SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [95].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2017-006-000933
CRI-2017-006-000953
[2018] NZDC 26800

WORKSAFE NEW ZEALAND
Prosecutor

v

CRAFAR CROUCH CONSTRUCTION LTD
Defendant

Date of Hearing: 24 October 2018

Appearances: K J Patterson for WorkSafe New Zealand
J Opie for the Defendant

Judgment: 21 December 2018

RESERVED JUDGMENT OF JUDGE A A ZOHRAB
[as to sentencing]

Introduction

[1] Crafar Crouch Construction Ltd ("the defendant") demolished a building at 101 Budge Street, Blenheim ("the Budge Street property") over a period of six days in early August 2016.

[2] Shortly afterwards, the defendant demolished a building at 39 Queen Street, Blenheim ("the Queen Street property") over a three-week period between December 2016 and January 2017.

[3] The two buildings were later found by WorkSafe to be contaminated to varying degrees with asbestos and asbestos containing material ("ACM").

[4] As a consequence of the demolition work at the Budge Street property, the defendant has pleaded guilty to a charge under ss 36(1)(a) and 48(1) and (2)(c) of the Health and Safety at Work Act 2015 ("the Act"). The defendant admits that, being a person conduction business or undertaking ("PCBU"), it failed to ensure, so far as was reasonably practicable the health and safety of its workers in the course of demolition and waste removal work at the Budge Street property, and that failure exposed the workers to a risk of serious illness.

[5] In relation to the Budge Street property, WorkSafe identified that it was reasonably practicable for the defendant to:

(a) ensure a risk assessment was undertaken prior to work commencing;

(b) implement controls to manage the risk of exposure to asbestos;

(c) monitor the control measures to ensure effectiveness;

(d) ensure a safe system of work was in place for the task of demolition;

(e) train workers to recognise potential ACM;

(f) ensure appropriate personal protection equipment ("PPE"), including respiratory masks, was provided and worn by workers; and

(g) consult with New Zealand Islamic Development Trust ("NZIDT") about potential hazards/risks.

[6] The defendant has also pleaded guilty to a charge of breaching r 20(2) and (6)(b) of the Health and Safety at Work (Asbestos) Regulations 2016 in relation to the Budge Street property. It admitted that, being a PCBU having intended to carry out demolition of a structure at a workplace, it failed to ensure the structure, namely the Budge Street property, was inspected to determine whether asbestos or ACM was fixed to or installed in the structure, prior to demolishing the structure.

[7] As a consequence of the demolition work at the Queen Street property, the defendant has pleaded guilty to a charge under ss 36(1)(a), 48(1) and (2)(c) of the Act. The defendant admits that, being a PCBU, it failed to ensure so far as was reasonably practicable the safety of workers working for the defendant, while the workers were at work in the business of demolition at the Queen Street property, and that failure exposed the workers to a risk of serious illness.

[8] In relation to the Queen Street property, WorkSafe identified it was reasonably practicable for the defendant to have:

(a) communicated and liaised with the Aitken Children Family Trust ("ACFT") and the Marlborough District Council ("the Council") regarding any action they may have taken in respect of identifying asbestos;

(b) undertaken a thorough inspection of the building site to identify asbestos or ACM;

(c) prepared a written asbestos removal plan, and monitored compliance with a written plan;

(d) obtained a Clearance Certificate for the site after removing the textured ceiling;

(e) formally trained its workers in the fitting of their asbestos-related PPE; and

(f) provided its workers with the appropriate information and health monitoring in relation to asbestos.

Approach to sentencing

[9] When sentencing for offences under s 48 of the Act, the Court must apply the Sentencing Act 2002 ("the SA"), but must also have particular regard to the sentencing criteria set out in s 151(2) of the Act, and which states:

> (2) The court must apply the Sentencing Act 2002 and must have particular regard to—
>
> (a) sections 7 to 10 of that Act; and
>
> (b) the purpose of this Act; and
>
> (c) the risk of, and the potential for, illness, injury, or death that could have occurred; and
>
> (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
>
> (e) the safety record of the person (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
>
> (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
>
> (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[10] In *Stumpmaster v WorkSafe New Zealand,* the High Court laid down a four-step sentencing process with priority to be given to the assessment of reparation.[1]

Step 1: Assess the amount of reparation to be paid to the victim.

