

(a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence,

(b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,

(c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,

(d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,

(e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee.

(2) The court may take into consideration other matters that it considers relevant.

Objective Considerations

1. The primary factor the Court must consider when determining sentence is the objective gravity or seriousness of the offence. This is determined through consideration of the upper most limit of a sentence that is justified as appropriate or proportionate to the gravity of the crime in light of its objective circumstances (*Veen v The Queen (No 2)* at 472, 485-486, 490-491 and 496; *Hoare v The Queen* [1989] HCA 33; (1989) 167 CLR 348 at 354), and the lower limit of the offence by allowing for consideration of the subjective factors of the matter to produce a proportionate range that reflects the objective gravity of the offence (*R v Dodd* (1991) 57 A Crim R 349 at 354; *R v Nichols* (1991) 57 A Crim R 391 at 395; *Garrett v Freeman (No 5)* [2009] NSWLEC 1; (2009) 164 LGERA 287 at [51]; *Pittwater Council v Scahill* [2009] NSWLEC 12; (2009) 165 LGERA 289 at [50] and *Plath v Rawson* [2009] NSWLEC 178 at [46]).
2. The objective circumstances of the offence and the purposes of punishment inform the lower limit of sentencing discretion, a bottom line beneath which a sentence cannot legitimately be set (*Rawson* at [46] citing *SZ v The Queen* [2007] NSWCCA 19; (2007) 168 A Crim R 249 at [4]- [6] and *Graham v R* [2009] NSWCCA 212 at [43]-[44]).
3. In determining the objective gravity or seriousness of the offence, the circumstances of the offence to which the Court may have regard include (see *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34; (2006) 145 LGERA 234 at [163] and *Gittany Constructions Pty Ltd v Sutherland Shire Council* [2006] NSWLEC 242; (2006) 145 LGERA 189 at [110] and *Rawson* at [48]):

(a) the nature of the offence;

(b) the maximum penalty for the offence;

(c) the objective harmfulness of the defendants' actions;

(d) the defendants' state of mind in committing the offence;

(e) the defendants' reasons for committing the offence;

(f) the foreseeability of risk of harm to the environment;

(g) the practical measures to avoid harm to the environment; and

(h) the defendants' control over the causes of harm to the environment.

Objective Considerations: Quintaz and McCudden

Nature of the Offences

1. In *Rawson* Preston CJ stated (at [49]):

[49] A fundamental consideration of relevance to environmental offences is the degree by which, having regard to the maximum penalties provided by the statute in question, the offender's conduct would offend against the legislative objectives expressed in the statutory offence: *R v Peel* [1971] 1 NSWLR 247 at 262; *Garrett v Williams* [2006] NSWLEC 785; (2006) 160 LGERA 115 at [89]; *Garrett v Freeman (No 5)*; *Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council* [2009] NSWLEC 1; (2009) 164 LGERA 287 at [52]; *Director-General of the Department of Environment and Climate Change v Rae* [2009] NSWLEC 137 at [15].

1. The primary object of the POEOA is to protect, restore and enhance the quality of the environment in New South Wales by, *inter alia*, reducing risks to human health and preventing the degradation of the environment through mechanisms that reduce the discharge of substances likely to cause harm to the environment (see s 3(d)(ii)) and improve the efficiency of the administration of the environment protection legislation (see s 3(f)). The issuing of the Clean Up Notice and the Notice for Information supported these primary objects.

2. The purpose of s 91 is to serve the primary objects of the POEOA as expressed in s 3 by empowering an appropriate regulatory agency to require the occupier of land to take remedial steps on that land where the authority reasonably suspects that a pollution incident has occurred. There is a clear need to uphold the regulatory system established under the POEOA which depends on personal and corporate entities taking steps to remediate, rectify and remove sources of pollution as directed and in a timely manner. This system minimises any actual or potential environmental harm caused by the pollution and ensures that the costs of remediation are borne by those responsible for the pollution. The actions of Quintaz in failing to comply with the Clean Up Notice undermined this system and offended the objects of the Act. It is in this context that the offence against s 91 of the POEOA is objectively serious.
3. In relation to the offence committed pursuant to s 211 of the POEOA, once again this offence is reflective of the need to ensure compliance with the regulatory scheme underpinning the Act. The purpose of provisions of the character of s 193 is to enable an authorised regulatory officer to carry out an investigation in the nature of an inquiry in connection with any matter within the responsibility of the authority that appointed the officer (*Hardie Holdings Pty Ltd v Director-General of the Department of Natural Resources* [2007] NSWLEC 39; (2007) 151 LGERA 373 at [30]-[39]). Any compromise in the access to information required by the authority results in a concomitant comprise in the ability of that authority to ensure compliance with the Act and to protect against environmental harm. In failing to provide the information as required by the council, Mr McCudden undermined this regulatory scheme and offended the objects of the POEOA as expressed in the offence.

