IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-2138
[2014] NZHC 84

BETWEEN	AUCKLAND WATERFRONT DEVELOPMENT AGENCY LIMITED	
	Plaintiff	
AND	MOBIL OIL NEW ZEALAND LIMITED	
	Defendant	

Hearing: 19, 20, 21, 22, 27 and 29 August 2013

Counsel: A R Galbraith QC and M Smith for Plaintiff
M G Ring QC, P Rzepecky and A Colgan for defendant

Judgment: 7 February 2014

JUDGMENT OF KATZ J

This judgment was delivered by me on 7 February 2014 at 2:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] Mobil Oil New Zealand Limited ("Mobil") leased two properties in the tank farm, at the western end of the Port of Auckland, from the 1950s and 1960s through until 2011. The tank farm was Auckland's main base for bulk fuel storage and distribution from the 1920s until the 1990s. It was located in an area that was progressively reclaimed from the Waitemata Harbour between 1905 and 1917.

[2] When Mobil departed the properties (known as the Pakenham and ASPT sites) in 2011, the subsurface of the land was heavily contaminated. Some of this contamination had been present in the subsurface of the land from the outset, due to toxic waste from the (then) nearby gas works being used as fill during the reclamation process. In addition, further contamination was caused by oil company tenants who occupied the sites for 30 to 40 years prior to Mobil. Some contamination also spread to the sites from neighbouring tenants. For example, a major spill of 1.8 million litres of jet fuel by Shell on an adjoining site in 1986 spread to the subsurface of Mobil's sites. Finally, significant contamination was caused by Mobil's own activities on the sites over the 50 to 60 years of its occupancy.

[3] The current owner of the land, Auckland Waterfront Development Agency ("AWDA")[1] is the successor to the original owner, the Auckland Harbour Board. AWDA is redeveloping the area, now known as the Wynyard Quarter, as part of New Zealand's largest urban revitalisation project. The completed development will include a mix of residential, retail, and commercial uses, while retaining the existing marine and fishing industry uses. The Pakenham and ASPT sites accordingly now require extensive remediation, including the removal of subsurface contamination, to meet modern environmental standards for residential and commercial property.

[4] The key issue in this case is the correct interpretation of a clause in five 1985 tenancy agreements between Mobil and AWDA (covering different parts of the sites). That clause required Mobil to deliver up the land "in good order and clean and tidy and free from rubbish, weeds and growth, to the reasonable satisfaction of [the lessor]". I will refer to this as the "clean and tidy clause".

[5] AWDA argued that the clean and tidy clause obliged Mobil "upon termination of the leases, to deliver possession of the land in an uncontaminated condition, save in respect of any inorganic contaminants associated with gasworks derived wastes which formed part of the original reclamation, and so that it can be used for any permitted activity".[2] Put another way, AWDA's case was that in 1985 Mobil and the Harbour Board intended by the clean and tidy clause that, during the tenancies and on their termination, Mobil would be obliged to rid the subsurface of all historic contamination, from all sources, that had accumulated on the sites since the 1920s, except the gas works waste. This would enable the Harbour Board or its successor to use the sites for any activity permitted as at the date of termination of the leases (rather than as at the date the leases were entered into). In the alternative, AWDA argued that there was an implied term to essentially the same effect.[3]

[6] Mobil's position, on the other hand, was that there was no such express or implied term. Rather, the clean and tidy clause was directed to the surface condition of the land rather than the subsurface. Further, regard must be had to the condition

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1 An entity wholly owned by Auckland Council.
2 Fifth amended statement of claim at [19].
3 Fifth amended statement of claim at [25].

of the land at the commencement of the 1985 tenancies, not its condition 60 years earlier in the 1920s. Viewed in its proper context, and with reference to previous case law, Mobil submitted that parties' intention in 1985 was that Mobil would keep and deliver up the land in a suitable condition for use by another industrial tenant. It says it has met this obligation.

[7] If I find that there was an express or implied term obliging Mobil to remove all contamination (other than that inherent in the land itself) from the subsurface of the sites, then Mobil will be required to pay AWDA the sum of $10 million in damages. That is because, during the course of the hearing, Mobil and AWDA reached agreement that the cost of the "incremental" increase in the scope of works reasonably required to develop the sites, due to the need to remove or contain subsurface contamination (save for that inherent in the land itself) will be $10 million.

Factual background

[8] The western reclamation, where the tank farm was located, was reclaimed from the sea specifically for industrial use. The fill material included dredgings from the harbour floor, sandstone from nearby cliffs, and also more variable fill such as demolition debris, toxic gas works waste and refuse from city tips.[4]

[9] From the early twentieth century onwards, ships were increasingly changing to oil fuel. Demand for fuel increased further following the introduction of the first motor cars into New Zealand at the end of the nineteenth century and the exponential growth in vehicle usage after the First World War.

[10] The Harbour Board realised the potential that the oil industry offered for Auckland's growth, and its own revenues. It undertook research (including site visits) of overseas bulk oil facilities. By 1922 both the Harbour Board and the Auckland City Council had decided that oil companies should be encouraged to establish substantial bulk fuel storage and distribution terminals in the western

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[4] Most of the historical background, including that relating to the history of the western reclamation and the development of the tank farm generally, was not in dispute. An historian, Dr Jennifer Carlyon, gave helpful evidence on behalf of Mobil summarising the relevant historical background.

reclamation area. Its location away from the commercial and residential development areas of early twentieth century Auckland, and in close proximity to a deep water wharf, made it ideal for such activity. The development of the tank farm was not only profitable for all concerned but was also vital to regional growth.

[11] The original leases offered by the Harbour Board for sites within the tank farm were for terms of 50 years. This provided security of tenure for oil company tenants and an incentive to invest in the necessary infrastructure. Of some significance to this case, the repair covenants in the original 50-year leases did not contain any "make good" obligations in relation to land, only in relation to improvements. This seems to have been the Harbour Board's general practice, not confined to Mobil.[5]

[12] Early tenants of the Pakenham and ASPT sites were companies unrelated to Mobil. From various dates in the late 1920s and 1930s until the 1950s and 1960s, companies associated with Exxon Mobil's Australian operations took over occupancy of the Pakenham and ASPT sites. The legal entity Mobil (which includes various companies that were amalgamated into the present day company) occupied the Pakenham and ASPT sites from the 1950s and 1960s onwards.