Step 2: Fix the amount of the fine, by reference first to a starting point using the guideline bands and then having regard to aggravating and mitigating factors.

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1 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 at [3] and [35].

Step 3: Determine whether further orders under ss 152-158 of the Act are required.

Step 4: Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[11] In terms of Step 2, and the fixing of a fine, the Court identified four bands of culpability and the appropriate range of fine to be imposed.

	Culpability	Penalty Range
Band 1	Low culpability	Up to $250,000
Band 2	Medium culpability	$250,000 to $600,000
Band 3	High culpability	$600,000 to $1,000,000
Band 4	Very high culpability	$1,000,000 plus

[12] Factors the High Court in *Stumpmaster* considered relevant to the assessment of culpability and the level of a fine are:[2]

(a) identification of the operative acts or omissions at issue;

(b) an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk;

(c) the degree of departure from standards prevailing in the relevant industry;

(d) the obviousness of the hazard;

(e) the availability, cost and effectiveness of the means necessary to avoid the hazard;

2 At [36] and [37].

(f) the current state of knowledge of the risks and the nature and severity of the harm which could result; and

(g) the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[13] When WorkSafe filed its submissions, they sought:

(a) an Order for restoration pursuant to s 145 of the Act; and

(b) an Adverse Publicity Order pursuant to s 153 of the Act.

[14] WorkSafe abandoned the application for an Order for Restoration during the course of submissions. Further, subsequent to my reserving my decision, they abandoned the application for an Adverse Publicity Order.

Step 1 – assessing reparation – Budge Street and Queen Street properties

[15] The workers in relation to the work done over the six days at the Budge Street property were the digger operator, and who assisted with the clearance and removal of demolition waste.

[16] The workers in relation to the work done over the three weeks at the Queen Street property were the site foreman, and

[17] When WorkSafe filed their submissions, the defendant had not made any reparation payments. WorkSafe therefore sought an order for reparation in the sum of $5,000 under s 32(1)(b), the emotional harm limb of the SA, with respect to each affected worker at the Budge Street and Queen Street properties.

[18] Further, with respect to the Budge Street property, WorkSafe sought a reparation payment for not only but also his family, and this was because took his work clothes home to wash, potentially exposing family members to asbestos. expressed concern for his family, and was annoyed that the defendant had exposed not only himself, but his family to asbestos. WorkSafe also

submitted that the Court should consider making an order of reparation of $5,000 to the four members of family who were potentially exposed to asbestos.

[19] At the time of the sentencing hearing, it was accepted that the defendant, on 12 October 2018, had paid compensation of $4,000 to and $3,000 to each It was also accepted that on 12 October 2018 the defendant had paid $1,500 compensation to each of and Furthermore, the defendant also paid $1,000 to for some work at the Queen Street property.

[20] It was submitted on behalf of the defendant that the Court should take account of the fact that the amount of compensation paid to was higher than any of the reparation orders made in any of the asbestos-related cases dealt with under the (now repealed) Health and Safety in Employment Act 1992 ("the HSEA"), with the exception of the order of $5,000 made in 2001 to a home owner in *Campbell Floorsanders* which involved the aggravating factor of work done at the victim's home.[3]

[21] Furthermore, it was submitted on behalf of the defendant that given no victim impact statements had been provided by WorkSafe for family members, there is no evidence before the Court of any emotional harm suffered by them. It was also submitted that the reality of the situation is that even if asbestos fibres were on work clothes when he went home, it is highly unlikely that there was any issue of his family members being exposed to those fibres. If there was exposure it would have been minimal and no greater than the everyday background risk. Accordingly, it was submitted that not only was there no justification for a reparation order in respect of family members, there was no jurisdiction to make such an order.

[22] The informant noted that emotional harm reparation had been previously ordered in the *WorkSafe New Zealand v Hutt Construction 2013 Limited and Delaney* when no victim impact statement had been provided.[4]

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3 *Department of Labour v Campbell Floorsanders* DC Timaru, 8 November 2001.
4 *Worksafe New Zealand v Hutt Construction 2013 Limited and Delaney* [2016] NZDC 3652.