Maximum Penalty

1. The maximum statutory penalty is of considerable significance in determining the objective gravity of the offence (*Rawson* at [57]). It demonstrates the seriousness with which these offences are viewed (*Scahill* at [52]). In *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* (1993) 32 NSWLR 683 at 698 it was stated that:

the maximum penalty available for an offence reflects the "public expression" by parliament of the seriousness of the offence ...

1. In *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 (at [31]), the High Court unequivocally referred to the need to have regard to the maximum penalty as a legislative yardstick to enable comparison between the worst possible case and that currently before the court.
2. The maximum penalty against a corporation for breach of s 91(1) is $1 million, and in the case of a continuing offence a further penalty of $120,000 for each day the offence continues.
3. The maximum penalty against an individual for breach of s 193 is $250,000 with a further penalty of $60,000 for each day the offence continues.
4. Both penalties reflect the considerable objective seriousness with which Parliament views the commission of each offence.

Harm Caused to the Environment

1. In relation to the Quintaz offence, whilst the prosecutor has stated that this was a “fairly serious pollution incident”, the largely unchallenged evidence of Dr Orr was that the pollution incident was “minimal”. I accept this characterisation of the harm caused to the environment. This is reinforced by the finding that the asbestos fragments that were located on the Property were bonded and therefore posed a lesser risk of harm to human safety and the environment.
2. Thus while the commission of the offence caused environmental harm in the sense that the failure to comply with the Clean Up Notice had the consequence that bonded asbestos and other waste material remained present on the Property, this harm was minimal (s 241(1)(a) of the POEOA).
3. Equally, the potential for harm to the environment while the waste remained present on the Property without an RAP was minimal due to the bonded nature of the asbestos and, in Dr Orr’s opinion, the limited amount of asbestos fragments present.
4. This conclusion is partially supported by the council’s delay in

prosecuting both Quintaz and Mr McCudden (over a year after the summonses were served). While the council sought to explain the delay on the basis that the Property was under surveillance and because by reason of the vacation of the tenant there was little risk of any harm to human health, the fact remains that if the harm to the environment had been significant warranting urgent remediation, then it is likely that the council would have sought to prosecute the matter with greater expediency. In making this observation I am not being critical of the council, rather I am commenting on the nature and magnitude of the environmental harm caused by the pollution incident.

5. In terms of the McCudden offence, while the commission of the offence clearly did not result in any harm to the environment, it nevertheless had the potential to exacerbate any environmental harm present by impeding the ability of the council to properly carry out its regulatory function by investigating the pollution incident.

Practical Measures to Avoid the Harm

1. In terms of practical measures Quintaz could have taken to avoid harm to the environment (s 241(1)(b) of the POEOA), Mr McCudden, as the will and mind of the company, could and simply should have complied with the requirements of the Clean Up Notice. At all times Quintaz had control over the Property and the waste deposited on it. No reason was given by him, on behalf of Quintaz, as to why compliance was not practically possible.
2. Instead, by failing to comply with the Clean Up Notice when issued, the task of removal of the waste was rendered more difficult than it otherwise would have been because rainfall made it more difficult to access all of the stockpiles on the Property for the purpose of the detection and removal of asbestos. While steps were belatedly taken to comply with the terms of the Notice, these were not initiated until after the summons was served on Quintaz.
3. In relation to the s 211 offence, again the practical step that could have been taken to comply with the Notice served on Mr McCudden was to ensure that the information sought was provided to the council. I accept that Mr McCudden did take the practical measure of engaging Mr Lawrence to liaise with the council and to advise him

and that Mr Lawrence indicated to Mr McCudden that the matter could be resolved informally. But given his awareness, as I have found, of the consequences of non-compliance with the Notice, Mr McCudden ought to have done more to ensure that the information was provided in time. The sanctions attaching to non-compliance with legal obligations cannot be evaded by the mere retainer of legal representatives.

