THE SUPREME COURT OF NEW ZEALAND SC 107/2015

[2016] NZSC Trans 6

BETWEEN **MOBIL OIL NEW ZEALAND LIMITED**

Appellant

AND **DEVELOPMENT AUCKLAND LIMITED (FORMERLY AUCKLAND WATERFRONT DEVELOPMENT AGENCY)**

Respondent

Hearing:	20 April 2016
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	M G Ring QC and J P Greenwood A R Galbraith QC and M C Smith

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CIVIL APPEAL

MR RING QC:

May it please Your Honours I appear with Mr Greenwood for the appellant.

ELIAS CJ:

Thank you Mr Ring, Mr Greenwood.

MR GALBRAITH QC:
If the Court pleases I appear with Martin Smith for the respondent.

ELIAS CJ:
Thank you Mr Galbraith and Mr Smith. Yes Mr Ring.

MR RING QC:
Thank you Your Honour. Madam Registrar if I could hand up the summary of the submissions that I am proposing to make. Your Honours the essential question in this appeal is whether the clean and tidy clause in 1985 periodic tenancies and, if not, an implied term into those tenancies obliged Mobil to undertake extensive, lengthy and expensive remediation work to remove contamination that had accumulated since the 1920s, during which time the sites were occupied by Mobil and its predecessors who were not part of Mobil.

If I can just take you to some of the documents first as a familiarisation exercise. If you turn to volume 3 of the case on appeal, at page – I'm sorry it's volume 2, page 213. There's an aerial shot of the sites that we're going to be talking about. On the left upper part of the picture is the Beaumont Street site and that's Beaumont Street that runs down the right-hand side and if you can look sort of slightly down from half way where you can see some lines running across the page, that's where there was an ultimate division in the 1985 tenancy agreements.

GLAZEBROOK J:
Sorry are those the – are you referring to the dotted red lines?

MR RING QC:
Yes, so I'm talking about the dotted – if you look at the Beaumont Street side –

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
So that's the top left?

MR RING QC:
Yes top left, dotted red lines are Beaumont Street. That's the whole site.

GLAZEBROOK J:
Okay.

MR RING QC:
It was subsequently in 1985 divided into separate sites, and we'll have a look at a plan of those in due course. If you look on the right-hand side towards the bottom that's the Pakenham Street site which again was divided. Beaumont Street in 1985 became three tenancy agreements, Pakenham Street became two and if you turn to the hand up that I gave you just now, the last page before we actually go to the agreements will give you a summary of the five tenancy agreements. As you can see, two related to Pakenham Street, three relating to Beaumont Street of different sizes. Two of them, sorry, three of them one month periodic tenancies, two of them six month periodic tenancies to reflect the intention that the tenancies two and three might not be needed after the Wiri pipeline came on. You can see there the removal of improvements, the comparative clauses for the removal of improvements and each one of them containing a clean and tidy clause.

And if we go to the Court of Appeal judgment in volume 1 at page 7, paragraphs 11 and 12, there at 11 is another table with the lot numbers, legal description and in 12 that will give you the history of the occupation of the sites and, ultimately, the New Zealand companies became part of Mobil and in fact the last New Zealand company to become part of Mobil was Atlantic and that didn't happen until 1998.

So now just having a look at the leases themselves, again back to volume 2, if you turn to page 175 that's the first lease dated in 1925 to Vacuum Oil Company Property Limited. This is effectively what in 1985 became the south part of the Beaumont Street site and just some key features, on page 175, clause 3, there's the make good clause confined only to the buildings and structures, fixtures and fences.

ELIAS CJ:
I see in your summary of the terms in the hand up, I'm just turning it up again, you say, "Clean and tidy at commencement during and on termination." The "at commencement" is an inference, is it, from the "keep"?

MR RING QC:
Yes, "keep" means "put", yes.

ELIAS CJ:

Remind me, I did read that in your submissions but where does that come from, keep means put?

MR RING QC:

It comes from the authorities and the New Zealand authority would be *Weatherhead v Deka New Zealand Ltd* [2000] 1 NZLR 23 (CA).

ARNOLD J:

There's no dispute about that though, is there?

ELIAS CJ:

No.

MR RING QC:

No, there isn't. So 176, volume 2, clause 7, "Vacuum won't carry on or permit to be carried on of demised premises, any offensive or dangerous trade or business or suffer to be done upon the demised premises anything which may be or become a nuisance or cause injury to the Board with the proviso that the business of an oil merchant wouldn't be regarded as offensive and dangerous trade." And that's the clause which the Court of Appeal said, and in particular, in relation to the "cause injury to the Board" was effectively an objection not to damage the land.

GLAZEBROOK J:

Okay.

ARNOLD J:

So the only reference to business of oil merchant is that one in clause 7 –

MR RING QC:

That clause –

ARNOLD J:

Right.

MR RING QC:

– yes it is. And passing in clause 12, the –

GLAZEBROOK J:

Is there a paragraph reference for the Court of Appeal? It doesn't matter, we can find it but?

MR RING QC:

So the Court of Appeal saying that?

GLAZEBROOK J:

Yes.

MR RING QC:

Yes I can hopefully find that for you.

GLAZEBROOK J:

It doesn't matter, we can find it, it's just –

MR RING QC:

I will be coming to it. Page 178, that's the, what later became Beaumont Street North. These leases – and if you, perhaps if you just have a look at that one at page 182.

GLAZEBROOK J:

So this one was Pakenham Street, was it, the first one you showed us?

O'REGAN J:

No, It was Beaumont South.

MR RING QC:

The first one was Beaumont –

GLAZEBROOK J:

Oh, Beaumont South, okay. Sorry, I have got that down, sorry, I just lost that for a moment.

O'REGAN J:

So you're taking us to page 182, did you say?

MR RING QC:

Yes.

O'REGAN J:
That's the little map.

MR RING QC:
That's the little map, yes, of Beaumont Street and you can see the lot numbers and lot 30 is relevant because lot 30 was surrendered by Mobil as part of the 1985 negotiations and so Mobil tenanted that site through to 1985 and then it was surrendered back to the Board with the Board assuming responsibility for restoring the site in terms of improvements which was the comparative obligation that Mobil took in relation to other sites. The significance –

ELIAS CJ:
When you say assuming responsibility, was that under a written arrangement?

MR RING QC:
It's recorded in negotiations.

ELIAS CJ:
Well, are you going to take us to that?

MR RING QC:
I'm going to take – I'm taking you to the negotiations.

ELIAS CJ:
Thank you, yes.

MR RING QC:
I'm just trying to give you an overview at this stage.

ELIAS CJ:
Yes.

MR RING QC:
But the significance, I just want to highlight the significance of this because we see this as quite important. The allegation is that this is a heavily contaminated site and that Mobil undertook, willingly undertook to remediate all of the contamination on both of these sites under the 1985 tenancies. Lot 30 is an adjoining part of one of the sites. Whatever they thought about the rest of the sites they must have thought about lot 30 as well. If lot 30 was

contaminated, if the other sites were contaminated lot 30 was just as contaminated. If there was a legal obligation in relation to the other sites there was a legal obligation in relation to lot 30. It was logical if there was going to be remediation work to all of the sites that there would be remediation work to lot 30 yet lot 30 was just handed back and the Board assumed responsibility for it from then on. We say it is just inconceivable that the parties contemplated this extensive or any extensive or any decontamination work but yet were happy to leave lot 30 out of that picture.

ELIAS CJ:

But you say they didn't leave it out because they specifically addressed it in the negotiation documents?

MR RING QC:

Yes, and the key thing about the negotiation documents is that there is no reference to contamination. There's no reference that it was anybody's radar. The whole focus of the negotiations that I'm wanting to take you to was about making the site clean and tidy after Mobil removed the improvements. And so there was a reciprocal obligation on the Board. The Board said, "Okay, in relation to lot 30 Mobil you don't have to do that, we'll assume whatever that responsibility is." But the key point for us there is it's inconceivable that the parties would have left lot 30 out if they thought there was going to be a contamination obligation that had to be fulfilled by Mobil in relation to the other sites. And it reinforces, we say, that the whole focus of the discussions in 1985 were make good obligations in relation to what would happen if and when the improvements got removed and it was –

GLAZEBROOK J:

Can I just ask something that's been puzzling me is why we're looking at negotiations in terms of normal contractual interpretation principles even the expended interpretation principles because negotiations are explicitly excluded and I know one of the reasons we might be is because the Court of Appeal relied on those to a certain extent but my question is, why?

MR RING QC:

There's several reasons for that. The first is that the negotiations do show what topics were on the parties' minds.