[13] Negotiations for new tenancy agreements took place in the early 1980s, against the background that a pipeline had been commissioned that would link the oil refinery at Marsden Point to the Wiri Oil Services storage terminal in Manukau. Mobil intended moving some of its operations to new tank farms at Wiri and, as a result, both parties envisaged that Mobil would cease occupying two of its five parcels of land once the Wiri terminal was operational. Mobil intended to retain the other three parcels of land for the foreseeable future.

[14] The three tenancy agreements for the parcels of land Mobil wished to continue to occupy provided for one monthly renewable tenancies (in contemplation of the parties shortly negotiating new long term leases). Those three tenancy agreements provided for Mobil to repurchase the structures and other improvements

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5 BP lease schedule, referred to in *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC) at [24] – [26]. A copy of the schedule is attached to the unreported version of that judgment.

from the Harbour Board that had passed into the Harbour Board's ownership when the original 50-year leases came to an end. During the lease term, or on termination, Mobil was entitled to remove those structures provided that the "site shall be left in a clean and tidy condition" (clause 6(c)).

[15] The two tenancy agreements for the sites that the parties' envisaged Mobil would be vacating within 18 months or so (once the Wiri terminal was operational) were six monthly renewable tenancies, terminable on notice. They did not provide for Mobil to repurchase the improvements, but did allow Mobil, if it was not in breach of its obligations under the lease, to remove the buildings and fixtures on termination if it wished. Alternatively, the Harbour Board could require Mobil to remove the improvements and make good any damage caused by such removal. All five tenancy agreements included the clean and tidy clause, in virtually identical form.

[16] Ultimately Mobil did not surrender two parcels of land once the Wiri terminal became operational. Efforts were made to negotiate new tenancy agreements to replace the 1985 tenancy agreements. These were unsuccessful, however, largely because Mobil would not agree to accept the imposition of express terms imposing on it liability for environmental remediation. After the 1985 tenancy agreements came to an end, on 31 December 1993, Mobil continued in occupation as a tenant holding over.

[17] Meanwhile, from the late 1990's onwards, the western reclamation tank farm facilities began to be decommissioned. Industrial activity in the area was gradually phased out, and the focus shifted to port development and urban renewal initiatives. Mobil ceased occupation of the sites in 2011.

Interpretation of the clean and tidy clause

[18] Many countries, including England, Australia and Canada, have introduced legislation to allocate legal responsibility for the remediation of historic contaminated land. Despite extensive policy work being undertaken since the 1990s, including two relevant Ministry of the Environment Discussion Papers, New Zealand does not currently have any specific legislation allocating liability for cleanup of

historic contaminated sites (those which predate the coming into force of the Resource Management Act 1991). Further, any tortious causes of action that the Harbour Board or AWDA may once have had, for example pursuant to the tort of waste, are now statute barred. AWDA's claims against Mobil are accordingly framed solely in contract. In particular, AWDA alleges that in 2011 Mobil breached its contractual obligations regarding the condition the land was to be delivered up in.

The clean and tidy clause

[19] The full text of the clean and tidy clause obliges Mobil:

> At all times to keep the said land hereby demised in good order and clean and tidy and free from rubbish, weeds and growth and will at all times keep all buildings, oil storage tanks, structures, fixtures and other improvements in or upon the said land in good and tenantable repair and condition to the reasonable satisfaction of the Board and will upon the determination of this tenancy or any new tenancy for any reason or cause whatsoever yield and deliver up to the Board the said land and any improvements left thereon in such good and tenantable repair and condition and clean and tidy to the reasonable satisfaction of the Board.

[20] This clause, although comprising one long sentence, includes four inter-related obligations. Firstly, in relation to buildings and other fixtures, Mobil is required:

(a) during the course of the tenancy, to keep all "buildings, oil storage tanks, structures, fixtures and other improvements in or upon the said land in good and tenantable repair and condition to the reasonable satisfaction of the [lessor];" and

(b) at the end of the tenancy, to yield and deliver up any improvements left on the land in "such good and tenantable repair and condition". This is effectively shorthand for a delivery up obligation which mirrors [20](a) above, namely to deliver up any improvements in good and tenantable repair and condition to the reasonable satisfaction of the lessor.

[21] In relation to land, Mobil is required:

(a) during the course of the tenancy, to keep the land "in good order and clean and tidy and free from rubbish, weeds and growth....to the reasonable satisfaction of the [lessor]"; and

(b) at the end of the tenancy, to yield and deliver up the "said land... clean and tidy to the reasonable satisfaction of the [lessor]". This is effectively shorthand for a delivery up obligation which mirrors the obligation set out in [21](a) above. In other words, the land is to be delivered up at the end of the tenancy in good order and clean and tidy and free from rubbish, weeds and growth, to the reasonable satisfaction of the lessor.

[22] It was common ground that the nature and extent of the "clean and tidy" obligation was the same at the commencement of, during, and on termination of the tenancy.

The natural and ordinary meaning of the clause

[23] The ordinary rules of construction of contract apply to the interpretation of the clean and tidy clause. I must determine, objectively, what the common intention of the parties was when they agreed the clause. In other words, what would a reasonable and properly informed person, with all the background knowledge reasonably available to Mobil and the Harbour Board in 1985, have considered the words of the clause to mean?

[24] The starting point is to consider the natural and ordinary meaning of the words used, viewed in the context of the contract as a whole. This must then be "cross-checked" against the relevant factual background known to both parties. If the natural and ordinary means results in a conclusion that flouts commercial common sense, it must be made to yield to common sense.[6]

[25] AWDA submitted that the natural and ordinary meaning of the words "good order" and "clean and tidy" would preclude the land being contaminated in any way

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6 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, [2010] NZSC 5, [2010] 2 NZLR 444 at [61].

that would change its character, potential, or in any way compromise the health or safety of people or the environment. This is particularly so given that those standards were to be met to the reasonable satisfaction of the lessor. The parties could not reasonably have expected that the delivery up of contaminated land would be acceptable to the lessor. Further, the words convey an obligation not to damage the land or to do any act that would constitute the equivalent to the tort of waste which comprises, in simple terms, an obligation not to compromise the owner's reversionary interest in the land.

[26] On AWDA's approach the clean and tidy clause sets an absolute standard. The condition of the land at the commencement of the 1985 tenancies, or even at the commencement of Mobil's occupancy of the sites in 1952 and 1963 respectively, is irrelevant. "Clean and tidy" and "good order" mean uncontaminated, save for any contamination inherent in the reclaimed land itself.