[23] It was submitted on behalf of the defendant that the payments to equal the reparation order of $3,000 to the employees in *Hutt Construction 2013 Limited.* Further, it was submitted that victim impact statement confirms that his exposure was limited, and he also does not appear to have concerns about the potential health-related effects from his work at the Budge Street property.

[24] As far as the Queen Street property was concerned, the defendant submitted there was lesser culpability, and particularly less risk. Furthermore, there was no jurisdiction to order reparation in relation to as he had not suffered any emotional harm.

[25] I note that the Courts have recognised that emotional harm is difficult to quantify financially, and that it is an intuitive exercise. In *Big Tuff Pallets Ltd v Department of Labour*, Harrison J observed that:[5]

> Fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short-term or long-term.

[26] For the reasons given later in this decision, I have concluded there was no actual harm to the workers, and the actual risk to the workers was negligible. Given the contents of the victim impact statements, the lack of any victim impact statements from family, the reparation awards made in earlier cases, and the voluntary compensation payments made by the defendant, I see no need to order any further reparation payments as far as the Budge Street and Queen Street properties are concerned. I also accept that the risk was lesser for the Queen Street property, and that there was a principled basis on which to distinguish payment of compensation as between the two properties, and that to order further amounts would be inconsistent with awards made in earlier cases.

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5 *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 at [19].

Step 2 – assessing quantum of fine – charges 1 and 3

[27] With reference to *Stumpmaster* and charge 1 in relation to the Budge Street property, and charge 3 in relation to the Queen Street property, the informant submitted that the offending in each case falls at the top of band 2, medium culpability, and warrants a starting point of a fine for each offence of $550,000.

[28] It was submitted on behalf of the defendant that for the Budge Street property the offending falls at the bottom end of band 2, medium culpability, and warranted a start point of a fine of $290,000.

[29] Further, in terms of charge 3 for the Queen Street property, it was submitted on behalf of the defendant that the offending falls at the bottom end of band 1, low culpability, and warranted a start point of a fine of $73,000.

[30] It was submitted on behalf of the informant that this was the first case involving asbestos under the Act, and given the increased and enhanced penalty regime, that past cases dealing with asbestos should not provide much in the way of assistance to the Court under the new regime.

[31] It was submitted on behalf of the defendant that ignoring past case law under the HSEA was flawed because:

(a) WorkSafe did not refer to cases decided under the HSEA in assessing the defendant's culpability, and which would result in the defendant's culpability in these matters being determined in a vacuum and, as such, would be inconsistent with ss 8(a) and (e) of the SA.

(b) There were obvious differences between the facts in charges 1 and 3, and which would justify different approaches being taken to the assessment of culpability.

(c) On WorkSafe's culpability assessment, the work done on the Budge Street and Queen Street properties would constitute the worst asbestos-related offending ever, and that position was unsustainable.

(d) WorkSafe failed in their submissions to engage properly with the issue of risk, and which has therefore skewed their culpability assessment.

Budge Street

[32] The risks associated with demolishing buildings which contain asbestos are well known. As far as the Budge Street property is concerned, it needs to be remembered that Mr Crafar, as the director and shareholder of the defendant, held a Certificate of Competency relating to the handling of asbestos under the (now repealed) Health and Safety in Employment (Asbestos) Regulations 1998, and so was experienced and knowledgeable about asbestos. He was also aware of the New Zealand Guidelines for the Management and Removal of Asbestos ("the Guidelines").

[33] It was submitted on behalf of the defendant that the reason why the defendant did not take the reasonable steps set out in the particulars to the charge was because Mr Crafar did not think ACM was present at the site. More particularly, he had formed that view because:

(a) The building at the Queen Street property was not large and had been extensively damaged by fire, and services to it had been disconnected. Accordingly, because of the involvement of various parties, he thought any ACM would have been identified and brought to his attention. He therefore worked on the basis that, given it had not been brought to his attention, then there was no asbestos on site.

(b) Given the aforementioned circumstances, a visual inspection was appropriate, and having conducted such an inspection, he did not see any material that could have been AMC.

(c) He did not get a LIM, and the owner did not bring anything about the potential presence of asbestos to his attention.

[34] The building was old, and the potential presence of asbestos was noted in the LIM, and in those circumstances a visual walk-through was insufficient, and inconsistent with industry practice.