GLAZEBROOK J:

But that will be the case in just about every negotiation you have. Every negotiation you have will be, have different aspects of clauses that have then not found their way into the agreement, but isn't the objective theory of contract that you're actually not worried a jot about what the parties were actually thinking, you're worried about what the objective manifestation of the words they used examined in context but that context does not include prior negotiations.

MR RING QC:

Well the second point, Your Honour, is that we say negotiations are relevant to the extent that they show how the parties use language.

GLAZEBROOK J:

Well that as well has been said not to be the case.

MR RING QC:

Yes, well in that case there were conflicting –

GLAZEBROOK J:

I know Professor McLauchlan would totally disagree with that but that's not where – and for good reason because he, in his mind at least, because he shows the cat means dog type of language. But cat means dog is a bit different, is a definitional point, isn't it, rather than –

ELIAS CJ:

Is your point, however, a definitional one about what was understood by clean and tidy or the provisions of the clause in this context, that it was about removal of the buildings?

MR RING QC:

Absolutely that is the point, Your Honours. And Your Honour –

GLAZEBROOK J:

But Lord Bingham would still say you don't look at negotiations for that, wouldn't he, because if you can look at negotiations for that you can look at negotiations for any purpose, there’s no point in excluding them.

MR RING QC:

Well this Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC), Justice Tipping's judgment, said you can look at negotiations for that purpose.

GLAZEBROOK J:

Well that's Justice Tipping's judgment, there's been a majority judgment since of this Court that would throw some cold water on that I would suspect.

MR RING QC:

Well it would, in my submission, Your Honour, it would seem strange that the parties have a line of correspondence which says we propose this, that's fine in principle, now let's get down to the detail of it. You'll remove these improvements and make the site, and restore the site. You'll remove these improvements and leave it clean and tidy and we'll take responsibility for restoring the site on these improvements, and then there is a signed document that they both enter into and the phrase the encompasses that topic is clean and tidy and the Court can't look at what the parties mutually said in order to determine what clean and tidy is.

GLAZEBROOK J:

So you're asking us to accept Professor McLauchlan's view rather than the explicit exclusion of prior contractual – because it's always been admitted that they could be seen as relevant, they're just excluded for matters – Lord Bingham said this, I think, didn't he? Or somebody has said if they're excluded on –

ELIAS CJ:

I'm totally confused on contractual interpretation.

GLAZEBROOK J:

– effectively because it would just flood the Court with a whole lot of material that it doesn't need especially on the objective view of contract that their intent is manifested in the words they use.

WILLIAM YOUNG J:

But this is to be – the parties would create their own dictionary.

MR RING QC:

Yes, that's the essence of what I'm saying, Your Honour, the parties have talked about a topic in a particular way. They've manifested agreement in principle about that by the communications. That's then found its way into a written document that they've both signed. It just strikes me, Your Honour, as unusual to say that the Court would not be assisted at all to the point that you can't even look at it to see what they said in that context and I accept that it may be a matter of discrimination in particular cases but the Court being flooded, I'm not sure that that is the key point in preference to the key point of whether the Court would be assisted. If the answer is that the Court would be assisted in determining objectively what the parties intended then the fact that there is a lot of evidence, and it might happen in a lot of cases, is surely not a reason to do it.

WILLIAM YOUNG J:

It is a question of balancing the problem of listening to lots of evidence against the benefit, so is the cake worth the candle?

MR RING QC:

Yes, I'm totally accepting is the effort worth the probative value but in this case there's not a lot of effort required because there's only a very small amount of communication and when it comes to determining just how pertinent it is, I accept that there are degrees of relevance as well but it would seem, with respect, that this particular line of communication which seemed to be the predominant focus of the whole of the negotiations, it was this topic that monopolised, almost exclusively monopolised the pieces of correspondence.

ELIAS CJ:

Is it not, I might be wrong about this because I haven't gone to the document you're referring to but is it necessary or are you able to say that how lot 30 was treated is not the sort of negotiation that is excluded because it was a concluded position reached by the parties so that it may be contextual matrix?

MR RING QC:

I don't have to go to the particular words of the negotiations on my lot 30 point because it's the mere fact that lot 30 was excluded and it's obvious that there were no remediation obligations imposed on Mobil before that happened and nobody has ever said that Mobil has an obligation in lot 30. If you want to go to negotiations you then see why that is because the parties said that in the negotiations. But I don't actually need to go to the negotiations

themselves, the words that were used, it's the fact that lot 30 was excluded when it would seem to be in exactly the same position as the contiguous land the it was next to.

ELIAS CJ:
You may be using negotiations a little bit loosely, it may not help you.

GLAZEBROOK J:
I wasn't referring to lot 30 I was referring to Mr Ring taking us to specific correspondence when I was talking about negotiations.

MR RING QC:
Well it is very much, His Honour Justice Young's point about the private dictionary that I was really looking to in using –

GLAZEBROOK J:
It just strikes me that if that's the private dictionary then just about anything would be because there will always be a dispute over what a particular word means or a particular phrase means and if you can say in any case that that's a private dictionary – I'm not suggesting you can't make the argument because Professor McLauchlan has made the argument, I'm just pointing out that it seems to me you are in Professor McLauchlan's camp as against the, what would be traditionally from the basis of contractual matrix, et cetera, excluded.

MR RING QC:
Yes, I accept that, Your Honour. So there are several other of the leases going back to the beginning but they are all in very similar terms. If we move on in time now to the 1975 leases or tenancy agreements, you find those at, starting at page 199, and at 200 is the make good clause in the September 1975 tenancy agreement which again is limited to the land, to the buildings, that's at page 200, clause 3. And then at 201, clause 7 –

ELIAS CJ:
Just looking at that clause which, on its face, is all about structures rather than the land, it's because the demise premises is a defined term and includes land, is it, that it's acknowledged that it is concerned with the state of land?

MR RING QC:
No that's the other lease, that's the other tenancy agreement.

ELIAS CJ:

Which one?

MR RING QC:

The one, the next one, the one we're going to look at –

ELIAS CJ:

Same date, 75 or was it the 85 ones?

MR RING QC:

No there were two in 75.

ELIAS CJ:

Yes.

MR RING QC:

The first one is this one and it was the same as the original leases only confined to buildings.

ELIAS CJ:

Right, I see.

MR RING QC:

And then it's the tenancy agreement that starts at 207.

GLAZEBROOK J:

What date is that one, the date, the year is cut off, is that 75 as well?

MR RING QC:

Yes, it's 30 October 1975.

GLAZEBROOK J:

Yes.

MR RING QC:

And –

ELIAS CJ:

What page is it?

MR RING QC:

207, and right at the bottom of that page is the definition the demise premises and that's carried through right, the last line of that page 207.

ELIAS CJ:

"All said parcels of land", I see, "and other structures", I see.

MR RING QC:

And then that phrase is carried through to the make good clause which is clause 3 at 208 and then on 209 there is –

GLAZEBROOK J:

So that means that in that lease it includes land.

MR RING QC:

It does.

GLAZEBROOK J:

Is that the point?

MR RING QC:

Yes. We – nothing in by way of circumstances or correspondence to give any indication as to why there is this difference between the two.

GLAZEBROOK J:

Does the demised premises in the other lease include land?

MR RING QC:

No.

ELIAS CJ:

Sorry which other lease, the 25 or –

MR RING QC:

Oh I'm sorry, it's quite right at 199 –

GLAZEBROOK J:

Clause 3 doesn't but I'm just wondering whether the definition itself includes land. It looks as though it would.

MR RING QC:

Yes it does.

GLAZEBROOK J:

It does in fact doesn't it?

MR RING QC:

Yes, middle of 199.

ELIAS CJ:

Well sorry, is it the case then that all the 75 leases –

GLAZEBROOK J:

No, no it includes land but clause 3 in the first lease is specifically limited to buildings because they don't use the term "demised premises".

ELIAS CJ:

I see, yes.

MR RING QC:

So yes at 201 –

GLAZEBROOK J:

Do they have a clause 7 in that 2007 lease or did they –

MR RING QC:

Yes.

GLAZEBROOK J:

So they have exactly the same one?

MR RING QC:

Exactly the same, at the bottom of 201.

GLAZEBROOK J:

Yes okay. So they probably thought demised premises means premises being buildings in clause 3 actually.

O'REGAN J:

Well no because they talk about buildings placed on demised premises in clause 3.

GLAZEBROOK J:

Yes well exactly, that's what I mean.

O'REGAN J:

Does that mean a building put on top of another building?

MR RING QC:

That then takes us to the tenancy agreements themselves and they start at page 119 of this volume.