[27] Mobil, on the other hand, submitted that the clause conveys an intention to impose obligations relating to the appearance of the sites, namely the state of the surface of the land. The natural and ordinary meaning of the words used does not convey an obligation to fully remediate the subsurface of contamination, which would require excavation, removal and replacement of the soil to a depth of 3.5 metres. Rather, in their ordinary meaning, "tidy" and "free from rubbish, weeds and growth" can reasonably only refer to the surface appearance and condition of the land. While one dictionary meaning of "clean" may be free from pollution, this is usually with reference to air or water, rather than to land. The more common use in everyday language – particularly in the expression "clean and tidy" – relates to physical appearance, and so also points to the surface condition. "In good order" refers generally to everything being where it should be, and nothing being out of its proper place. It also contains a connotation of functionality. When applied to land (as opposed to something with moving parts) it suggests suitability for a contemplated use or purpose.

[28] Individually, and taken together, Mobil submitted that in their generally accepted usages these expressions do not immediately conjure up obligations to rid

the land of all historic subsurface contamination. Rather, they are all consistent with obligations in relation to the surface of the sites.

[29] Unfortunately, this is not a case where the natural and ordinary meaning of the words is so apparent that there is no need to look any further to determine the meaning of the clause. Although, in my view, the natural and ordinary meaning tends to favour Mobil's interpretation, the words "good order" and "clean and tidy" are certainly open to meaning "free of contamination, including historic subsurface contamination", in the right factual context. It is therefore necessary to consider the broader factual context in some detail.

Pre-contractual negotiations

[30] The evidence before the Court included considerable extrinsic material, including evidence relating to pre-contractual negotiations. Such evidence is admissible to establish the parties' knowledge of relevant circumstances, providing the setting in which they used the words in the contract, including the genesis of the transaction, the background, the context, the market in which they are operating, and the subject matter. This also includes the objective commercial purpose, particularly what ground the contract was intended to cover.[7] However, the subjective content of the negotiations, such as evidence of how the parties were thinking and their individual intentions, is not admissible as an aid to interpretation.

[31] The pre-contractual negotiations focussed largely on the arrangements in relation to improvements on the sites and matters ancillary to that. The only specific mention of the phrase "clean and tidy" in the pre-contractual correspondence was in the context of an express clause (clause 6(c)) obliging Mobil to restore the site following the removal of any fixtures. Mobil submitted that the phrase "clean and tidy" cannot have been intended to bear differing meanings in clause 6(c) and the clean and tidy clause. Both clauses should be read consistently as relating to the surface of the sites, with the clean and tidy clause imposing a somewhat broader obligation, for example also requiring the removal of weeds and rubbish. There is

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7 *Vector Gas Ltd v Bay of Plenty Energy Ltd,* above n 6, at [14].

some force in that submission, although it is only one of many considerations to weigh in the balance in the overall interpretation exercise.

[32] Mobil submitted that it was of even greater significance that there was no reference to, or discussion of, any requirement to decontaminate the site in the contemporaneous documents.

[33] AWDA submitted, however, that the fact that the pre-contractual negotiations were silent on this issue was attributable to lack of knowledge by the Harbour Board that Mobil's activities were causing contamination, rather than indifference to such contamination. AWDA called evidence from Mr Richard Thompson, the Property Manager of AWDA. Mr Thompson has been employed by AWDA and its predecessors, including the Harbour Board, since 1985. His evidence was that, to the best of his knowledge, no one at the Harbour Board was aware in 1985 that Mobil was causing significant contamination to the sites in the course of its activities. Rather, contamination only became a live issue for the Harbour Board in the late 1980s, following a major spill of jet fuel by Shell on an adjoining site. The Shell spill generated some publicity and concern at the time and ultimately resulted in the Harbour Board and Auckland Council commissioning a study of the western reclamation land by the New South Wales Department of Planning, which was finalised in April 1989.

[34] Mobil challenged this evidence, noting that Mr Thompson only joined the Harbour Board in 1985 and was therefore limited in his ability to address the full scope of its institutional knowledge, including that contained in historical records referred to by Dr Carlyon in her evidence. Those records, Mobil submitted, indicated that the Harbour Board and the City Council were well aware of the risk and incidence of product spill in the western reclamation, as an incident of the transport, storage and distribution of petroleum products.

[35] Having carefully considered all the evidence before the Court, I have concluded that the appropriate inference is that, as at 1985, the Harbour Board was aware of at least some incidents over the past 50 to 60 years on or around the sites, as a result of which petroleum products had spilled or leaked into the ground. It

probably did not, however, appreciate the full nature and extent of the contamination and its adverse effects on the subsurface of the land. I note in this context that the 1985 tenancy agreements were entered into prior to the modern era of heightened awareness of environmental issues. For example, they pre-date the Resource Management Act 1991 by some five years.

[36] In this context the pre-contractual negotiations and other contemporaneous documents (such as internal Harbour Board documents) do not evidence any particular concerns by either party in 1985 regarding the condition of the subsurface of the sites. In the absence of any such concern, it is difficult to infer a common intention to impose or assume extensive obligations relating to historic subsurface contamination, including that caused by third parties, by means of a largely boilerplate repair covenant. There is no evidence that addressing subsurface contamination, or environmental remediation more generally, was one of the commercial purposes of the 1985 tenancy agreements or part of the ground that the parties intended the agreements to cover.

Post-contractual conduct

[37] Mobil relied on the parties' post contractual conduct as further evidence that there was no common intention that the 1985 tenancy agreements impose a subsurface remediation obligation on Mobil.

[38] Conduct subsequent to the formation of a contract can be taken into account to a limited extent. The focus must, however, be an objective conduct, rather than expressions of subjective intention and understanding.[8] If it is clear from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, "it would be inappropriate to presume that they meant something else".[9] Further, the conduct must be mutual, so that evidence that only demonstrates one party's subjective intention or understanding as to meaning is not admissible.[10]

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8 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [56].

9 *Gibbons Holdings Ltd v Wholesale Distributors* Ltd [2007] NZSC 37, [2008] 1 NZLR 277 at [63]. See also Elias CJ at [7].

10 *Vector Gas Ltd v Bay of Plenty Energy Ltd,* above n 6, at [30] – [32].

[39] As noted above, efforts were made to negotiate new long term tenancy agreements during the 1990s. Those negotiations foundered, in large part over the insistence of the Harbour Board and, subsequently Ports of Auckland Limited, that Mobil warrant that it had not contaminated the sites, or agree to an express term requiring it to decontaminate the sites. Mobil was unwilling to agree to such terms.