[35] The irresistible conclusion is that the defendant's conduct departed in a material way from industry standards and guidelines.[6] Furthermore, the defendant made a number of assumptions about the presence or otherwise of ACM, and left other parties to draw to his attention the presence of ACM, when the defendant is of course responsible for the health and safety of its employees. Furthermore, the asbestos regulations and the Guidelines highlight the dangers, and inspection for and testing for asbestos was appropriate and required, and the means available to mitigate the risk were not expensive and were available.

[36] The real contest between the parties is as to an assessment of the nature and seriousness of the harm occurring, as well as the realised risk. The informant's position is that the risk of harm from exposure to asbestos is well known, and the harm is potentially very serious and life-threatening, whereas the defendant's position is that no actual harm has occurred, and the risk of any of the three workers developing an asbestos-related illness due to the work at the Budge Street property is indeed very low.

[37] The work took place at the Budge Street property over six days. was the digger driver and was the most exposed, working mostly in an enclosed cab with a filtered air conditioner. The material being removed was dampened down.

[38] were drivers, and made some 12 to 15 visits to the site. Their trucks had enclosed cabs. Whilst all three workers were outside of their cabs at various stages, it was on very limited occasions. Accordingly, it was submitted on behalf of the defendant that none of the exposures could be described as heavy, as contemplated by the *Investigation Report Asbestos Risks in the Canterbury Home Repair Programme* ("the WorkSafe CHRP Report").

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6 Paragraphs 24 to 29, and more particularly paragraphs 27 and 28 of the Summary of Facts.

[39] Furthermore, WorkSafe had filed in these proceedings a statement from the WorkSafe CHRP Report, dated 25 June 2018 by Mr Dodwell. At pages 18 and 19 of the report he stated:

> With asbestos exposures, the probability of harm is always very low, but when applying such probabilities across the industry over time, we can expect deaths to occur.
>
> This is because even when the [Workplace Exposure Standard] is exceeded; there is a very low likelihood of harm. Despite the low probability because the consequence we are referring to is death, WorkSafe considers such exposures high risk.

[40] The defendant also referred to the opinion offered by Dr Ryder Lewis, attached as Exhibit D to Mr Crafar's affidavit, when he noted in the advice provided to the workers that:

> It is thought the exposure needed to cause most asbestos diseases has to be quite large. This could be either very intense exposure for some months, or a lesser degree of exposure for many years.

[41] WorkSafe also raises the issue of exposure to members of the public and, while conscious of that, I simply note that the charge relates to exposing its workers to risks.

[42] The clear conclusion to be drawn from all the material is that the exposure needed to cause most asbestos diseases has to be quite large, and requires either intense exposure for some months, or as a lesser degree of exposure for many years. Neither of those scenarios apply to the facts of this case. In the case of the Budge Street property, it was just short of one week, and for the Queen Street property, it was three weeks. Furthermore, the exposure was not for extended periods of time.

[43] However, having made that observation, one can well understand WorkSafe's concerns about asbestos because, despite the low probability, there is no safe level of exposure to asbestos, and the potential consequence is death. Furthermore, the purpose of the Act as stated in s 3(1)(a) and (2) must be borne in mind.

[44] Accordingly, the culpability assessment here is more difficult than, for example, a case where one is dealing with an unguarded machine where there is the

immediate risk of, for example, amputation of limbs or serious injury, or a risk that has been realised and an injury has resulted.

[45] Accordingly, when I weigh up all of the *Stumpmaster* culpability factors that are summarised at [12] herein, my provisional assessment of the defendant's culpability is that it is the bottom end of the medium culpability band, and which therefore would attract a fine start point in the range of $300,000. What particularly influenced me in this placement, is the defendant's knowledge through Mr Crafar with respect to asbestos and ACM, the failure to follow industry guidelines, the apparent abdication of its responsibility for the assessment and identification of risk to other parties, and its failure to make its own enquiries in the face of obvious "red flags".

[46] However, I am also required to take into account s 8(a) and (e) of the SA, and which provide as follows:

> **8 Principles of sentencing or otherwise dealing with offenders**
>
> In sentencing or otherwise dealing with an offender the court—
>
> (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
>
> ...
>
> (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
>
> ...