ELIAS CJ:

Of this volume?

MR RING QC:

Yes it's the first document in volume 2.

ELIAS CJ:

Oh yes.

MR RING QC:

And there the – 121, the demised premises includes the land. 123 or 122, paragraph 3, Mobil is agreeing to purchase from the Board the existing oil tanks and structures. This was required because they had reverted to the ownership of the Board at the end of the last tenancy and at 1 January 1981 is of course the date that these leases were or these agreements were backdated to start from.

ELIAS CJ:

What other linkage is there between or you might be coming to this, between the 85 leases and the earlier leases? Are there any – I mean within the text of, is there anything within –

MR RING QC:

Not that I can think of Your Honour. The only connection is that carry through on what was happening with the improvements.

ELIAS CJ:

Right. It's just that from the written submissions, I wasn't quite sure how firm your position is on the successor in title arguments here. You know, that Mobil effectively is to be treated as the, yes as the successor to the – in the previous agreements.

MR RING QC:

Well that table that I showed you in the Court of Appeal judgment which sets out the history of the leases.

ELIAS CJ:

Yes.

MR RING QC:

What you had originally were leases being given to or granted to Australian companies, separate Australian companies who later on became part of Mobil Australia.

ELIAS CJ:

Yes.

MR RING QC:

Then in the '50s and '60s there was an assignment of those leases to New Zealand companies and those New Zealand companies then eventually became part of Mobil New Zealand.

ELIAS CJ:

Took the 85.

MR RING QC:

And then in – by 1975, at least because some of those companies were already part of Mobil New Zealand the leases were in the name of Mobil New Zealand. So as at 1975 you've got the two tenancies, tenancy agreements that we looked at before that are in the name of Mobil New Zealand.

GLAZEBROOK J:

I sort of took from your submissions that at least as a – I'm sorry I'm just – probably as a backup position you say at the Mobil Australia was a different entity from Mobil New Zealand, is that a fair enough or perhaps you can explain exactly what you say about successor companies et cetera?

MR RING QC:

The position we take is that when these leases were first granted and when any contamination started it wasn't done by a company that Mobil is legally liable for. It's not Mobil in a –

GLAZEBROOK J:

Well that would have to be the case because of the separate corporate entity.

MR RING QC:

Correct.

GLAZEBROOK J:

Right up to 1975 wouldn't it?

MR RING QC:

Correct. Well it would go – it would at least go up to 1953 or the 1950s and '60s when there was an assignment to New Zealand companies.

GLAZEBROOK J:

So I was right in terms of you make the split between Australia and New Zealand?

MR RING QC:

Yes.

GLAZEBROOK J:
Yes that's what I'd taken from your submissions that Australia is a different group of entities from New Zealand and your probably other – your point might be that 1975 is the time when it was actually Mobil.

MR RING QC:
Well –

GLAZEBROOK J:
So it's really the split between Australia and New Zealand which is what I'd taken from your submissions is your position, is that right?

MR RING QC:
Well yes it is but I'd like to just add a supplementary point to that. As at the time in 1953 and 1962 where there was the assignment to the New Zealand company, at that moment in time and for any contamination that started in 1962, Mobil was not then legally liable for the Mobil –

GLAZEBROOK J:
No that's what I – because you're not going to be legally liable are you? So it's 1975 is the legal liability you say? This is assuming of course there is legal liability.

MR RING QC:
Yes, yes, yes of course. Well I'm drawing the distinction between the Australian companies and New Zealand companies on the basis that Mobil was never, is never liable for what the Australian companies did. Mobil has become liable, if there is a liability, for what the New Zealand companies did because ultimately the New Zealand companies became part of Mobil but when it was happening –

WILLIAM YOUNG J:
Was that an amalgamation process?

MR RING QC:
Yes it was but when it was happening, when the contamination was happening by these companies Mobil wasn't then necessary liable for them it only –

GLAZEBROOK J:

Yes, I've got your point thank you. I think I did take that from your submissions.

ELIAS CJ:

That chain presumably doesn't matter if the respondent's are correct or – I thought, in fact, you have acknowledged that the obligation under the lease in keeping is to put –

MR RING QC:

Correct.

ELIAS CJ:

So in a way its back story, is it, if that, if your liability McLauchlan arises originally under the 1985 leases because you have taken on an obligation to put into good shape, it doesn't much matter, does it?

MR RING QC:

Well it doesn't but it does then reflect on what obligations the parties might have assumed, or might be taken to have assumed with the 1985 tenancy agreements.

GLAZEBROOK J:

And it might also, if there is a term which I think the respondent suggest in every lease that's implied that you, you undo what you've done in terms of waste, then it might be quite significant as to whether you do that from 1985 from 1975 or from 1925.

MR RING QC:

Well indeed and this really all revolves around the tipping point issue.

GLAZEBROOK J:

I understand that, which you say is 1985.

MR RING QC:

No it's the 1970s.

GLAZEBROOK J:

No, sorry, the tipping point had clearly been reached in 1985, sorry, I put that wrongly.

MR RING QC:

Yes, I think the key point for us there is not only had the tipping point long gone but it had, the tipping point and any limitation period had long gone.

GLAZEBROOK J:

Yes, yes.

ELIAS CJ:

I can understand that the argument on the implied term as to waste relates to your actions in the tenancy but what about your – but that's not the same thing as your contractual obligation to put into good repair, is it?

MR RING QC:

No it isn't but what we say about that is the, again on the basis of *Weatherhead* and the other authorities, that you have to look at the nature, extent, degree, whether what you're, what the, where the work that's required is going to give the landlord that something completely new or different to what he had before.

ELIAS CJ:

But then liability will depend entirely on the meaning of put it to good repair or clean and tidy or whatever, the argument that you started with. And if you're wrong on that, what's your answer?

MR RING QC:

Well it also has significance, Your Honour, in terms of the suggestion that the parties went into the negotiations of the 1985 agreement with some belief or contemplation that Mobil had an actual potential liability for all this historical contamination as well.

ELIAS CJ:

But if it took on that obligation, what's your answer?

MR RING QC:

Well if, I mean that, I think if Mobil took on the obligation then Mobil has the obligation.

ELIAS CJ:

I mean if that is the effect of the obligation under clause 3.

MR RING QC:

Well then the only fallback position we have on that is that it wasn't an obligation to remediate back to a residential standard, which this site never was. It's only an obligation to make the site reasonably suitable for the reasonably contemplated tenant who was going to come in after Mobil, and that's another Mobil. Another oil company, and the site was –

GLAZEBROOK J:

Or an industrial person I think, not necessarily an oil company as you're saying.

MR RING QC:

Another equivalent industrial –

GLAZEBROOK J:

Well an industrial tenant as against a residential.

MR RING QC:

And we say that the site was suitable, was reasonably suitable for that type of tenant. It's important to bear in mind, Your Honours, that the 10 million was 10 million on the basis that Mobil's obligation was to remediate to the residential standard.

ELIAS CJ:

Yes.

GLAZEBROOK J:

What is it –

ELIAS CJ:

Is it –

GLAZEBROOK J:

Sorry.

ELIAS CJ:

What is it to the industrial standard, do we know that?

MR RING QC:

Well our position is, it was at the industrial standard, and so it's nothing.

WILLIAM YOUNG J:
I don't know –

MR RING QC:
No, it's, well it wasn't accepted by the Court of Appeal.

WILLIAM YOUNG J:
No, but I mean is it really, I mean if you want, people want to put buildings on it, can they really do that with the soil in the state it currently is?

MR RING QC:
Well if, no, the answer to that is almost certainly no, but that – we don't, we say that's not the test for whether it was reasonably suitable for an industrial user.

GLAZEBROOK J:
Well if you can't put a building on it, and you can't put people anywhere near it in an office, in any sort of office building, is it suitable? I mean is there a different standard under resource consents for industrial and is there evidence of that?

MR RING QC:
Well it was let immediately with no work being done.

GLAZEBROOK J:
Well I understand that but they might not have…

MR RING QC:
And it was done after the, DAL's predecessor had obtained an environmental report which said that there was no health hazard in allowing these tenancies.

WILLIAM YOUNG J:
So for what purposes has it been let?

MR RING QC:
It was let to Luna Rossa as a base for the America's Cup and another part of it was let to Southern Spars.

ARNOLD J:

No, there were substantial buildings associated with those, weren't there? I mean Southern Spars, doesn't it operate, or did operate from a building there?

MR RING QC:

It did but there's no evidence, there's certainly no evidence that anybody remediated the sites.

ARNOLD J:

No, but you said earlier that it almost certainly you couldn't put a building on there, but I thought there were buildings on there that were used by tenants.