[40] During those negotiations, neither the Harbour Board nor Ports of Auckland suggested that the 1985 tenancy agreements already included a term that addressed liability for subsurface contamination. Mobil submitted that this indicates that both parties had a common understanding that the 1985 tenancy agreements did not impose obligations on Mobil to remediate the subsurface of the sites.

[41] While there is some force in that submission, I give it relatively little weight in the overall interpretation exercise. Even if the clean and tidy clause did extend to subsurface contamination, it was clearly desirable that this be made clear by way of more explicit drafting in any future longterm lease. It is not unusual for commercial entities to seek to clarify any ambiguities in earlier contracts or to improve the clarity of expression when they enter into further contracts covering the same subject matter. That does not preclude, however, the possibility that the subject matter already fell within the scope of the earlier clause.

Other relevant aspects of the factual matrix

[42] In addition to pre-contractual negotiations and post-contractual conduct, some guidance as to the parties likely common intention can be obtained from other aspects of the factual matrix.

[43] Firstly, as noted above, the Pakenham and ASPT sites were already heavily contaminated at the outset of the 1985 tenancy agreements. The sources of contamination included toxic waste from the (then) nearby gas works, the activities of tenants who had occupied the sites for 30 to 40 years prior to Mobil, contamination that had spread to the sites from neighbouring sites, and Mobil's own activities on the sites. In my view it would be relatively unusual for a tenant to agree to remove historic contamination caused by entities for which it is not legally

responsible. I would therefore expect any such common intention to be expressed in clear and unambiguous wording.

[44] This view is further reinforced by the fact that the original 50-year leases for the Pakenham and ASPT sites (and, it appears, for the tank farm sites generally) did not impose obligations on tenants in relation to the condition of the land (as opposed to buildings and fixtures). As a result neither Mobil, nor the original tenants under those leases, had any contractual obligation to remediate the land to its original 1920s condition on termination of those leases in the mid 1970s. Accordingly, if Mobil was to assume, in 1985, retrospective contractual liability for 60 years of historic contamination of the sites, this would have been a significant departure from the previous and historic basis of the parties' relationship. One would normally expect this to be addressed explicitly, rather than left for inference from the general wording of the clean and tidy clauses.

[45] Finally, the 1985 tenancy agreements were short term periodic tenancies, terminable on either one months' or six months' notice. The shorter the tenancy, the stronger the inference must be against a common intention to impose onerous, extensive and expensive repair obligations on a tenant.

[46] Taken together, these factors provide further support for Mobil's contention that the clean and tidy clause was not intended to extend to remediation of historic subsurface contamination of the sites.

The economic rationale of a lease transaction

[47] AWDA did not pursue a cause of action based on the tort of waste, presumably for limitation reasons. Nevertheless, it argued that the general principles underlying waste are relevant to interpretation of the 1985 tenancy agreements as they reflect the underlying economic rationale of a lease transaction.

[48] The essence of the doctrine of waste is that what a lessee receives and pays for is the use of the lessor's property for the duration of the lease term. At the end of that period the lessee's interest ceases and the use of the property which the lessee contracted for reverts to the lessor. The temporary use of the property by the lessee

does not, absent the consent of the lessor, entitle a lessee to damage or alter the reversionary interest of the lessor.[11]

[49] AWDA submitted that Mobil's activities on the sites have compromised the lessor's reversionary interest. It referred to several Canadian cases which, it said, have recognised the responsibility of an oil company lessee not to damage the lessor's reversion, such that it is appropriate to define or imply an obligation on expiry to remediate any contamination.[12]

[50] Mobil disputed that the tort of waste has any relevance, even by analogy. There is no cause of action based on waste and Mobil submitted that AWDA is effectively trying to recast a contractual claim as a tortious one, in order to circumvent limitation issues. Mobil submitted that a lessee's obligation not to commit waste is "altogether separate and distinct" from the obligation imposed by a covenant to repair and gives rise to separate and distinct remedies.[13]

[51] In my view, considering the principles underlying the tort of waste adds little to the interpretation exercise in this case. First, the doctrine of waste does not extend to damage resulting from reasonable use of the land.[14] What is reasonable use is to be determined by reference to the nature of the demised premises and the use ordinarily expected of such premises. In *The Manchester Bonded Warehouse Company v Carr*, Lord Coleridge CJ said: [15]

> ...any use of [the demised premises] is in our opinion reasonable provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having

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11 *West Ham Central Charity Board v East London Waterworks Company* [1900] 1 Ch 624; *Marsden v Edward Heyes Ltd* [1927] 2 KB 1 (CA).

12 *Canadian National Railway Co. v Imperial Oil Ltd,* 2007 BCSC 1557; *Darmac Credit Corp. v Great Western Containers Inc.* (1994), 163 A.R. 10, [1994] AJ. No. 915, 1994 Carswell Alta 816 (Q.B.); *Westfair Properties Ltd. v Domo Gasoline Corp*., [1999] 133 Man R (2(d)77); *Progressive Enterprises Ltd v Cascade Lead Products Ltd*, [1996] B.C.J. No 2473 (Q.L.) (BCSC).

13 *Regis Property Co Ltd v Dudley* [1959] AC 370 at 407; [1958] 3 All ER 491 at 510 (HL). See also *Marlborough Properties Ltd v Marlborough Fibreglass Ltd* [1981] 1 NZLR 464 (CA) at 466 and at 472, where it was held that the existence in the lease of a covenant by the lessor to repair did not exempt the lessee from liability for waste; *BP Oil New Zealand Ltd v Ports of Auckland Ltd*, above n 5, at [73] – [75].

14 *BP Oil New Zealand Ltd v Ports of Auckland Ltd,* above n 5, discussing Laws of New Zealand Landlord and Tenant at [199]; Halsbury's Laws of England (4th ed. Reissue) vol 27(1) at [34].

15 *The Manchester Bonded Warehouse Company v Carr* (1880) 5 CPD 507 at 512.

> regard to the nature of the property and to what the tenant knew of it and to what as an ordinary business man he ought to have known of it.

[52] While it is impossible to now determine whether Mobil's use of the land was at all times reasonable, judged against the laws, regulations and industry standards of the time, it seems likely that it was. I note that the land use expressly authorised in the original 50-year leases carried with it the likelihood of contamination. Environmental awareness is a relatively modern phenomenon. AWDA's own evidence was that the Harbour Board did not start turning its mind to such issues until the late 1980's.