Foreseeability of Risk of Harm

1. Given that Quintaz was in the business of removing, amongst other things, demolition waste and asbestos and given that the recitals of the Clean Up Notice made it clear that asbestos was present on the Property, the defendant could reasonably have foreseen the risk of harm to the environment by effectively leaving asbestos untreated and stockpiled on the Property as a result of its non-compliance with the Clean Up Notice (s 241(1)(c)).
2. Likewise, I consider that Mr McCudden, particularly given his position as a councillor and in light of his previous experience as a police officer, ought reasonably to have foreseen that by failing to provide the information requested by the council that he would impede the investigation by it into the pollution on the Property.

Control Over Causes of Harm

1. At all times Quintaz had full control of the causes of the commission of the offence. It, through Mr McCudden, understood the obligations the Notice imposed but it took no steps to attempt to comply with the requirements of the Notice until after the proceedings were commenced (s 241(1)(d)).
2. Likewise, it was Mr McCudden who at all times gave instructions to his solicitor, Mr Lawrence, in relation to compliance with the s 193 Notice.
3. Thus in relation to the commission of both offences, the defendants had at all times control over the events giving rise to the charges.

State of Mind of Defendants

1. Through Mr McCudden, Quintaz was clearly aware of the

requirements imposed under the Clean Up Notice and was aware of the consequences of non-compliance. Indeed Quintaz had forewarning of the Clean Up Notice and its terms when it was served with a Notice of Intention to issue the Clean Up Notice on 22 January 2009 (the former Notice being in exactly the same form as the latter).

2. Notwithstanding the repeated warnings by the council concerning the failure of Quintaz to comply with the Clean Up Notice, it did not engage a suitably qualified person to prepare the required report pursuant to the Clean Up Notice until 20 May 2009 (although an unqualified person was engaged earlier in April 2009) and the report was not submitted to the council until 9 June 2009.
3. Having said this, and despite an absence of evidence from Mr McCudden, I do not find that Quintaz deliberately defied the Clean Up Notice issued by the council. As discussed immediately below in relation to Mr McCudden, there is insufficient evidence to draw this inference from Quintaz's inaction.
4. Similarly, I do not find that Mr McCudden consciously flouted compliance with the Notice for Information. The evidence is to the contrary. Immediately upon receipt of the Notices, Mr McCudden engaged Mr Lawrence to advise him. Mr Lawrence assured Mr McCudden that he would attempt to negotiate a resolution with council and that he was confident that this would occur. Later, Mr McCudden terminated Mr Lawrence's retainer and engaged new solicitors, Gadens, to advise him in respect of the Notices and to liaise with the council. None of this behaviour is consistent with Mr McCudden deliberately ignoring the Clean Up Notice or the Notice for Information.
5. Beyond this, acceptable exculpatory evidence as to Mr McCudden's state of mind was not put before the Court. I do not accept, as counsel for the defendant submitted, that evidence of the state of mind of Mr McCudden can be adequately furnished by either Mr Lawrence or Ms Schumacher. Therefore, while it may be reasonable to assume that Mr McCudden was initially hopeful, based on the representations of his solicitor, Mr Lawrence, that the subject matter of the Notices could be informally resolved, the Court cannot positively attribute to Mr McCudden a state of mind that he was buoyed by this sense of false optimism, engendered by Mr Lawrence,

and believed that the matter was in hand.

Reason for Committing the Offences

1. The criminality involved in the commission of an offence is to be measured not only by the seriousness of what occurred, but also by reference to the reasons for its occurrence (*Plath v Chaffey* [2009] NSWLEC 196 at [45]- [47] and *Garrett v Williams* [2006] NSWLEC 785; (2006) 160 LGERA 115 at [120]).
2. In relation to the s 91 offence, it was Ms Schumacher's evidence that the reason for Quintaz's non-compliance with the Clean Up Notice was the company's extenuating financial circumstances. However, for the reasons discussed above, I did not find reliable Ms Schumacher's evidence concerning the financial affairs of Quintaz. Accordingly, I placed no weight on it. The consequence of this is that I do not accept that the reason Quintaz did not comply with the Clean Up Notice was because of any financial inability to do so.
3. Mr McCuddden similarly offered no reason for committing the s 211 offence other than, by inference, those suggested by Mr Lawrence and Ms Schumacher. I place less weight on these explanations, proffered as they were, by persons other than Mr McCudden himself. Furthermore, while I accept that Mr Lawrence's conduct contributed to the events giving rise to the commission of the offence, this contribution cannot be a wholly mitigating factor. At all times, and aware of the potentially severe consequences of non-compliance, it was Mr McCudden who instructed Mr Lawrence. It was therefore he who bore the responsibility for ensuring compliance with the Notices.