MR RING QC:

Existing buildings?

ARNOLD J:

Yes.

MR RING QC:

Yes, yes, there were.

ARNOLD J:

Yes.

MR RING QC:

Yes, I'm sorry, I thought the question to me was you couldn't build a building on there, where there isn't one at the moment.

ARNOLD J:

Oh, I see.

MR RING QC:

So I'm at 122, tenancy agreement number 1, paragraph 4 at 123, is the removal of the improvements. Again this is the one month, one of the one month tenancies, so one of the sites that Mobil was not contemplating giving up because of the Wiri pipeline. Paragraph 6, the rights, Mobil's rights during or within a reasonable time of termination to remove the improvements and at 124 under the conditions, condition (c) which is the only other place in

any of the agreements, this one and the comparable one for the other sites, where the clean and tidy phrase is used a second time.

ELIAS CJ:
What do you make of that?

MR RING QC:
Well we say that this reinforces, from a textured point of view, that the parties didn't intend clean and tidy impose a remediation of contamination obligation. Paragraph 9 at 124 –

GLAZEBROOK J:
I think I just missed that point. Is this, do you say this was the only agreement that was mentioned twice, or did you say in all of the tenancies it's mentioned twice, sorry I just didn't quite catch –

MR RING QC:
This agreement –

GLAZEBROOK J:
This is the only one.

MR RING QC:
And the other one that for the other site that is comparable to this. So there's – so they're the only agreement –

GLAZEBROOK J:
So that's two out of the five? Two out of the five, thank you.

MR RING QC:
Two out of the five that have it a second time –

GLAZEBROOK J:
Yes, yes, that's fine.

MR RING QC:
– all of them have it the first time.

ELIAS CJ:

So which are these ones? Are these the – why are they different, is there any reason?

MR RING QC:

Yes, they're different because these are the ones, the sites that Mobil thought it would be keeping –

ELIAS CJ:

Ah, yes.

MR RING QC:

– after the Wiri pipeline. The other two Mobil thought it would be relinquishing. In fact it never did but it thought it would be.

ARNOLD J:

Where it uses in clause 6(c) the word "the site", is that the location of the particular structure that's removed or is it a reference to effectively the land leased, the whole of it?

MR RING QC:

Well it's got to be the more confined part, doesn't it, because clause 9 is the wider obligation that covers the whole site and clause 9 is the clean and tidy clause in –

ARNOLD J:

Yes I suppose that's right actually because under clause 6 you can remove any of the existing oil tanks, so you might just take out one and then you're obliged to make sure that the location that you removed it from, the site, is left in a clean and tidy condition.

MR RING QC:

Correct. I mean there's no doubt there's an overlap between the two but not unusually where you've got a boilerplate type make good clause and then you've got a specific clause dealing with the removal of improvements, you might well have duplication.

So that's clause 9 in that agreement. Now if you turn to 30, see this is – that's the site that this agreement relates to, it's the northern part of Pakenham Street and tenancy number 2 is the southern part of Pakenham Street, which is the one with the 5570 square metres on it and that starts again at 131 and there's a reference at 133, top of 133, to six month tenancy on 132 and then if it's still going 11 months after Wiri becomes operational, then there are

some provisions to deal with that. Provided always in any event the total term shall be 13 years, expiring on the 31st of December 1993 and that was the same for all of them. They all had an ultimate expiry date of 1993 and because this was contemplated as being replaced by Wiri there weren't the same requirements to purchase the improvements. Mobil was allowed to just continue to use the improvements without paying for it and clause 5 on 135, is the clean and tidy clause, essentially in the same terms as clause 9 that we previously looked at.

And at 141 there's the diagram for that part of Pakenham Street. The other three agreements, starting at 142, are in either the first form or the second form. The one at 142, that's tenancy agreement number 3, it's the same as number 2 and if you turn to 152, you can see the area it relates to is that – so it's the north-west corner of the Beaumont Street site. Tenancy number 4 –

GLAZEBROOK J:
And is that the same as 1 or 2?

MR RING QC:
Number 2. Tenancies 4 and 5 are the same as number 1 and at 163, tenancy number 4 is the rest of the northern part of the Beaumont Street site and at 174, tenancy number 5 is the southern part of the Beaumont Street site but with the important exception of lot 30. Originally the idea was that lot 30 would be given away in stages but because the negotiations took so long it ended up being given away completely by the time they got to documenting the agreements. So that's just highlighting the point I was making before that it would seem extraordinary that there would be an excavation obligation that stopped at the line between lot 30 and lot 31, if that's what the parties intended.

So Your Honours against that background of the documents, can I turn to the hand-up now. Just starting with the ordinary meaning and the overall point that we want to make here is that when you look at the 1985 tenancy agreements, they are striking for the fact that they look like the ordinary sort of agreements that you would expect to find in the demise of commercial light industrial premises. They're leases or they're agreements to let buildings that happen to be on land and that's to be distinguished – they're not ground leases, they're not the terms that you would expect to see if that's the type of agreement that was being contemplated and so when the clean and tidy clause is chosen as the make good here, it is in the range of what could be used to describe the make good, clean and tidy has got to be at the most benign end of it.

ELIAS CJ:

Well doesn't it depend on what it gets applied to because it depends on how you use the land.

MR RING QC:

Well it does, it does but this is land that was created out of nothing, it was created out of rubbish and out of toxic gasworks waste. It was set aside and designated for the oil companies to come and use. They were given leases for 50 years where the only express make good clause was the buildings. In that context as well clean and tidy is a fairly light use of language if the parties were contemplating that there would be wholesale excavation to remove 50 plus years of contamination.

GLAZEBROOK J:

You could say however that that would have been avoided if there hadn't been contamination because as I understand it the contamination is because, in part at least, they flushed all the oil out of the of the tanks into the ground. If they hadn't done that and had some other means of clearing the tanks and, I don't know, there was spillages as well but it's actually an action of the tenant which, on the respondent's argument would be they actually weren't allowed to do under those earlier leases because they weren't allowed – they were allowed to use it as oil companies but oil companies doesn't mean per se as a necessary adjunctive business that you actually get rid of your waste into the land rather than in some other way.

MR RING QC:

Well I'm coming to that issue as a separate point on here but one of the, the answers that we have for that is the there was no evidence from which it could be concluded that what Mobil did was anything other than normal practice by all companies at the relevant time, that's one point.

GLAZEBROOK J:

I'm sure that's probably right but whether that necessarily means that you're not in breach of the lease I don't know.

MR RING QC:

Well the High Court found, as had Justice Hanson in *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC), that what was done was reasonable use of the land

in terms of the obligation not to commit waste. The Court of Appeal found differently because they said that the practices were negligent, they accepted there was a negligence requirement and said the practices were negligent but, with all due respect to the Court of Appeal, there was no evidence on which –

GLAZEBROOK J:
Well it was deliberate but in accordance with the practice.

MR RING QC:
Yes.

GLAZEBROOK J:
Does that actually not make it negligent because you deliberately did it and it was in accordance with practice? Because it's probably in accordance with practice that the dairy companies have been contaminating streams, does that necessarily mean that it's – because it's deliberate and they do it in accordance with practice does that mean it's not waste?

MR RING QC:
Well the question is whether it's lawful conduct and if it was standard practice for all companies and if the Board, the Harbour Board and it's successors knew that it was happening – if the Harbour Board –

GLAZEBROOK J:
Yes, I can understand that in terms of an estoppel on some way.

MR RING QC:
Well I was going to go back to the very beginning. If the Harbour Board knew that these were – that spillages and leakages were part and parcel of the operation of oil companies then they would have contemplated that they would not be getting back, unless they specifically contracted for it, they would not be getting back uncontaminated land. And not only do they come along in 2011 and say they want uncontaminated land they want what started as a toxic waste dump, they want a silk purse out of, they want residential land at our expense.

GLAZEBROOK J:
Well they're not suggesting that it gets rid of the toxic – they're not suggesting that there is an obligation to get rid of the toxic waste that went in there in the first place, are they?

MR RING QC:
No now, that was their first pursuit.

GLAZEBROOK J:
I know they were initially but they're not now.

MR RING QC:
Not now, but inevitably they will be getting that if they're entitled to the 10 million.

So the point that we're making in 1.1 is that relying on the language, that clean and tidy, in good order, individually or collectively those are words in ordinary language that contemplate the state of the surface readily visible. They describe particularly the phrase clean and tidy, describes a standard of presentation that it is presented as looking nice. It's not ordinary language that would be associated with an obligation to remove subsurface contamination.