[53] Secondly, even if I were to apply the principles underlying the tort of waste to interpretation of the 1985 tenancy agreements, that would not support the interpretation advanced by AWDA. Rather, it would support an interpretation that, at best, would require Mobil to remove only that contamination for which it is responsible, and arguably only since 1985. That falls significantly short of the delivery up obligation asserted by AWDA.

The obligation to "keep" the land clean and tidy

[54] AWDA noted that, pursuant to a well established line of landlord/tenant authorities,[16] Mobil's obligation to *keep* the land in good order and clean and tidy during the term of the tenancy required Mobil to first *put* the land into that condition at the commencement of its tenancy, to the extent the land was not already in that condition. The reasoning is that the lessee cannot keep the premises in repair without first putting them in repair.[17]

[55] It was therefore irrelevant, AWDA submitted, that the subsurface of the land was already heavily contaminated at the outset of the 1985 tenancies. The obligation to keep the land clean and tidy required Mobil to first put the land into that condition. This required Mobil to remove all the historic subsurface contamination

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16 Including *Proudfoot v Hart* (1890) 25 QBD 42 (CA); *Crédit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803 at 821; *Weatherhead v Deka New Zealand Ltd* (No 2) [1999] 1 NZLR 453 (HC) at 462.

17 *Payne v Haine* (1847) 16 M & W 541 at 545; 153 ER 1304 at 1306; K Lewison Woodfall: Landlord and Tenant (online ed, Sweet & Maxwell, 2014) at 13.041. The fact that some earlier lessee allowed the premises to fall into disrepair in breach of that earlier lessee's covenant to repair is not relevant: *Bailey v John Paynter (Mayfield) Pty Ltd* [1966] 1 NSWR 596 at 606.

(save for that inherent in the land itself). Mobil was then required to keep and deliver up the land in that condition.

[56] It is well established (and was common ground) that, if a tenant has an obligation to put, to keep and to leave sites in a particular condition, the nature and extent of this obligation is the same at the commencement of, during, and on termination of the tenancy. However, in my view, this is a factor that strongly favours Mobil's interpretation of the clean and tidy clause, rather than AWDA's.

[57] If Mobil's interpretation of the clean and tidy clause is correct, then at the outset of the 1985 tenancies Mobil was obliged to put the *surface* of the sites "in good order, clean and tidy and free from rubbish weeds and growth", to the extent that the sites were not already in that condition. It was then required to keep and deliver up the sites in such condition. Such an obligation is commercially reasonable and would not be unduly onerous, even in the context of tenancies that were terminable on short notice.

[58] On the other hand, if AWDA's interpretation of the clean and tidy clause is correct, then at the outset of the 1985 tenancies Mobil was required to remove all historic *subsurface* contamination from the sites, save for the gas works waste. This would have been a massive undertaking, involving excavation of the site to a depth of 3.5 metres, permanent removal of the contaminated soil, and replacement of it with clean soil. The remediation exercise would likely take many months, if not years. It would be extremely expensive. The sites would likely be unusable for the purposes of bulk fuel storage while the remediation work was being undertaken. Further, all of this would be required in the context of tenancy agreements that were terminable on either one or six months' notice.

[59] I cannot accept that the common intention of the parties was that Mobil would have such an obligation at the commencement of the 1985 tenancies. However, if Mobil did not have an obligation to decontaminate the subsurface of the land at the commencement of the tenancies, it necessarily follows that it would not have such an obligation on termination of the tenancies.

[60] Further, an obligation to remove all historic subsurface contamination, (requiring removal and replacement of all the soil on the sites) would arguably go beyond making good any damage, to requiring renewal of the subject matter of the demise. Normally a covenant to repair will not go that far.[18] If it were otherwise, the tenant would effectively be giving the landlord back a different thing from that which was taken under the lease.[19]

The significance of Mobil's longterm occupancy of the sites

[61] AWDA submitted that the broader factual context of this case requires the Court to look beyond the narrow confines of the 1985 tenancy agreements and have regard to Mobil's continuous occupation of the Pakenham and ASPT sites for over 50 years. Further, with some limited exceptions, the sites were occupied by other companies within the Exxon Mobil group (albeit not the defendant to these proceedings) back to the 1920s and 1930s. In such circumstances, it would be commercially reasonable for the parties' to have had a common intention in 1985 that Mobil would restore the subsurface of the land to its 1920s condition.

[62] Mobil on the other hand, rejected any suggestion that it would be appropriate for the Court to, in effect, stand back and view the relationship of the parties on a global or long term basis. It submitted that successive tenancies, including by holding over after expiry of a lease, are separate legal contracts and must be analysed as such. In particular, Mobil relied on the legal presumption of "surrender by operation of law", which presumes that there is possession by the landlord at the moment between the end of one lease and the beginning of the next. On that basis, Mobil submitted, the relevant date for the purposes of the clean and tidy clause was 1 January 1994, when the holding over tenancies commenced, rather than at the outset of the 1985 tenancy agreements (or any earlier leases). The practical effect of the doctrine, Mobil submitted, was that the landlord accepted the properties as surrendered in 1994 in the condition they were then in (that is, contaminated) and re-let them to Mobil in that state.

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18 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 at 915-917; *Weatherhead v Deka New Zealand Ltd,* above n 16; *Lister v Lane and Nesham* [1893] 2 QB 212, at 216-217.

19 *Lurcott v Wakely and Wheeler* above n 18; *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612; *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12.

[63] The doctrine of surrender by operation of law generally operates to enable third parties, such as guarantors and assignees, to have clearly-defined and finite obligations.[20] Its application in the context of repair covenants, however, is more problematic.

[64] A similar argument to that advanced by Mobil was considered by the British Columbia Court of Appeal in *Canadian National Railways v Imperial Oil*.[21] In that case Imperial Oil had an obligation under a 1989 lease to return leased property to Canadian National Railways in a "clean and neat condition", to the reasonable satisfaction of the lessor. If the doctrine of surrender by operation of law applied, it would relieve Imperial Oil of liability under the previous lease agreements in a successive chain of leases dating back to 1914.

[65] The Court reviewed a number of previous Canadian cases where a tenant had remained in possession of a property between the ending of one lease and the entering of a new lease. The relevant courts had identified concerns about a strict application of the doctrine of surrender by operation of law where its application would relieve a tenant of liability under the previous lease agreements. In *O'Connor v Fleck*[22] the Court concluded that the notional possession of the landlord at the moment between the end of one lease and the beginning of the next is no more than a legal fiction in the context of a restoration and cleaning covenant.