[47] It is argued on behalf of the defendant that to achieve a proper assessment of the gravity of the offending, and the culpability of the defendant, and to also achieve consistency in sentencing, that this Court is obliged to consider the culpability assessments carried out by other Judges in previous asbestos-related cases.

[48] WorkSafe take issue with that submission and suggests that, given we are operating in a new post-*Stumpmaster* environment, that past cases under the now repealed HSEA therefore do not assist the Court in light of the increased and enhanced penalty regime.

[49] My view is that, whilst not being bound by the earlier District Court decisions, I am required to give consideration to the earlier cases decided under the HSEA when determining the defendant's level of culpability. In my view, *Stumpmaster* has not changed the approach as to the assessment of culpability, rather, it does provide an increased and enhanced penalty regime. In turn, that means the greater the assessment of culpability, the greater the fine post-*Stumpmaster*. It has not, however, altered the approach to be taken in assessing culpability.

[50] On behalf of the defendant, Mr Opie helpfully provided a detailed analysis of pre-Act case law. More particularly, he submitted that the defendant's culpability was equivalent to that of the defendant in *Hutt Construction 2013 Limited*, and was therefore at the low end of band 2. He also submitted that the defendant's culpability was less than in *Department of Labour v 17 Argentine Ltd*.[7] His submission was that the start point adopted in *17 Argentine Ltd* was significantly out of step with other cases with similar levels of culpability. Furthermore, his submission was that the defendant's culpability was considerably less than in *Page, Blakely Construction Limited, Ngaha, Topham Holding Ltd* and *Robertson*.[8]

[51] Given the culpability assessments in cases decided under the HSEA, it was submitted by the defendant that the starting point of $550,000 argued for by WorkSafe meant by comparison to earlier cases, that this would mean that the defendant was the worst offender in relation to asbestos that there had ever been, and by a considerable margin. Accordingly, given the defendant's submissions, Mr Opie suggested that the fine should be at the lower end of *Stumpmaster* band 2, and in the range of $285,000 to $295,000, as opposed to the $550,000 argued by WorkSafe.[9]

[52] While it is difficult to compare the varied cases under the HSEA with one another, there are some helpful distinctions that assist in assessing the defendant's culpability.

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7 *Department of Labour v 17 Argentine Ltd* DC Wellington CRI-2008-085-003596, 5 February 2009.

8 *WorkSafe v Page* DC Auckland CRI-2014-004-004462; *WorkSafe New Zealand v Blakely Construction Limited* [2015] NZDC 24902; *Worksafe v Ngaha and P&M Demolition Specialists Limited* [2017] NZDC 8515; *WorkSafe New Zealand v Topham Holding Ltd* [2017] NZDC 27224; and *Worksafe v Robertson* [2018] NZDC 9940.

9 At paragraph 87 of WorkSafe's Prosecution Sentencing Submissions.

[53] Although the defendant suggests the Budge Street offending is most like *WorkSafe v Hutt Construction 2013 Limited and Delaney,* likely because of the demolition having occurred in close proximity to a nearby preschool like the Budge Street property having occurred close to a backpacker's hostel and children's playground, I disagree.

[54] I find *Hutt Construction 2013* to be less culpable than the defendant here because Mr Delaney did at least make checks with the Council whom did not alert him as to the presence of asbestos. Mr Crafar didn't even undertake any preliminary checks with other parties, only doing a walkthrough, and deciding there was no asbestos, operated on that incorrect assumption, similar to *17 Argentine*. This is disconcerting in light of his expertise and knowledge of the risks and dangers associated with asbestos in the construction industry.

[55] Another distinguishing feature between *Hutt Construction 2013* and the facts of this case is that the former demolition did in fact undertake testing to confirm or deny the presence of asbestos after being warned by a neighbour. No testing or warning from the public was received or communicated to Mr Crafar, and work only ceased once WorkSafe issued a prohibition notice.

[56] Otherwise, the number of potentially "harmed" victims are similar between the two. In *Hutt Construction,* there was only one worker (a contractor) harmed, but there were also three neighbours affected (a couple and one person), as well as a preschool nearby that was affected. Conversely, in this case there are three workers that have been potentially harmed as a result of the Budge Street work, and there is the nearby playground and backpacker's hostel. There is no evidence to the actual exposure to harm nor the risk realised.