Conclusion on Objective Considerations

1. Overall the Court accepts the submission of both defendants that the objective gravity of the offences was lower than that proffered by the prosecutor. However, it was not as low as that suggested by the defendants, especially given the continuing nature of the offences. I therefore find that the commission of both offences to be of low to medium objective seriousness.

Subjective Considerations: Quintaz and McCudden

1. A proportionate sentence requires the Court to take into account any personal or mitigating factors present (*Gittany* at [144] and the authorities cited thereat).
2. The evidence discloses mitigating factors that the Court must take into account in determining the appropriate penalty (s 21A(3) of the CSPA).
3. The subjective circumstances of the defendants to be considered include:

(a) prior convictions;

(b) good character;

(c) plea of guilty;

(d) contrition and remorse and likelihood of reoffending;

(e) cooperation with regulatory authorities;

(f) capacity to pay penalty imposed;

(g) general deterrence; and

(h) specific deterrence.

Prior Convictions

1. In *Veen v The Queen (No 2)* the High Court stated (at [477]):

[477] ...The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.

1. Neither Quintaz nor Mr McCudden have any prior convictions for any environmental offences or indeed any offences (see s 21A(3)(e) of the CSPA and *Gittany* at [146]).

Good Character

1. As discussed above, the good character of Mr McCudden is evidenced by:

(a) the testimonials and newspaper articles; and

(b) the fact that there are no prior convictions.

1. The principles in relation to how good character is to be considered in environmental prosecutions were recently set out in *Rawson* (at [143]-[148]):

1. Prior good character can have both a negative and a positive aspect: *Ryan v The Queen* [2001] HCA 21; (2001) 206 CLR 267 at [27]. The negative aspect of good character can refer to the absence of prior convictions and otherwise not having previously engaged in other criminal conduct: *Weininger v The Queen* [2003] HCA 14; (2003) 212 CLR 629 at [25]. The positive aspect of good character can include a history of prior good works and contribution to the community: *Ryan v The Queen* at [27]. The reason for prior good character being a mitigating factor is that a "morally good" person is less deserving of punishment for a particular offence than a "morally neutral or bad" person who has committed an identical offence: *Ryan v The Queen* at [30], [31].
2. Good character may operate to reduce the sentence which the objective facts of the offence would otherwise attract: *Ryan v The Queen* at [174]. As with prior criminality, prior good character is not part of the objective circumstances of the offence: *R v McNaughton* [2006] NSWCCA 242; (2006) 66 NSWLR 566 at [17]. Prior good character is relevant to where, within the boundary set by the objective circumstances, a sentence should lie: *R v McNaughton* at [26].
3. There are two distinct stages in using prior good character in the sentencing process. First, it is necessary to determine whether the offender is of otherwise good character. Secondly, if so, it is necessary to determine the weight that must be given to that mitigating factor. The weight that must be given to the

offender's otherwise good character will vary according to all the circumstances: *Ryan v The Queen* at [23], [25].

4. The weight to be given to prior good character depends, to an extent, on the character of the offence committed: *R v Smith* (1982) 7 A Crim R 437 at 442; *Ryan v The Queen* at [143]; *R v Gent* [2005] NSWCCA 370; (2005) 162 A Crim R 29 at [51].

5. Certain classes of offences are ones in which many, perhaps even most, offences are committed by persons who are not members of a criminal class or do not have criminal convictions against them: *R v MacIntyre* (1988) 38 A Crim R 135 at 139; *R v Kennedy* [2000] NSWCCA 527 at [21]; *Ryan v The Queen* at [143]. Prior good character may be extended less weight in these classes of offences. Child sexual assault, drug trafficking and drink driving offences are illustrations. White-collar offences are another class. It has been observed that such crimes are rarely committed by people who have a criminal history: *R v Rivkin* [2004] NSWCCA 7 at [410]; *R v Adler* [2005] NSWSC 274 at [51]; *R v Williams* [2005] NSWSC 315 at [61]; *R v I R Hall (No 2)* [2005] NSWSC 890 at [101]; *R v Gent* at [59]. Less weight is accorded to prior good character in sentencing for white-collar crimes.