[66] In *C & M Holdings Ltd v Tiffany Gate Ltd* the lease in issue was an extension of three previous leases. Karakatsanis J held that the tenant's obligations to repair in the previous leases were not extinguished by virtue of the new lease:[23]

> Even if there is a notional surrender of the lease by the operation of law when the second lease was granted, the surrender does not relieve the tenant of liability for past breaches and the date of actual possession must be the starting point in determining the tenant's obligations. To hold otherwise would result in the landlord losing its right to sue whenever a new lease is negotiated with the same tenant of would require the tenant to remove the improvements while continuing in possession. Such an interpretation would be impractical and commercially unreasonable.

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20 *Otehei Bay Holdings Ltd v Fullers Bay of Islands Ltd* [2011] NZCA 300, [2011] 3 NZLR 449 at [61] – [62] and [80] – [81].

21 *Canadian National Railways v Imperial Oil*, above n 12.

22 *O'Connor v Fleck,* 2000 BCSC 1147, 70 B.C.L.R (3d) 280 at [87].

23 *C & M Holdings Ltd v Tiffany Gate Ltd,* 2004 Carswell Ont. 9330 (WLEC) (Ont. S.C.J.) at [17].

[67] The Court in *Canadian National Railways* followed these earlier authorities, concluding that Imperial Oil was not relieved of liability for past breaches of its obligation to restore the property. Its obligation was accordingly to restore the site to its condition at the commencement of its occupation in 1914, and not merely at the commencement of the 1989 lease which contained the "clean and neat" provision.

[68] I find the reasoning of the Court in *Canadian National Railways*, and the earlier authorities relied upon by the Court, to be compelling. The differing factual matrix of this case, however, results in a somewhat different outcome than that in *Canadian National Railways.*

[69] Applying the reasoning in *Canadian National Railways* to this case would not support the imposition on Mobil of an obligation to restore the land to its original 1920s condition. At most, Mobil's obligation would be to restore the sites to their condition at the commencement of its own occupation, in 1952 and 1963 respectively. Mobil's predecessors had occupied and contaminated the sites for approximately 30 to 40 years by then. It is irrelevant that some of the prior tenants were historically part of the Australian operations of the Exxon Mobil group. These proceedings have been issued against Mobil only. It is solely that company's legal liability that is in issue.

[70] Further, in this case the Harbour Board's original 50-year leases did not include any make good obligations in relation to land. This is despite the fact that the land use expressly authorised in those leases carried with it the likelihood of contamination. Accordingly, unlike *Canadian National Railways*, this is not a case where the doctrine of surrender by operation of law would relieve Mobil of liability for past contractual breaches, dating back to the 1920s. On the contrary, AWDA sought to impose retrospective contractual liability on Mobil that extended significantly beyond that contained in prior leases.

[71] Identical lease terms were, however, in effect from 1985 to 1994 (when the 1985 tenancy agreements came to an end) and from 1994 to 2011 (pursuant to the holding over tenancies). Accordingly the period from 1985 through

until 2011 should, in my view, be treated as one continuous period of tenancy for the purposes of clean and tidy clauses, applying the reasoning set out in *Canadian National Railways*.

[72] Mr Simon Hunt, an environmental science expert, gave evidence on behalf of Mobil that the "tipping point" for contamination of the sites occurred some time during the 1970's, by which time the sites likely required complete remediation. If so, Mobil's activities, and those of its neighboring tenants from 1985 onwards, were not causative of any loss suffered by AWDA.

[73] I found Mr Hunt's evidence to be persuasive. It is not necessary, however, to formally determine whether the sites were fully contaminated prior to 1985 or not. AWDA's case proceeded solely on the basis that the relevant obligation was to restore the land to its original, uncontaminated (save for gas works waste) condition. It is not necessary (or possible, on the evidence before the Court) to quantify any loss to AWDA based on a lesser remediation obligation, for example to restore the land to the condition it was in as at 1985.

The Anstruther line of authorities

[74] If the clean and tidy clause does not require the land to be restored to its original 1920s condition, then what exactly does it require? Mobil submitted that guidance as to the appropriate standard of remediation can be found in the English Court of Appeal's decision in *Anstruther-Gough-Calthorpe v McOscar,*[24] a leading authority on the interpretation of repair covenants in leases.

[75] The general rule for construction of repair covenants in leases, unless there is some contrary indication in the contract or surrounding factual context, is that a covenant to repair should be construed with reference to the age, character and locality of the premises.[25] In *Anstruther* the Court was required to determine whether the relevant character and locality for the purposes of the repair covenant

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[24] *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 (CA) at 727 - 728, [1923] All ER Rep. 198; *New Zealand Insurance Company, Limited v Keesing* [1953] NZLR 7 (SC) at 12.

[25] *Proudfoot v Hart*, above n 16.

should be assessed as at the commencement of the lease (1825) or on expiry of the lease (1920).

[76] At the commencement of the lease the three houses that were the subject of the demise were new and were situated in a semi-rural part of London. When the lease expired the neighbourhood was run down and prospective tenants would expect nothing more than the lowest standard of repair. The lessee argued, unsuccessfully, that the standard of repair should be measured by the needs of prospective tenants on expiry of the lease in 1920. The Court held that the lessee was liable for the cost of putting the houses into that state of repair in which they would be found if they had been managed by a reasonably minded owner having regard to their character at the commencement of the lease term. The standard of repair required was not diminished because the neighbourhood had deteriorated. The lessee was required to do such repairs as would make the premises reasonably fit for occupation by a lessee of the class who would have been likely to occupy them at the time of the lease.

[77] *Anstruther* has been followed in numerous subsequent cases (including in New Zealand)[26] and has been applied in the context of commercial as well as residential leases. Based on the *Anstruther* line of authorities, Mobil submitted that the clean and tidy clauses required the sites to be delivered up in such a condition that they would be reasonably fit for occupation by a lessee of the class who would have been likely to occupy them at the time that Mobil commenced its holding over tenancies on 1 January 1994. This would have been an industrial tenant. (For the reasons outlined at [61] – [73] above the relevant date is, in my view, 23 October 1985, although nothing turns on the difference).

[78] AWDA did not accept that the *Anstruther* line of authorities was relevant or helpful on the facts of this case. It submitted that such cases are distinguishable. They relate to repair clauses relating to buildings, not land. Further, in each case the buildings in question were, on reversion, expected to be available for a continuation of the same use. In this case, however, Mobil had a right to remove fixtures on expiry of the term. AWDA submitted that this recognises that the land's future use is not necessarily determined by its use at the commencement of the lease or even

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[26] See for example *New Zealand Insurance Company, Limited v Keesing,* above n 24.

during the lease term. Mobil was accordingly obliged to deliver up the land in a condition that rendered it suitable for any lawful purpose to which it might be put, assessed as at the termination date in 2011.