[57] Those lower culpability cases referred to by counsel were *Department of Labour v Ward Demolition Limited* (although I respectfully disagree with the learned District Court Judge and would have set a higher start point and culpability), *Department of Labour v Concrete Drilling and Cutting (1992) Limited* and *Department of Labour v Willis St Parking Limited.*[10] I note that both in *Ward* and this case the defendants were in the business of demolition and asbestos removal, whereas in *Concrete Drilling and Cutting (1992) Limited* and *Willis St Parking Limited* the defendants were by contrast naïve and inexperienced.

[58] Further, the demolitions were both commercial and carried out over a short time frame with the *Hutt Construction* occurring over one to two days and this case occurring over six days.

[59] With all due respect to the learned District Court Judge, I am of the view that the case of *Page* was underassessed as to the level of culpability with that particular set of offending, and ought to have attracted a higher fine starting point both then, and now, under *Stumpmaster*.

[60] On my review of the cases, *Page* certainly appears to be the worst of its kind as to culpability when compared to other cases. It had more aggravating features than *17 Argentine* which attracted the same start point and placement in the culpability bands. *Page* affected the most number of people, it involved the defendant having actual knowledge, lying to people, failing to get testing done, acting in a nonchalant manner, and also occurred over the longest period of time.

[61] On my assessment, *Page* warranted a start point fine in the range of $100,000 to $125,000 under the *Hanham* bands, straddling between the highest end of the medium culpability band, and the lowest end of the high culpability band.

[62] Based on the defendant's conversions between the *Hanham* bands and *Stumpmaster* bands, that translates a $100,000 start point to a $600,000 start point

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10 *Department of Labour v Ward Demolition Limited* DC Auckland CRN6004502262, 21 August 2009; *Department of Labour v Concrete Drilling and Cutting (1992) Limited* DC Wellington CRI-2011-085-003423, 13 December 2011; *Department of Labour v Willis St Parking Limited* DC Wellington CRI-2011-085-003421, 1 May 2012.

(with every increment of $5,000 equating to an increment of $35,000 in Band 2) and a $125,000 start point to approximately $732,000 (with every increment of $7,500 equating to an increment of $40,000 in Band 3).

[63] I am of the opinion that *Blakely* is more serious and attracts a greater level of culpability than in this case. In *Blakely*, the defendants had actual notice of asbestos, having located it on site but failed to fully inspect, dust with ACM was found on neighbouring properties and work did not cease when asbestos was discovered for a third time on site. In this case, the defendant stopped as soon as it was notified by WorkSafe and operated on the unawareness there was asbestos on site.

[64] As to an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk, I think it pertinent to observe that it is difficult to draw comparisons to cases concerning residential properties. It is important to highlight that while the responsibility remains the same for all defendants charged for these types of breaches, there are different risks of exposure to asbestos in respect of commercial demolitions in contrast to small scale demolitions, or renovations that are residential in nature.

[65] With commercial properties, the extent of risk is higher with larger contaminated properties having a greater likelihood of exposing asbestos harm to a greater range of people and, logically, the extent of risk being lower in respect of smaller residential properties being exposed to a likely smaller audience of nearby people. Every case is of course fact dependent however. For example, in *Ngaha* there were several complaints from neighbours about dust containing ACM going over properties, and in *Robertson* the site was visited by multiple parties. There was no evidence of harm discussed in either case.

[66] Generally speaking, in so far as harm and risk is concerned, I did not find it helpful to draw comparisons between this case and the residential property cases of *Campbell Floorsanders, Ngaha, Topham Holding* and *Robertson*. I note also that, and with respect to the District Court Judge, *Ngaha* appears to be somewhat of an outlier case in terms of its culpability assessment and fine starting point.

[67] Overall, I find this case sits in between *Hutt Construction* and *Blakely,* and therefore assess the case as sitting at the lower end of *Stumpmaster* band 2, medium culpability band, which is consistent with my provisional assessment, and assess a fine start point of $300,000 as appropriate.

Queen Street

[68] As far as the Queen Street property is concerned, Mr Crafar not only had specific knowledge with respect to asbestos from the process of obtaining the Certificate of Competency, and awareness of the Guidelines, he should also have had a heightened awareness with respect to the need to consider whether or not asbestos was present at the Queen Street property, given that WorkSafe issued a non-disturbance notice to the defendant for the work conducted at the Budge Street property on 16 September 2016. This was only several months prior to the work starting at the Queen Street property.