6. Environmental offences are another illustration of a class of offences committed by person who, typically, are of prior good character. They very rarely have previously engaged in other criminal conduct and mostly do not have any prior convictions for environmental offences. The prevalence of the commission of environmental offences by persons of otherwise good character, and the importance of the sentence for environmental offences achieving the purpose of general deterrence, makes the fact that the offender is of otherwise good character of less relevance than it might be in sentencing for other types of offences.

2. Mr McCudden fits the category of environmental offender discussed above in *Rawson*, that is to say, he is a person of prior good character in the sense of not having previously engaged in criminal activity. Pursuant to the reasoning in *Rawson* (especially at [148]), I therefore accord a lesser weight to this factor in mitigation (s 21A(3)(f) of the CSPA).

3. I reach a similar conclusion in respect of Quintaz.

Pleas of Guilty

1. While both Quintaz and Mr McCudden pleaded guilty, the pleas did not come at the earliest available opportunity, each was made on the third occasion the prosecutions were before the Court.
2. In not pleading guilty on the first mention date and by waiting to do so only after the prosecutor had served its evidence, the utilitarian value of the pleas was diminished (see *Director-General of the Department of Environment and Climate Change v Rae* [2009] NSWLEC 137; (2009) 168 LGERA 121 at [58]- [64], especially at [61]). Accordingly, both Quintaz and Mr McCudden are entitled to only 15 per cent discount for their plea of guilty (see ss 21A(3)(k) and 22 of the CSPA).

Contrition and Remorse and Likelihood of Reoffending

1. The defendants submitted that they expressed their contrition and remorse by:

(a) Ms Schumacher's evidence;

(b) a letter of apology tendered on behalf of Mr McCudden; and

(c) the pleas of guilty.

1. I accept that both Mr McCudden and through him, Quintaz, have expressed contrition for the commission of the offences. However, for the reasons given above, I do not give this factor full weight because of the unsatisfactory nature of Ms Schumacher's evidence (see s 21A(3)(i) of the CSPA).
2. I note in passing that, in my view, a bare plea of guilty is not evidence of contrition. Pleas of guilty may be entered for a multitude of reasons, none of which concern remorse or regret in the commission of the offence.
3. I have some hesitation in finding that Quintaz or Mr McCudden will not re-offend in the future (s 21A(3)(g) of the CSPA) given the length of time it took for compliance with the Notices to be effected

in the face of repeated warnings from the council as the consequences of non-compliance. However, on balance, I accept that it is unlikely that either will commit any further offences in the future.

Cooperation with the Regulatory Authority

1. As stated in *Rawson (*at [165]), a "sentencing court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence: see s 23(1) of *Crimes (Sentencing Procedure) Act* 1999".
2. In relation to both offences, I accept the prosecutor's submission that the non-compliance with the Notices clearly evidenced a lack of cooperation with the council in its investigation including by causing delay and diverting its limited resources. In these circumstances, it cannot be said that either Quintaz or Mr McCudden fully cooperated with the council in its investigation and prosecution of the offences (see ss 21A(3)(m) and 23(1) of the CSPA).
3. Having said this, it is acknowledged that both defendants cooperated to the limited extent of entering pleas of guilty and filing agreed statements of fact for both offences thereby reducing the cost and length of the prosecution.

Payment of Prosecutor's Costs

1. During the hearing the defendants agreed to pay the costs of the council fixed in the amount of $72,400. This amount included costs of $45,700 for Quintaz and $26,700 for Mr McCudden. The payment of these costs is an aspect of its punishment and the offer to pay them is a factor in mitigation (*EPA v Barnes* [2006] NSWCCA 246 at [78]).

Capacity to Pay Fines

1. Mr McCudden's financial situation is not known. Absent any evidence to the contrary, I do not find that he is impecunious and that

therefore he is unable to pay the appropriate penalty for his offence (see s 6 of the *Fines Act* 1996).

2. Given the vague and imprecise nature of the evidence that Ms Schumacher gave concerning the company's current financial affairs, I also find that there is no fiscal impediment to Quintaz paying whatever penalty is imposed.

Extra Curial Punishment

1. Mr McCudden submitted that an additional factor to take into account in respect of the s 211 offence was the extra curial punishment that he would in all likelihood suffer as an elected councillor with the prosecuting council. That is to say, the matter will receive considerable adverse publicity in the local community in which Mr McCudden resides and works. I accept that this is a factor to which I ought have regard (*Abdel Alameddine v R* [2006] NSWCCA 317 at [25]- [27]).