[79] Each case must necessarily turn on its own facts and the particular wording of the relevant clauses. Nevertheless, in my view, the *Anstruther* test does provide helpful guidance in this case. As noted above, the nature and extent of Mobil's obligations under the clean and tidy clause were the same at the commencement of, during, and on termination of the tenancy. It was therefore essential that Mobil be able to ascertain the scope of that obligation at the outset of the tenancy. That would not be possible if the scope of the obligation fell to be assessed at some unknown future termination date. The standard required by the clean and tidy clause would potentially fluctuate over time as permitted uses of the land changed. Mobil would not know from one moment to another whether it was in breach. This would potentially create, in the words of Atkins LJ in *Anstruther* "the most astonishing variation of obligations and rights" throughout the tenancy.[27]

[80] Applying the *Anstruther* test, the clean and tidy clause required Mobil to keep the land in a condition suitable for a lessee of the class who would have been likely to occupy the land as at 1985, and deliver the land up in that condition. This provides commercial certainty, as both parties would know, as at 23 October 1985, the type of tenant who would be likely to occupy the property.

[81] In particular, in 1985 the Pakenham and ASPT sites were both zoned for industrial use and the tank farm was still fully operational. There was no realistic possibility of the land being used for commercial or residential purposes at that time. No zoning change to the nature of the land use in the area was formally proposed before 1997 and it was not until a further plan change became operative in 2010 that there were concrete provisions to develop the Wynyard Quarter area.

[82] I accept Mobil's submission that, in such circumstances, the contemplated class of tenant in 1985 would have been a heavy industrial user and that such a tenant would not have been unduly concerned about subsurface contamination.

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[27] Above n 24, at 732.

Further, the evidence indicates that the sites were delivered up in a fit condition for such tenants as, following Mobil's departure, the sites were leased to industrial tenants.

Conclusion on interpretation of the clause

[83] For all of the reasons I have outlined, which I summarise at [95] below, it is my view that AWDA's first cause of action is untenable. The clean and tidy clause did not impose an obligation on Mobil to remove all subsurface contamination from the Pakenham and ASPT sites (save for gas works waste) when it ceased occupancy of the sites in 2011, effectively restoring them to their 1920's condition. I set out my view as to the correct interpretation of the clause at [97] to [98] below.

Implied term

[84] AWDA's alternative cause of action was that it was an implied term of the 1985 tenancy agreements that Mobil would, during the term of its occupation, take all steps available to prevent contamination of the sites by hydrocarbon pollution from its activities and on termination of its occupation would remediate any hydrocarbon contamination caused by it or its predecessors' activities.[28] This cause of action did not feature prominently at trial and was addressed only in passing in AWDA's closing submissions. I will therefore deal with it fairly briefly.

[85] There is Canadian authority for implying a term into a lease requiring a tenant to remediate contaminated land at the conclusion of the lease term.[29] Most of the observations in these cases regarding implied terms appear to be obiter, because the relevant leases contained express covenants that would have led to the same outcome, for example an express term requiring the tenant to restore the premises to their original condition on expiry of the lease,[30] or to return the premises "free from industrial waste".[31] Further, the implied terms discussed in the Canadian cases appear to be more limited scope than that advanced by AWDA in this case. For

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28 Fifth amended statement of claim at [25].

29 For example *Darmac Credit Corp. v Great Western Containers Inc.; Progressive Enterprises Ltd. v Cascade Lead Products Ltd*; *Canadian National Railways v Imperial Oil Limited,* above n 12.

30 *Darmac Credit Corp. v Great Western Containers Inc,* above n 12.

31 *O'Connor v Fleck,* above n 22.

example they are limited to contamination caused by the particular tenant (not extending to its predecessors).

[86] Approaching the issue on the basis of orthodox principles of contract law, the first, and fundamental, difficulty for AWDA is that the proposed implied term would be inconsistent with the scope of the express clean and tidy term. There can be no basis for implying an additional delivery up obligation which is broader than, and therefore inconsistent with, the express clean and tidy clause in the 1985 tenancy agreements.

[87] In *BP Oil New Zealand v Ports of Auckland Ltd*[32] Rodney Hansen J rejected the existence of an implied make good covenant in respect of the land occupied by BP Oil in the western reclamation tank farm. In that case the express make good covenant in BP's lease with the Harbour Board related to improvements only (comparable to the original 50-year leases in this case). His honour concluded that as the parties had elected not to impose any express repair obligations on BP in relation to the land, but only the improvements, it would be inappropriate to impose obligations on BP in relation to the condition of the land by way of an implied term.

[88] In my view the grounds for rejecting an implied term in this case are even stronger than in the *BP Oil* case, as the clean and tidy clause expressly extends to the land as well as the improvements. It would be inappropriate to imply a term relating to the condition of the land on delivery up, when that issue is already expressly addressed in the 1985 tenancy agreements.

[89] In addition, the proposed implied term does not meet the conditions for the implication of terms set down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[33] For example, the proposed implied term is not necessary to give the 1985 tenancy agreements business efficacy. Rather, the implication of such a term would improve the bargain that the then landlord (the Harbour Board) negotiated with Mobil in 1985, in line with the term that the Harbour Board sought, unsuccessfully, to impose on Mobil in subsequent negotiations in the 1990s.

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32 *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208, HC.

33 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376.

[90] Further, the term is not so obvious that it goes without saying. In fact, for the reasons I have outlined above, I consider it most unlikely that a lessee in the position of Mobil in 1985 would have accepted a retrospective obligation to remediate not only its own historic contamination of the land but also that of its predecessors and neighbours. This is particularly so in circumstances where Mobil had no pre-existing obligation to do so and the tenancy agreements were all terminable on relatively short notice. Any remediation clause of such an onerous nature would likely require extensive negotiation and careful and comprehensive drafting. It is not appropriate for such issues to be addressed by way of an implied term.

[91] For all of these reasons I am satisfied that the second cause of action is also untenable.

Summary and conclusions

[92] Unlike a number of other countries, New Zealand has no specific legislation dealing with liability for historic contaminated sites. Further, any causes of action in tort are now statute barred. As a result, the sole issue in this case is the extent to which Mobil was contractually required to remediate the Pakenham and ASPT sites when it ceased occupying them in 2011.