And then we go to the textual context which we were talking about before and at this point I can take you to the negotiations.

ARNOLD J:
Just before, just looking at the context provided by the lease itself, the reference to clean and tidy in 6(c), it seems unlikely that that refers to subsurface contamination because if you're entitled to remove a particular structure on the site, let's say one of the oil tanks becomes surplus to use and they remove it, the idea that clean and tidy requires you just for that little portion to remediate down to three metres or whatever it is seems a little odd, particularly as you're entitled to, if you want to, to reinstate the particular improvement, so they could put another oil tank on there. So looking at lease, at the words “clean and tidy” in that particular context it is a bit difficult to see how they would incorporate subsurface, removing subsurface contamination.

ELIAS CJ:
Is that based on subclause D?

ARNOLD J:

You can reinstate, it's not based on –

ELIAS CJ:

D's invocation, yes.

ARNOLD J:

It's a combination of the fact that the power under clause 6 is to remove, effectively, any or all of the improvements. So the reference to this site must be to whatever is removed which may just be one oil tank and it would be odd if there was an obligation to remediate in the sense that we're now talking about in relation to that one oil tank on what is a wholly contaminated site.

MR RING QC:

That's effectively the point we're making at 1.4, subparagraph 2. In the hand up, 1.4, on the first page?

ARNOLD J:

Yes, I see, yes. Okay, but it just seems to me that, you know, before you go to negotiations just looking at the document itself that provides something of a clue which is not to say that the context of clause 9 might not require a different answer but at least in clause 6 it doesn't really seem to bear the extent of the meaning.

MR RING QC:

If I could take you to, in the context of negotiations, take you to volume 2, 214.

ELIAS CJ:

Sorry, 214?

MR RING QC:

Volume 2, 214. So this is the Harbour Board and in the third paragraph that's them talking about taking back some of the land and in the last paragraph this was the need to line up the tenures because there had been different start dates to the 50 year leases, then there'd been tenancy agreements in 1975 and so there was a need to get everything starting and finishing on the same date.

WILLIAM YOUNG J:

It was leased in perpetuity, what's that? There's a reference at the bottom of the page to, "We'd like to discuss the possibility of lining up all the companies' tenures including that piece of land present lease in perpetuity." Is that somewhere else, is it?

MR RING QC:

Yes, I'm not sure where that is. I think that might be – I don't believe it's either of the two sites that we're talking about. One of the other sites that was surrendered which you will see in the negotiations here, refers to block D and I think that might be block D.

So Mobil responds at 216, lot 30 being vacated in three stages and then over on the top of 217 in the D which is obscured in the photocopying, last sentence, "Site clearance to be the Board's responsibility." And then –

GLAZEBROOK J:

Sorry is that the lot 30?

MR RING QC:

Lot 30 yes. And then you can see that the rest of the discussion is about what's going to happen with the improvements and then on the next page, 218, block B, "(a) Mobil agrees to remove the improvements and restore the site on termination." On the next page, para 4, block A, subparagraph (d) –

GLAZEBROOK J:

When you say "restore" what do you say that means?

MR RING QC:

It's restore in the context of removing the improvements and we say it's the clean and tidy obligation that is to make the surface look nice.

GLAZEBROOK J:

Well restore the site, I can understand the clean and tidy argument but restore the site, do you say that just in context it must have been talking about – because it could be subsurface with buildings because you're removing foundations aren't you? So it's not just the surface because you have to fill in the holes presumably.

MR RING QC:
Yes but what you're leaving is –

GLAZEBROOK J:
No, no I understand that argument, it's just it's not – to say it's just above the surface can't be right because you're going to, when you remove buildings, usually have holes, I mean I don't know about these tanks whether you have much foundation for them, you must have some.

MR RING QC:
I'm not disagreeing with Your Honour. I'm accepting that the removal of the improvements is going to involve work below the surface of the – or different levels of surface of the ground if you like but the end obligation is not to – I mean what we're talking about there is –

GLAZEBROOK J:
Fill in the holes, fill in holes.

MR RING QC:
Yes, it's the opposite of remediation which is actually to remove soil.

ELIAS CJ:
As it turns out yes.

GLAZEBROOK J:
I mean it's not always, that wouldn't always be the case, would it be, to remove the soil because you might be able to treat it in some manner to remove contamination presumably in certain circumstances. I mean you might have to remove it and put it back but remove it to treat it but –

MR RING QC:
Well it's possible yes but what we're saying is the key point is –

GLAZEBROOK J:
Yes I understand the point being made.

MR RING QC:
Yes. 220(5)(b).

GLAZEBROOK J:
Actually to put it perhaps – what you say is you remediate the site in terms of whatever damage the removal of the improvements has caused, not leaving aside the removal of improvements?

MR RING QC:
Correct, thank you Your Honour that encapsulates it. 220 block D and subparagraph (b), that block D is the other one that was going to be surrendered and the Board is taking responsibility for clearing the site. And then at 221, the Board comes back to Mobil and says, "I'm pleased to advise the proposals contained in your letters of 9 December were considered by the Board, approval in principle was obtained subject to redevelopment work and new tankage programme being confirmed." So that provided then the framework for the negotiations. It took some time –

ARNOLD J:
Just before you leave that page, at 221, the penultimate paragraph it said it will be necessary to advertise the term leases in accordance with the requirements of the Public Bodies Leases Act. Are those advertisements anywhere?

MR RING QC:
No. We haven't even got a complete set of the correspondence from the time. But that paragraph does also refer to the reason that it took some time to get finalised agreements because the land parcels had to be or the then title boundaries had to be changed to what we saw in those plans and then at 222, this is the Board's solicitors, Russell McVeagh, Bell Gully were acting for Mobil and on 223, referring to lease 1 and the removal of the improvements, we see the specific reference to (iv) to, "The site shall be restored to a clean and tidy condition."

And again it's clear in that context that the parties or that the Board is not using clean and tidy in anything other than that superficial sense that we were talking about before and that Your Honour Justice Arnold referred to before.

And then Russell McVeagh to Bell Gully on 5 October 1984, referring on 226 to agreements 2 and 3.

GLAZEBROOK J:
And are they in the same order when they say 2 and 3 of – we've been given them in the same order have we or are they in slightly different orders or – I don't think it really matters terribly much but –

MR RING QC:
I think that it is because I think that if you go back to 221, there's (i) to (vi) and they contemplated at that stage six agreements and (i) to (v) seemed to correspond exactly to what we're talking about and I see in number (iii) under agreements 2 to 3, the Board would like agreement 6 executed to complete its records. So that seems to confirm that. But it's in paragraph 1 under agreements 2 and 3 that we wanted to refer Your Honours. Obviously in the event of Mobil not reinstating and of course, sorry, "Obviously the Board would require that the land be tidied up in the event of Mobil not reinstating." And again that's not the language that one would expect of parties that were contemplating wholesale subsurface decontamination work.

So those are the negotiation documents that I was referring to before and so we say in 1.4, subparagraph (1) of the hand-up that those similar expressions are consistent with the use of the clean and tidy language as describing a standard of presentation rather than describing a requirement for subsurface decontamination.

ARNOLD J:
I'm sorry I'm just trying to catch up on all this. This letter of 5 October '84 that you've taken us to, is a response to a letter of 18 August but we don't have that?

MR RING QC:
No we don't. We don't have a complete set of the communications.

ARNOLD J:
Right.

MR RING QC:
And I recognise that that's a problem.

ARNOLD J:
Well it's a problem in a sense. I mean if you go back to page 214 and the third paragraph of the Harbour Board's letter, it says, "We're looking at a suitable arrangement which would

give your company greater security of tenure and at the same time provide safeguards for the future use of this land." Now that very general language is actually compatible with the type of interpretation that the Harbour Board is suggesting. So to try and draw much out of an incomplete set of correspondence involving pre-contractual negotiations is at least a bit risky isn't it?

ELIAS CJ:

Well particularly as I can't see really that you're able to derive very much more help than you got from the text in the agreement. So it hardly seems worth the dogfight that is going to ensue if we have to revisit the principles of contractual interpretation again.

MR RING QC:

Well Your Honours above all else I hope I'm a pragmatist. I give it to you for the assistance that it provides. If Your Honours find it provides no assistance then I'm perfectly happy to read a judgment that doesn't revisit the whole of contractual interpretation yet again. So it is the best we've got, warts and all, and I can't make it any better than it is. The one thing that I would say to Your Honour Justice Arnold's point is that while I accept that in the use of language and in hindsight you might be able to say it's compatible, at the time, of course, it needs to be viewed in light of what was happening on the planning side of things and there are concurrent findings in the lower Court that there was no realistic prospect of any change in the designation from heavy industrial at this time and so I think it needs to be read at least in that context.