[69] Similar to the Budge Street property, Mr Crafar did a walkthrough to check for ACM and other hazardous material, but that was done in poor lighting and he did not identify anything of concern during that walkthrough. However, as with the Budge Street property, Mr Crafar made an assumption it was asbestos-free due to the building having been condemned by an engineer, all services having been disconnected and no notice arising from the involvement on the part of the council nor by other parties. Furthermore, he did not make any enquiries of the various parties himself.

[70] Then, during the initial part of the work, Mr Crafar identified a textured ceiling above the ground floor, and told his workers,
to treat the textured part of the ceiling as if it was asbestos, or ACM, and to remove it. However, no testing was done to confirm the position.

[71] The defendant's position is that in terms of the asbestos regulations, given that he had told his workers to proceed on the basis that it was ACM, there was no requirement under the regulations to test for ACM. Whilst that may be strictly correct, it meant that the workers did not know for certain what they were dealing with.

[72] The position on behalf of the defendant was that whilst the process of removing the textured ceiling did not comply fully with the defendant's obligations under the Act, they undertook a series of significant precautions, which were largely consistent with best practice. Furthermore, it is submitted that this was not a case of the defendant missing an obvious hazard, because the textured ceiling was identified, and the age of the building should not have been a "red flag" of itself, because its construction predated the importation of asbestos into New Zealand.

[73] However, whilst the workers were told to treat the site as having ACM present, and that they did have respiratory protective equipment ("RPE") and PPE, they were not instructed in the use of RPE or PPE, nor given training or information about asbestos handling. This was a significant departure from industry standards, as outlined in paragraphs 22 to 26 of the Summary of Facts.

[74] Furthermore, I think it most unlikely that the defendant, through Mr Crafar, would have been aware as to when asbestos was first imported into New Zealand, and that this would have in any way influenced the defendant's decision-making as to whether or not the Queen Street property would have asbestos or ACM.

[75] As previously discussed in relation to the Budge Street property, the real contest between the parties is as to the nature and seriousness of harm occurring, and the realised risk and, as I have previously noted, there is no evidence of actual harm, and the risk is negligible.

[76] Further, whilst the work at the Queen Street property was done over some three weeks, it was submitted on behalf of the defendant that in all reality the work in relation to the textured ceiling took place over one day, so if one considers the nature of the site, the fact that the asbestos or ACM was restricted to the ceiling, the fact that precautions were taken, and the lack of proof of actual exposure to asbestos or ACM, the risk to the workers was extremely negligible, and less so than in the Budge Street property.

[77] The difficulty with this submission is that on analysis of the soil sample, two samples tested positive for asbestos. Because of the defendant's failure to carry out

Precautions were taken once the textured ceiling was identified, but no thorough inspection was carried out to identify asbestos or ACM. Whilst workers were told to treat it as though it contained asbestos or ACM, and were provided with RPE and PPE, it is not significantly mitigating given there was no AMP in place, and no training given as to how to identify asbestos or ACM, or training in relation to fitting RPE and PPE. There was also no appropriate information and health monitoring in relation to asbestos. The reality of the situation is that the defendant arguably displayed a cavalier attitude towards its obligations to its workers with respect to asbestos and ACM, more especially when one considers not only being put on notice with respect to the Budge Street property, but also the purpose of the Act as emphasised by s 3(1)(a) and (2).

[83] Although this case, *WorkSafe v Yakka Contracting Limited* and *Ward* all share the common theme of workers wearing appropriate protective gear, in my view, the Queen Street offending is not comparable.[11] Furthermore, *Yakka* and *Ward* are lower culpability cases which did not have present the fact the defendant company had just a short period beforehand failed to take a number of steps in respect of demolition of an asbestos contaminated building. *Yakka* and *Ward* also only concern one victim. Accordingly, that supports the placement of culpability in the medium band.

[84] I am comfortable that the placement in the culpability banding is broadly comparable with cases under the HSEA.