[93] Mobil leased the Pakenham and ASPT sites from AWDA and its predecessors from the 1950s and 1960s through until 2011. The relevant tenancy agreements were entered into in 1985 between Mobil and the Auckland Harbour Board and included a clause requiring Mobil to keep and deliver up the land "in good order and clean and tidy and free from rubbish, weeds and growth, to the reasonable satisfaction of [the lessor]". I must determine, objectively, what the common intention of the parties was when they agreed that clause. In other words, what would a reasonable and properly informed person, with all the background knowledge reasonably available to Mobil and the Harbour Board in 1985, have considered the words of the clause to mean?

[94] AWDA submitted that the clean and tidy clause obliged Mobil to keep and deliver up the sites in an entirely uncontaminated state, save for any contamination inherent in the reclaimed land itself. This would require removing all of the historic

subsurface contamination that has accumulated on the sites since they were first leased to oil companies in the 1920s.

[95] Taking into account various relevant factors, including the natural and ordinary meaning of the language used, the broader factual context, and previous case law interpreting repair covenants in leases, I have concluded that AWDA's interpretation of the clean and tidy clause is not in accordance with the objective common intention of the parties as at 1985. My reasons for this conclusion include that:

(a) The natural and ordinary meaning of the words used in the clause, although open to competing interpretations, is more consistent with an obligation relating to the surface, as opposed to the subsurface, of the land.

(b) There was no mention in the negotiations that preceded the 1985 tenancy agreements of subsurface contamination issues. It is possible that a common intention to impose a subsurface decontamination obligation existed without any specific reference to it in correspondence or documents at the time. On the particular facts of this case, however, it is unlikely.

(c) The main focus of the pre-contractual negotiations was the ownership of buildings and improvements on the site and the extent to which Mobil would be entitled or obliged to remove these at lease end. The phrase "clean and tidy" is used elsewhere in the 1985 tenancy agreements in the context of restoring the condition of the surface of the site, following removal of buildings or improvements. The clean and tidy clause appears to reflect similar objectives and should be read consistently with that clause, although the scope of the obligation is somewhat broader (extending to removal of rubbish, weeds and growth from the site).

(d) The sites were already heavily contaminated at the outset of the 1985 tenancy agreements. The sources of contamination included toxic waste from the (then) nearby gas works, the activities of tenants who had occupied the sites for 30 to 40 years prior to Mobil, contamination that had spread to the sites from neighbouring sites, and Mobil's own activities on the sites. It would be unusual for a tenant to agree to remove historic contamination caused by entities for which it is not legally responsible. Any such agreement would normally be expressed in clear and unambiguous wording.

(e) Local government actively encouraged the development of the tank farm in the 1920s. To incentivise investment in the area by oil companies, leases were offered for an initial term of 50 years. Those leases did not, however, impose any repair or "make good" obligations on tenants in relation to the condition of the land (as opposed to buildings and fixtures). Accordingly, if Mobil was to assume, in 1985, retrospective contractual liability for 60 years of historic contamination of the sites, this would have been a significant departure from the previous and historic basis of the parties' relationship. This would normally be addressed explicitly in lease documentation.

(f) The 1985 tenancy agreements were short term periodic tenancies, terminable on either one months' or six months' notice. The shorter the tenancy, the stronger the inference must be against a common intention to impose onerous, extensive and expensive repair obligations on a tenant, particularly by way of a highly general (indeed almost boilerplate) clause.

(g) If a tenant has an obligation to put, to keep and to leave sites in a particular condition, the nature and extent of this obligation is the same at the commencement of, during, and on termination of the tenancy. If AWDA's interpretation of the clean and tidy clause is correct, then at the outset of the 1985 tenancies Mobil was required to

immediately remediate the subsurface of the sites. This would have been a massive and extremely expensive undertaking, likely to take many months, if not years. The sites would likely be unusable for the purposes of bulk fuel storage while the remediation work was being undertaken. Such an interpretation would be commercially unrealistic.

(h) Given that the nature and extent of Mobil's obligations under the clean and tidy clause were the same at the commencement of, during, and on termination of the tenancy, it was essential that Mobil be able to ascertain the scope of that obligation at the outset of the tenancy. That would not be possible if the scope of the obligation fell to be assessed on the basis of possible land uses at some unknown future termination date. As at 1985 the land was already heavily contaminated, was zoned industrial, and the tank farm was still fully operational. The parties' intentions as to the condition in which the land must be kept and subsequently delivered up have to be assessed in that context.

(i) In the early 1990s, negotiations for new long term tenancies were undertaken. Those negotiations failed because Mobil would not agree to an express contractual term requiring it to remediate the sites. There was no suggestion during those negotiations that Mobil had already agreed to do so, by way of the clean and tidy clauses in the 1985 tenancy agreements.

[96] For all of these reasons, it is my view that the interpretation of the clean and tidy clause advanced by AWDA is untenable, commercially unrealistic, and not in accordance with the common intention of the parties as at 1985.

[97] Following the approach in *Anstruther,* Mobil was liable, pursuant to the clean and tidy clause, for putting both the buildings/fixtures and the land into that state of repair in which they would be found if they had been managed by a reasonably minded owner having regard to their condition at the commencement of the lease term in 1985. Mobil was required to do such repairs or maintenance as would make

the premises fit for occupation by a lessee of the class who would have been likely to occupy them at the time the 1985 tenancy agreements were entered into.

[98] Applying this approach, in 1985 the Pakenham and ASPT sites were both zoned for industrial use and the tank farm was still fully operational. There was no realistic possibility of the land being used for commercial or residential purposes at that time. No zoning change to the nature of the land use in the area was formally proposed before 1997 and it was not until a further plan change became operative in 2010 that there were concrete provisions to develop the Wynyard Quarter area. The contemplated class of tenant in 1985 would therefore have been an industrial tenant. There is no evidence that Mobil has breached its obligation to deliver up the land in a condition suitable for use by such a tenant.

[99] Finally, I found AWDA's second cause of action, that there was an implied term to return the land free of contamination caused by Mobil and its predecessors, to also be untenable. Such a term would be inconsistent with an express term of the contract (the clean and tidy clause) and also would not meet the requirements for finding an implied term set down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings.*

Result

[100] AWDA's claims fail in their entirety. Mobil is entitled to costs. If the parties are unable to agree costs then any memorandum on behalf of Mobil is to be filed by 28 February 2014 and any response by AWDA is to be filed by 14 March 2014. A decision on costs will then be made on the papers.

Katz J