Cost of Compliance

1. Counsel for Mr McCudden also submitted that the cost of compliance with the Notices, which was considerable (although no sum was provided), was a factor in mitigation.
2. The prosecution submitted in response that it would not be appropriate to take into account the cost of complying with either Notice because this was no more than the cost of complying with the law. I agree.

General Deterrence

1. In *Gittany*, Preston CJ stated the following applicable principles in relation to deterrence as a component of an appropriate penalty for an environmental offence (at [188]-[190] and [192]):

[188] In fixing the appropriate punishment for the offences, the Court needs to consider the purposes of sentences relevant to the offences in this case.

[189] There is a need to ensure that the appellant is made accountable for its actions and is adequately punished for the offences it has committed.

This requires the Court to ensure that the punishment for each offence adequately reflects the objective seriousness of the offences, whilst also taking account of the subjective circumstances of the appellant.

[190] There is a need to deter specifically the appellant from repeating the conduct that resulted in the commission of the offences, when the appellant carries out development in the future. The appellant needs to be told, by the Court's sentence, that breaches of the EPA Act, including by failing to carry out development consent, will be visited with significant financial consequences.

...

[192] To achieve general deterrence, courts need to impose a penalty that not only acts as a warning to others but also makes it worthwhile that the cost of taking precautions to avoid committing the offence (such as by obtaining and complying with development consents be undertaken): *Axer Pty Ltd v Environment Protection Authority* at 359-360; *Bentley v BGP Properties Pty Ltd* at [139]-[141], [148]-[157].

1. One of the purposes of the Court in imposing a sentence is to prevent crime by deterring the offender and other persons from committing similar offences. This purpose is enshrined in s 3A(b) of the CSPA.
2. A person will not be deterred from committing environmental offences by the imposition of nominal fines (*Bentley* at [140]). Equally, the sentence imposed by the Court must show the denunciation of the crime committed and take into account the moral outrage of the community (*Bentley* at [143]). The community is entitled to expect that the Court will exercise its discretion to impose penalties commensurate with the community's views.
3. The obligations of individuals to take Notices such as those issued under ss 91 and 193 of the POEOA seriously, to respond to them completely and in a timely manner and to generally assist regulatory investigative bodies are important public duties. I accept the submissions of the prosecutor that there is a need for general deterrence in respect of both offences:

(a) first, in relation to the s 91 offence, the penalty needs to serve as an effective general deterrent in the context of an environmental pollution

offence (*Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357 at 359-360), particularly where the offence concerns the failure to take remedial steps to address a pollution incident;

(b) second, in relation to the s 211 offence, the penalty needs to serve as a deterrent for those who seek to impede, deliberately or otherwise, the performance of a regulatory authority investigating statutory breaches, particularly breaches involving environmental pollution; and

(c) third, it is well recognised in respect of both offences, that there is a powerful need for general deterrence where an offence is of a type which undermines the integrity of a regulatory system (*Gittany* at [104]).

Specific Deterrence

1. In relation to the s 91 offence, the prosecutor submitted that there was a need for specific deterrence in respect of Quintaz given that:

(a) despite repeated warning from the council as to the consequences of non-compliance, the defendant did not retain an expert to inspect the Property until, at the earliest, late April 2009;

(b) the defendant was forewarned of the need to remediate the site when the draft Clean Up Notice was served. The defendant elected not to respond to the draft Notice; and

(c) the defendant was in the business of asbestos removal and therefore knew the risks posed by asbestos and knew of the likely presence of asbestos on the Property.

1. In relation to the s 211 offence, the prosecutor submitted that the Notice for Information was clear on its terms and that there was no impediment to Mr McCudden complying with it. This need, the prosecutor submitted, was reinforced by the continuing nature of the offence.
2. The prosecutor submitted that these facts show that Mr McCudden had knowledge of the responsibilities and consequences of not complying with the Notices and in not doing so he showed disregard

for the regulatory regime. The need for specific deterrence is consequently high. I agree. This disregard was exacerbated, in my opinion, by Mr McCudden's former employment as a police officer and current position as a councillor with the prosecuting council.

Conclusion as to Subjective Considerations

1. The subjective circumstances of both Quintaz and Mr McCudden mitigate the sentence to be imposed, but not to any significant extent.