ARNOLD J:

Yes I do understand that, yes.

MR RING QC:

So turning up to the hand-out, contractual context at 1.5. I've referred to the land being created from the waste products, the oil companies being strategically placed there and to the evidence, if I can just take you to the evidence of Jennifer Carlyon, which is referred to in both judgments, it's in volume 3 at 577 and at 577 at paragraph 5.7, at a time when the Board was looking at encouraging the oil companies to occupy the site. There's the Harbour Works report recommending the time has come when oil stores should be centralised. It refers at the bottom of the page to vehicles discharging oil shouldn't be berthed at the main wharves. The risks attached to the cartage of inflammable goods often leaking to a considerable extent would be considerably minimised and better supervision obtained if all such goods were discharged.

ELIAS CJ:

This is all very interesting but what's the point that you're deriving from it, that you want to –

MR RING QC:

That when the Harbour Board encouraged the oil companies to occupy the site, they did so knowing that there would be contamination in the ordinary course of the oil company's business. So they gave wasteland –

ELIAS CJ:

Is that contentious?

MR RING QC:

Well I think it is because the proposition that Your Honours are being asked to accept is that having done that 50 years later, 70 years later the successor of those oil companies, because they happen to be occupying the site still, now have to turn it into residential land.

GLAZEBROOK J:

Sorry I'm just having trouble working out where you – what page is it?

MR RING QC:

577 to 578.

GLAZEBROOK J:

Yes, no I've got that but what were they contemplating would happen?

ARNOLD J:

At the top of 578 it says, "The goods often leaking, the flammable goods often leaking."

GLAZEBROOK J:

But they're talking about minimising that though aren't they? They're not saying you can actually just spew as much as you like out and flush out your tanks and we're expecting that you're going to be negligent in terms of that, are they? They're just saying that there are risks involved which must be the case because you're dealing with inherently dangerous goods?

MR RING QC:

The point that we're making Your Honour is that this is part of the factual context which indicates that when the Harbour Board gave 50 year leases to the oil companies which said only – which only had a make good clause in relation to buildings. They never intended to get back pristine land but yet that is the claim that – that is what the claim is currently based.

GLAZEBROOK J:

Because they recognised that there were risks?

MR RING QC:

They recognised that there were risks, yes, that it was an inherently dangerous business, that it needed to be set aside, because of that it needed to be set aside from the main part of the port but it needed to be handy, it needed to have berthing facilities, it needed to be close to the commercial centre.

And so that's the point we're making at 1.52 that it was viewed as inherent in the nature of the business, there was no express term in the lease to make the damage to land only improvements and we say that in the context, in this context the covenant against injuring the lessor in those old leases refers to a legal liability from permitted activities, it doesn't refer to damaging the land and it would be a strange place to put a "damaging the land" covenant if you're already dealing with a "damaging the buildings" covenant expressly as we saw in clause 3.

The High Court found that the parties as at 1985 were aware of contamination but probably not of the full nature and extent of it and looking here at the bottom of page 1 and across to page 2, that the leaks and spills not being uncommon in bulk storage activities and again at Ms Carlyon's evidence at 591, she says at 8.10, "Leaks and spillages are not uncommon. Various reports listed many of the later ones." She refers to one in February 1935 where there was an explosion in the drainage board's pumping station, the corner of Fanshawe and Hardy Streets, believed to be caused by leakage into the sewers from the oil company's pipes. Pipes laid only five years ago found to be badly corroded. It's considered that leaks from these pipes, that after some time so saturated the ground that in conjunction with a heavy rain on the day, petrol rose with the groundwater and found its way into the sewers.

And refers, at the 8.11, the city engineer in the middle of that quote, "Further investigations however showed some pipes in frequent use with the company's compounds had

pronounced leaks with the result the ground became saturated with petrol and this, together with ground water found its way into the sewers."

On the next page at 8.14, May 1953, "The reclaimed land was less stable than non-reclaimed land, it could leave a problem for the pipelines. Corrosion which takes place due to the mixed nature of the reclaimed land is greater than would occur in a homogenous material. Not uncommon for petrol and other fuel oils to escape from these pipes during pumping operations finding their way into the sewers, in the harbour explosions have occurred."

And then in 1979 a meeting that's referred to in some detail in the *BP* case which is in our list of authorities at volume 2 at tab 2 and this is at page 236 of the judgment at paragraph 108, tab 2 –

GLAZEBROOK J:
I've got it, 108.

MR RING QC:
236, paragraph 108, documentary evidence establishes, however, that Ports of Auckland Limited was aware of oil based contamination of the western reclamation from as early as 1979. It refers to a meeting, a record of a meeting attended by the city solicitor, a lawyer representing BP and the Auckland City Council Dangerous Goods Inspector. The meeting appears to have taken place in the context of an application by BP for consent to install new tanks.

And then just a couple of lines down, "In the course of the meeting the Dangerous Goods Inspector has recorded as saying, 'That over the last 50 years or so the area has become saturated with petroleum products partly caused by the processes of dewatering also leaks from the bottom of tanks arising from the use of salt water in the dewatering processes and also loss of residue of petroleum product in tanks when they're emptied out for repair purposes. By these means a lot of product has found its way into the soil.'"

I see it's 11.30

ELIAS CJ:
It is. I'm getting concerned about the time, not your fault.

MR RING QC:

I'll try and move quickly now. I have, as is often the case, I have covered a number of these things already.

ELIAS CJ:

Yes.

MR RING QC:

And so I can probably move through quite quickly. Shall I try and be complete by 12.15?

ELIAS CJ:

No, I think if you're complete by the lunch adjournment that will be fine. If you can be earlier of course it will give everyone a bit more time. You know that we're sitting later today and not resuming until 2.45, thank you. All right, we'll take the adjournment now.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.50 AM

MR RING QC:

So in my hand-up at page 2, I've just been talking about the BP memorandum of meetings showing that the Ports of Auckland was aware that the ground was saturated at that stage in 1979.

ELIAS CJ:

Sorry what are you referring to?

MR RING QC:

The BP Oil record of meeting.

ELIAS CJ:

Yes.

MR RING QC:

And then we say at 5 on page 2 of the hand-up, there's no indication that any time before this century that the oil companies, including Mobil and its predecessors, have ever been called to account on this contamination particularly by enforcement of the various lease terms and we invite the inference that the parties didn't contemplate there would be any

existing obligation to remediate, that the make good clause then has to be construed against the context that in 1985 the only realistically contemplated tenant was still an oil company for the reasonably foreseeable future, that subsurface contamination did not affect the suitability of that tenant for its intended occupation and also leading to the inference that the parties didn't view contamination as damaging the tenantability of the land and/or they viewed it as a reasonable incidence of the permitted activities.

The 1985 agreements were the first time make good obligations had been introduced in relation to the land except for that difference in the 1975 tenancy agreements that has no apparent explanation. The explanation in 1985 is the Wiri pipeline and because of that and the surrender of or the contemplated surrender of some parts of the tenanted sites, the parties contemplated for the first time there would be removal of the improvements and we say the correspondence evidence is an exclusive focus on leaving the land looking nice.

There are no communications evidencing the common intention that's now contended for or any consciousness of contamination requiring remediation in the same period up to, including and even post-1985 until much later on in the negotiations, the unsuccessful negotiations for a long-term lease. In particular there's no evidence, we say, contrary to what the Court of Appeal held that the parties negotiated on the basis that Mobil had an actual or potential prior liability for its own contamination or for the cleanup costs under the tort of waste and the only cleanup costs in issue in the negotiations and in those tenancy agreements were those to restore the land to a clean and tidy condition after removal of the improvements.

Also we say whatever is the correct test, there's no evidence of – and that's the correct test in relation to waste and whether the reasonableness is just the use of the land for the permitted activity or whether there's no other proper way of doing it. There is no evidence of conduct expected at the relevant time from a reasonably competent oil company to justify any negligence finding and third, we say that any such liability would have been limited anyway to remediating the land caused in the preceding – or the damage caused in the preceding six years, that's any contemplated liability leading up to the agreements and there would be no liability on a keep means put basis unless and until Mobil signed up to the 1985 tenancies.

It's stark we say, Your Honours, just to sum up this particular point, that despite that evidence that I've taken you to back to 1935 of awareness that the ground is saturated with petroleum products, that at no stage has anybody said to anybody occupying those sites,

"Hey you need to clean this up". Not during the tenancies, not at the end of the tenancies, not at the transfer of the tenancies, not at the negotiation for the 75 agreements and in particular not at the negotiations for the 85 agreements and we point at number 8 again to what we say is the significant point in relation to the land that Mobil was surrendering.