Charge 2 – Budge Street - regulations breach

[85] Charge 2 is for a breach of r 20(2) and (6)(b) of the Health and Safety at Work (Asbestos) Regulations 2016 in relation to the Budge Street property.

[86] The defendant breached the regulations by not inspecting the building prior to demolition to determine whether asbestos or ACM was fixed to, or installed in the structure. One of the reasonably practicable steps is set out in charge 1 and is ensuring "a risk assessment was undertaken prior to work commencing". Such a risk assessment would have included the asbestos related inspection referred to in r 20(2)

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11 *Worksafe v Yakka Contracting Limited* [2015] NZDC 17004.

and (6)(b). The reality of the situation is that this breach is included in charge 1. In my view, it would be unfair to penalise the defendant twice for the same action.

[87] Accordingly, I agree with defence counsel that it is appropriate to simply convict and discharge the company on this matter.

Budge Street – other discounts

[88] Both parties agree that a 15 per cent discount is available for the defendant company for its previous good record and co-operation, and I agree that is appropriate. Given the defendant also paid $65,166.20 to remediate the site, together with the costs of medical examinations and also reparation and remorse, that warrants a further discount of 10 per cent. Accordingly, in my view they are entitled to a 25 per cent discount on the fine prior to the guilty plea discount.

Queen Street – other discounts

[89] The 15 per cent discount for previous good record and co-operation similarly applies. However, given that remediation costs for the site were $21,778.75 and there was more modest reparation, the discount for remediation, medical examination, reparation and remorse, warrants only a further 5 per cent discount. Accordingly, in my view they are entitled to a 20 per cent discount on the fine prior to the guilty plea credit.

Guilty plea credit

[90] The informant submits that a credit for a guilty plea in terms of *Hessell* should be 20 per cent, whereas the defendant submits that it should be 25 per cent.[12] The first call of the charges was on 12 September 2017, and that was dealt with administratively, with the matter then being called on three subsequent occasions before a plea of not guilty was entered on 5 December 2017. The matter was then set down for a case review on 9 February 2018, which was adjourned through to 5 April 2018 when pleas of guilty were entered.

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[12] *Hessell v R* [2011] 1 NZLR 607, [2010] NZSC 135.

[91] In the circumstances, given that there was little involvement on the Court's part, and there were negotiations as between the informant and the defendant as to the charges and summaries of facts, in my view, the full 25 per cent discount is appropriate.

Fine Calculation

Budge Street fine

Budge Street fine	$300,000
Less 25% discount	$75,000
(previous good record, co-operation, remediation, medical examinations, reparation and remorse)	
	$225,000
Less 25% discount (guilty plea)	$56,250
Total Fine	$168,750

Queen Street fine

Queen Street fine	$250,000
Less 20% discount	$50,000
(previous good record, co-operation, remediation, medical examinations, reparation and remorse)	
	$200,000
Less 25% discount (guilty plea)	$50,000
Total Fine	$150,000

What other orders under ss 152-158 of the Act are available?

[92] The parties agreed that the defendant would pay $4,000 towards WorkSafe's prosecution costs. The defendant did not, however, accept that they should have to pay costs of $1,428.17, being WorkSafe's costs of instructing an agent. In my view, however, it is appropriate to order that they meet the costs of the agent because this matter has required 14 mentions, either in Court or administratively, and if the Crown

Solicitor had not appeared as WorkSafe's agents, then WorkSafe's costs would have been significantly greater. Part of the costs was contributed to by the defendant's decision to seek an enforceable undertaking, rather than a prosecution, and that of course was their right.

[93] The parties agreed to an order for costs in testing for asbestos for both the Budge Street and Queen Street properties, totalling $3,615.21 inclusive of GST.

Conclusion

[94] In my view, the aggregate fine of $318,750 is both appropriate and proportionate, together with the compensation payments already paid, and the various costs orders. Accordingly, the defendant is convicted and fined $168,750 with respect to the Budge Street property and $150,000 with respect to the Queen Street property, together with Court costs of $130 on each charge. The defendant is simply convicted and discharged on the charge involving the breach of the Health and Safety at Work (Asbestos) Regulations 2016 involving the Budge Street property.

[95] It is also appropriate to grant name suppression for the workers/victims involved, and their respective families in terms of the Criminal Procedure Act 2011.

A A Zohrab
District Court Judge