Consistency in Sentencing

1. A relevant consideration in sentencing is the ascertainment of the existence of a general pattern of sentencing by the courts for offences such as the offence in question (*Gittany* at [179]-[183]).
2. The proper approach is for the Court to look at (*Gittany* at [182]):

[182] ... "whether the sentence is within the range appropriate to the gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence (other than that of a co-offender) which merely forms part of that range": *R v Morgan* (1993) 70 A Crim R 368 at 371 and *Capral Aluminium Ltd v Workcover Authority of NSW* (2000) 49 NSWLR 610 at 641.

1. Care must nevertheless be taken because each case is different and a sentence in one case does not demonstrate the limits of a sentencing judge's discretion (*Axer* at 365 and *Cabonne Shire Council v Environment Protection Authority* [2001] NSWCCA 280; (2001) 115 LGERA 304 at 312).
2. In cases where there are too few cases that share common characteristics and which represent a broad range of differing features, there is little assistance to be gained from a statistical analysis of the sentencing range or pattern that emerges (*R v Hoerler* [2004] NSWCCA 184; (2004) 147 A Crim R 520 at [41]- [47]). This is so with both the s 91 and s 211 offence.
3. In relation to the s 211 offence, the prosecutor referred the Court to the following three decisions by way of comparison:

(a) first, *Environment Protection Authority v Peters* (2006) 153 LGERA

238. This case involved systematic falsification of 300-400 records. The defendant was found guilty and fined $80,000 for falsifying information in relation to pesticide records. He was also found guilty and fined $10,000, reduced to $6,000, for two counts of using a registered pesticide in contravention of its label. The offence posed a threat to human health. The prosecutor properly conceded that *Peters* was a much more serious offence than the present one involving as it did significant dishonest conduct;

(b) second, *Great Lakes Council v Mood (No 2)* [2008] NSWLEC 68. This decision involved the defendant furnishing information knowing that it was false or misleading in a material respect. The defendant was fined $75,000 by way of penalty; and

(c) third, *Environment Protection Authority v Hargraves (No 2)* (2003) 124 LGERA 57. In this case an unrepentant defendant was fined $30,000 for two offences (reduced from $40,000) for giving a small amount of false information to authorities in an interview. The defendant created fictitious records designed to deceive the council for financial gain. There was no environmental harm and the defendant was otherwise of good character. The prosecutor stated that the facts of the present offence were more serious than those in *Hargraves*.

1. The prosecutor submitted, and I agree, that these decisions have to be treated with caution as they involve the provision of false or misleading information. However, the prosecutor noted that the maximum penalty under s 211 for omitting to provide information required pursuant to s 193 carried the same maximum penalty as the provision of false and misleading information. This was because, the prosecutor suggested, an omission to provide information was equally antipathetic to the council's information gathering powers as the provision of false or misleading information.
2. While this may be so in cases involving the deliberate withholding of information, in the present case I have found that there was no wilful refusal by Mr McCudden to provide information to the council. This finding necessitates the imposition of a lesser penalty than those awarded in the cases referred to above.
3. The prosecutor could not assist the Court with any previous cases concerning an offence against s 91 of the POEOA.

4. In relation to the s 91 offence, the defendant submitted that the decision of *Oberon Council v Australian Game Meats Limited* [2002] NSWLEC 96 was analogous. In *Oberon*, the defendant pleaded guilty to a charge that it failed to comply with a direction under s 96 of the POEOA to take certain preventative action, which included the preparation and submission of an environmental audit of its operations; the preparation and submission of a waste water design and management plan and the preparation and submission of a waste management plan. Documents that complied with the prevention direction were not submitted until after the commencement of proceedings. No actual harm to the environment resulted. No explanation was given for the delay in compliance. The defendant pleaded guilty and agreed to pay the prosecutor's costs. The defendant was fined $27,000.
5. The prosecution submitted that *Oberon Council* should be distinguished on the basis that that case did not involve a continuing offence and at the time the maximum penalty for a corporation for this offence was only $250,000. I agree with this submission.