And then as a second point, and this is the no breach point that we touched on before, even if there was an obligation to remediate subsurface contamination, it's only to remediate it to the extent necessary to enable the land to be tenanted by a reasonably minded similar type of tenant, similar class of tenant and that's a reasonably minded similar class to Mobil, industrial. That finding in our favour in the High Court was overturned by the Court of Appeal but we say that the Court applied the wrong legal test and secondly, that it speculated contrary to the unchallenged evidence.

First in relation to the contractual standard, put, keep and leave in the condition which was regarded as reasonable suitable for occupation by a reasonable minded tenant of the class contemplated at the commencement of the tenancy, that was the obligation and it wasn't as the Court of Appeal held, leave it reasonably suitable for every future new tenant.

ELIAS CJ:
What paragraph is that in the Court of Appeal judgment?

MR RING QC:
Turn to the judgment –

GLAZEBROOK J:
Is that based on – I mean I can understand the submission but is that based on any particular authority?

MR RING QC:
It's page 24, paragraph 60 and the answer to that is no.

GLAZEBROOK J:
No that's fine, I was just asking. So it's saying well you look at – presumably you look at the lease at the time it was entered into which is why you make the – and the situation at the time it was entered into, is that?

MR RING QC:
That's correct and it's the *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 (CA); [1923] All ER Rep 198 (CA) case that we rely on there. It says you wouldn't know where you were from one minute to the next if your obligation isn't fixed at the commencement of the tenancy. Again because of the "keep means put" primarily.

So we say that the Court of Appeal went wrong at that point and once you go past that point there was unchallenged concurrent findings by the High Court and the Court of Appeal but the contractual standard was based on the reasonably contemplated tenant in 1985 which was another oil company or similar and in particular there was no change in designation to the residential or light commercial use then reasonably in prospect and that's what the Court of Appeal said at paragraph 60 as well.

ARNOLD J:
Just by the way, the first point, you've got the quote, "Every future new tenant." That's not what the Court of Appeal said.

MR RING QC:
I'm sorry, every future – you're quite right. I'm sorry that's just totally my copying mistake. And the third point that we wanted to make here was that what the Court of Appeal then went on to say was that any new use would have involved construction, the contamination creates potential risk to future site occupants and workers from flammability or explosion of free product that's pulled, especially during site works, also a risk to the environment. These problems might affect any future construction work done for or by a new tenant. And what the Court of Appeal didn't refer to which we say is more pertinent than that speculation is that the land was actually re-let after Mobil vacated it, immediately after Mobil vacated it, two industrial tenants, without any remediation work being done or being required and the predecessor to DAL commissioned an environmental report which said that it was okay to do that from a health and safety point of view. So on that basis we would say, Your Honours, that even if we are required in principle by the terms of the tenancy agreements to remediate, there was in fact no need to remediate and we weren't in breach of our obligation in not doing so.

Dealing with the implied term at page 3, the implied term that was pleaded was an implied term co-extensive with the express term, that is on termination to remediate any hydrocarbon contamination caused by Mobil and its predecessors. The High Court rejected that implied term on the basis that because of the express term to make good on the buildings there was

no need for an implied term if it was covered and if it wasn't there was no basis for an implied term that was broader and inconsistent with the express term. Also not necessary for business efficacy and didn't go without saying.

The Court of Appeal dealt with a completely different implied term, not one that was pleaded at all and that was an implied term not to commit waste. It relied on the Canadian cases but we say that it erred, with respect, in relation to that because it failed to distinguish this case on the basis that here the land was made of rubbish including toxic waste when it was first leased, it wasn't pristine land, that the Harbour Board knew all along of likely contamination from the permitted business activities and indeed one of the Canadian cases used that as at least one significant factor against liability, that it would impose remediation obligations for historic contamination caused by previous lessees that were not Mobil and for whom Mobil was not legally responsible who occupied on different terms. It would create liability remediation obligations by Mobil occupying under previous leases and tenancies on different terms and also to remediate contamination caused by neighbours for actual former and current neighbours and particularly in this context, Your Honours, we refer to the Shell spill in 1986 where 1.8 million litres of jet fuel were spilt by Shell on an adjourning site.

GLAZEBROOK J:
Would the implied term necessarily do that? Because if there's an implied term not to commit waste well you haven't committed waste if somebody else committed waste. I realise there will be all of those difficulties in saying well what was caused by Shell and what wasn't but if that was the only thing that had happened, it's a bit difficult to see that that would be caught by an implied term to commit waste, not to commit waste because it can't really be an implied term not to allow others to commit waste when you have absolutely no – so just assuming that was the only thing, it wouldn't – that implied term wouldn't normally catch that is what my point is.

MR RING QC:
No I agree with that Your Honour. I was really focussing more on the practical ability in enforcing that term.

GLAZEBROOK J:
Oh here, obviously there's a difficulty, yes.

MR RING QC:

And of course that wasn't the only event caused by neighbours and you've probably seen the reference to the New South Wales report and all of the incidents that are referred to in there. And the final point we make under this head is that there was already damage past the tipping point before the lease commenced which makes this case different from the Canadian cases, mostly caused by non-Mobil entities and actionable until DAL's predecessors had allowed limitation periods to expire. So there's no need to bend over backwards looking for implied terms here to do justice, if that is one of the basis for the search because there were already remedies, enforcement remedies available to DAL and its predecessors had they moved more quickly and finally we say the Court of Appeal was wrong –

ELIAS CJ:

Sorry is that a tort of waste or are you talking about regulatory?

MR RING QC:

Tort of waste, I'm talking about the tort of waste. One of the reasons, one of the other reasons the Court of Appeal recognised the implied term was because it held that the traditional distinction between waste as a tort separate from an expressed repair covenant had become academic and referred to the remedial effect of the Property Law Act but we make the point here Your Honours that the parties entered into this agreement in 1985 against the backcloth that on the then state of the law there was no implied term against committing waste.

Further factors against an implied term, if clause 9 and clause 5 in the other forms of agreement didn't impose express remediation obligations we say the parties couldn't have intended to impose the obligation by implication.

GLAZEBROOK J:

If you're looking at not to commit waste do they have to intend to do it in the same way or is there a public policy element imposed in that implied term? So it's not an implied in the normal sense, it's a public policy implied term in respect of not having contaminated land and the person responsible for it.

MR RING QC:

Well we're talking about 1985.

GLAZEBROOK J:

No, no I understand that but if you, I suppose saying you're not – that is a public policy aspect rather than an implied term in the normal sense, whether in 1985 or otherwise and I can understand the issue that you might look at whether that was the case in 1985, there was that public policy implication but –

MR RING QC:

Well I think our position Your Honour would be that there's no public policy element in an implied term. An implied term is by definition a term between two private contracting parties and it doesn't matter whether one of them is a public body.

GLAZEBROOK J:

I know it's nothing to do with public body, it's just generally there's a public policy issue that you don't commit waste and that's always been a public policy issue which is why you have the tort against waste and so the implied term is that you don't do that but without the same sort of did these particular parties have in contemplation.

MR RING QC:

But the reason it is an implied term is because of the interest in the land that the landlord has in retaining the condition or the pristine nature of the land when it's let. Here we're talking about an implied term into the tenancy of what was effectively a rubbish dump.

GLAZEBROOK J:

Oh no, no I certainly understand that point. So that doesn't take – the public policy aspect doesn't take away that particular point, so…

MR RING QC:

Well I probably haven't answered Your Honour's question then.

GLAZEBROOK J:

No, no, no you're just saying it's an implied term like every other, you look at it in 1985 and you certainly look at it in the context of the lease, so that's an answer thank you.

MR RING QC:

Thank you. And so the point we're making in 2.32 is that the remedial effect of the Property Law Act in 2007 and how the law may have changed since 1985 is not a basis for imposing an implied term in 1985 when the law was different and the further factors against the

implied term is if it's – again if it's not in the express term, it's hard to see why it would've gone without saying to the point that it justified an implied term and if it's implied now, then it's also implied in the pre-1985 agreements and the recovery under those would be time barred because of the tipping point. Page 4 –

ELIAS CJ:
Well it would be time barred. It's not because of the tipping point is it?

MR RING QC:
Yes, I'm sorry would be time barred and because of the tipping point there would – no I – yes I understand what –

GLAZEBROOK J:
Because of the tipping point there's no liability under this lease because there was no new contamination, is the point isn't it?