Totality Principle

1. Both parties submitted, and I accept, that while the totality principle does not strictly apply to the present offences because they are separate and are against different defendants, the two offences both arise from the one incident concerning a reasonable suspicion that asbestos contaminated material was present on the site. It was this one incident that generated the respective Notices, the respective failures of both defendants to comply with the Notices, the respective summonses and the respective pleas of guilty. Thus in these circumstances, and where Mr McCudden is the sole director of Quintaz, the Court ought to adjust the monetary penalties in order to have regard to the close connection of the two offences (see *R v Hammoud* [2000] NSWCCA 540; (2000) 118 A Crim R 66). Moreover, the reality is that in each case it will be Mr McCudden who suffers the penalty, and therefore, there is a need to look at the overall criminality of Mr McCudden and Quintaz and the totality principle therefore applies in a *de facto* sense (see *Keir v Sutherland Shire Council* [2004] NSWLEC 754 at [16]).

2. In *Gittany* the Court described the totality principle and its application as (at [196], [199] and [200]):

[196] The totality principle is a principle of sentencing which must be applied when sentencing an offender who has committed more than one offence. The court should consider questions of cumulation or concurrence as well as questions of totality. When reviewing the aggregate sentence, the Court must consider whether it is "just and appropriate" and reflects the total criminality before the court: see *Mill v Queen* [1988] HCA 70; (1988) 166 CLR 59 at 62-63; *Pearce v The Queen* [1998] HCA 57; (1988) 194 CLR 610 at [49]; *R v Kalache* (2000) 11 A Crim R 152 at [110], [180]; *R v AEM* [2002] NSWCCA 58 at [70]; and *R v Bahsa* [2003] NSWCCA 36; (2003) 138 A Crim R 245 at [62], [63].

...

[199] In determining an appropriate aggregate sentence, the Court must consider the need to uphold public confidence in the administration of justice. If sentences are reduced substantially, offenders may view that they can escape punishment for successive deliberate discrete offences: *R v Wheeler* [2000] NSWCCA 34 at [36]- [37].

[200] In applying the totality principle, the Court must avoid determining a sentence that is disproportionate to the seriousness of the offence: *R v A* at [32]. The Court must first fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence as well as questions of totality: *Pearce v The Queen* at [45]; *R v Wheeler* at [31], [32] and *R v AEM* [64], [67].

1. However, as stated in *Rawson* (at [222] and see the authorities cited thereat), "[c]are must be taken, however, to ensure that any adjustment of individual sentences does not cause the aggregate sentence not to reflect the total criminality of the offender's conduct or the sentence for any individual offence to become disproportionate to the objective gravity of that offence".

Penalty to be Imposed on Quintaz

1. Taking into account all of the circumstances identified above,

including the continuing nature of the offence, I am of the view that a penalty of $150,000 discounted by a total of 25% (which includes an allowance for the guilty plea, the objective seriousness of the offence, the defendant's subjective factors and the application of the totality principle) is appropriate (see *Minister for Planning v Fancott Pty Ltd* [2009] NSWLEC 170 at [90] as to the availability of a composite discount). This results in a total fine of $112,500.

Penalty to be Imposed on McCudden

1. Counsel for Mr McCudden submitted that a penalty pursuant to s 10A of the CSPA was appropriate given the subjective factors relevant to Mr McCudden and because the fine imposed on Quintaz would be borne by Mr McCudden.
2. Section 10A(1) of the CSPA states:

A court that convicts an offender may dispose of the proceedings without imposing any other penalty.

1. In my opinion, in the absence of any explanation personally from Mr McCudden as to the circumstances giving rise to the commission of the offence and given the continuing nature of the offence (at least up to 4 June 2009) and the need for considerable specific deterrence in the present case, a conviction alone is insufficient.
2. Accordingly, taking into account all of the circumstances identified above, I am of the view that a penalty of $30,000 discounted by a total of 30% (which includes an allowance for the guilty plea, the objective seriousness of the offence, the defendant's subjective factors and the application of the totality principle) is appropriate. This results in a total fine of $21,000.

Orders

1. The formal orders of the Court for proceedings 50022 of 2009 against Quintaz are:

(1) the defendant is convicted of the offence charged in the summons;

(2) the defendant is ordered to pay a penalty in the sum of $112,500;

(3) the defendant is ordered to pay the costs of the prosecutor fixed in the amount of $45,700; and

(4) the exhibits may be returned.

1. The formal orders of the Court for proceedings 50023 of 2009 against Mr McCudden are:

(1) the defendant is convicted of the offence charged in the summons;

(2) the defendant is ordered to pay a penalty in the sum of $21,000;

(3) the defendant is ordered to pay the costs of the prosecutor fixed in the amount of $26,700; and

(4) the exhibits may be returned.

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