MR RING QC:
Correct, thank you. Page 4, keep means put. So we make the points at 3.1. That must mean Mobil had the same make good obligation at the commencement, during and at the termination of each tenancy agreement.

ELIAS CJ:
That interpretation, keep means put, you mentioned a case which is authority for it but what context was that in?

MR RING QC:
It was the *Weatherhead* case.

ELIAS CJ:
Yes I know it's not in contention so you don't need to take us there.

MR RING QC:
The context, the factual context was it was tenancy of a, I think, an industrial building and in the course of the tenancy the Council decided it was earthquake prone and work had to be done to strengthen and the question arose: is it the problem of the landlord or the tenant and the Court of Appeal held that keep means put, so if there was an obligation under the make good clause it was down to the tenant but because it was such a radical change to the

building that would give the landlord something different in essence, in nature, in degree to what he had before then there would be no such obligation and we would say we're in a much more deserving position for the application of that than even the tenant was in that case.

ELIAS CJ:
But because of the implications there was no such term, was that it sorry?

MR RING QC:
Yes because –

ELIAS CJ:
Because keep means put there was no –

MR RING QC:
Well because keep means put, if there was an obligation it would be an obligation at the beginning.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
So who says "keep means put"? Oh it's in *Weatherhead.*

ELIAS CJ:
But it must be based on something else because that is a slightly different thing.

GLAZEBROOK J:
It is a slightly odd thing to say, keep means put, because why can't keep mean keep? Keep as you get.

MR RING QC:
I'll just find the reference in my submissions Your Honours.

GLAZEBROOK J:
On the ordinary language I would've thought keep means keep it as you got it.

MR RING QC:

I'm just looking at the judgments, in the High Court –

GLAZEBROOK J:

Sorry whereabouts are we?

MR RING QC:

In this case, look at volume 1 at page 55, paragraph 54.

GLAZEBROOK J:

Oh so if it wasn't clean and tidy you're supposed to make it clean and tidy or whatever is that the idea?

MR RING QC:

Correct, yes that's the idea and –

ELIAS CJ:

But that's probably – oh maybe this is the way you're using it, sorry, if it is but that is probably a very good argument in support of the contention that clean and tidy is not something as significant as the Court of Appeal thought.

WILLIAM YOUNG J:

Oh it's the High Court, she refers to the High Court judgment not the Court of Appeal judgment because it's not really what the Court of Appeal was saying. They're saying the whole thing was to be construed in light of the condition that the building was in at the commencement of the lease. And do we have the High Court judgment in *Weatherhead?*

MR RING QC:

No we don't have the High Court judgment Your Honour.

WILLIAM YOUNG J:

Have we got any of the others, *Proudfoot v Hart* (1890) 25 QBD 42 (CA)*, Credit Suisse v Private Equity LLC v Houghton* [2014] NZSC 37?

MR RING QC:

I think *Proudfoot* might be in my friend's submissions. Yes it's tab 7, I think it also might be in the *New Zealand Insurance Company Limited v Keesing* [1953] NZLR 7 judgment as well.

GLAZEBROOK J:

Well it seems odd to say “keep means put” in this context anyway because it means that you have to put it into a condition at the beginning of the lease because these ones with repair you can understand because you can't keep it in repair if you don’t repair it to start with but here it would to their stew, remove everything, remediate, put it all back and then start spilling it out again and then fix that up when you get rid of it. That can't be the obligation here can it? Well it doesn’t make any –

ELIAS CJ:

Unless he’s right.

GLAZEBROOK J:

No, no I understand that but that’s the –

MR RING QC:

No you're right it doesn’t make any sense.

GLAZEBROOK J:

It doesn’t make any sense does it?

MR RING QC:

No.

GLAZEBROOK J:

That is the argument.

MR RING QC:

That is the argument but –

GLAZEBROOK J:

Well part of the argument.

MR RING QC:

Yes. It was common ground, it’s been common ground all the way through that keep means put and that whatever obligation had at the end it must have at the beginning and all the way through the 1985 tenancies.

WILLIAM YOUNG J:

It far more naturally means keep in the condition in which it was at the time of the lease. I mean that's a far more natural reading of a provision like that isn't it?

MR RING QC:

Well I'm not unhappy with that reading because –

WILLIAM YOUNG J:

No and I appreciate that.

GLAZEBROOK J:

But you can understand with a repair that if there's a broken window in building –

ELIAS CJ:

And particularly for residential.

GLAZEBROOK J:

– you have to fix the window because otherwise you can't keep it in repair throughout the thing but it doesn't make sense in this context to have keep means put. So doesn't it mean keep can mean put and that you really do have to fix the window because if you don't fix the window you can't keep the thing in repair throughout because you can't say oh well my obligation to keep it in good repair, I'm able to say oh well the window was broken to start with and the fact that water then – oh maybe the roof is better idea, the fact that the water comes in through the roof and the whole thing falls down is actually not my problem.

ELIAS CJ:

Well this is really what *Proudfoot* is about.

GLAZEBROOK J:

Well no I'm sure that – that's what I mean, it's in a different context is what I'm –

MR RING QC:

But if clean and tidy means remediate subsurface contamination then the DAL's case is that Mobil have an obligation to keep it clean and tidy, that is to make sure there was no subsurface contamination and also to remove the subsurface contamination at the beginning

of the tenancy because otherwise they weren't keeping it in a clean and tidy. If clean and tidy doesn't mean that, which is what we say, then no problem.

ELIAS CJ:
In fact some of the cases that are cited in *Proudfoot* make the point that the term "good repair" is to be construed with reference to the subject matter and must differ, as that may be a palace or a cottage.

MR RING QC:
Right.

ELIAS CJ:
And it's all about occupation. So I'd be a bit worried about us accepting, because the parties haven't really seemed to put it in issue, that put always means – that keep always means put. I know your principal argument is that on the interpretation of the clause that you put forward, it doesn't. I mean it's not a problem.

MR RING QC:
No but if I were able to go back to not agreeing that keep means put then it's a quicker route to no liability for me than the one I'm currently on. So I'm happy to leave that opportunity there if it is there.

ELIAS CJ:
Well we might have to ask Mr Galbraith about it. I'm just worried about mucking up the law, not about necessarily the result in the particular case.

MR RING QC:
So again all I've highlighted in 3.1 is what the implications are if keep does meant put and just making the point at the bottom of 3.1, we're not just talking about as at 1985, we're in fact talking about a four year backdated obligation or five year backdated obligation to January 1991, January 1981. And then we come onto the *Weatherhead* point.

GLAZEBROOK J:
Oh I see.

MR RING QC:
I'm sorry?

GLAZEBROOK J:
Sorry I just didn't understand that because of the commence date.

MR RING QC:
Yes, yes. So at 3.2, this is the *Weatherhead* point that however expansive make good covenant words may appear to be, the nature and extent of the obligation opposed and assumed must have been reasonably within the contemplation of the parties at the date of the demise. The point being that you can't require the tenant to hand back something different and whether that's described as a difference in kind, a difference in character and substance or nature to what the tenant took at the commencement of the tenancy, the overall requirement seems to be one of proportionality and this is particularly significant we say where the parties have apparently have used boilerplate type make good clause language.

So the test is whether the language is appropriate to describe the extent of the work, the extent to which the end product differs from what's currently there and the extent of the cost that the tenant has to bear and those are points again that are taken out *Weatherhead* and the test we say isn't as the Court of Appeal described it, whether the remediation work can be considered reasonable and again citing from *Weatherhead* one way of applying the test is to ask whether if the required work is carried out this would give the lessor a windfall and we say that's just absolutely what would be happening here. Again the land created from waste, set aside and designated for long-term use for activities likely to cause contamination, there was no realistic foreseeable change in the use in 1985, it had already reached the tipping point before the agreements commenced, even backdated to January 1981. The required remediation work was to excavate the entire 2.5 hectare surface, to remove all soil to three and a half metres, to dump that soil, to replace that soil with newly externally sourced soil and that was work that would require years to complete. The sites would be obviously unusable during that time, it would cost millions of dollars. The result would be that DAL would have had new land free from organic – from its original toxic waste, as well as now suitable for residential use when it was never suitable for that use before.

When you compare this, again when you compare this to *Weatherhead* we are literally talking about new land but the surface platform, three and a half metres deep, would have been sourced from somewhere else and we say at 3.4, "It's inherently implausible that the parties intended this remediation obligation when the tenancies could be terminated on one month or six months' notice even if enforcement of the obligation might have been viewed as

unlikely." And again the context where none of this has even been mentioned in any communications. The parties were aware of the existence of extensive contamination, even if they were not aware of the full nature and extent. There is no indication of any consideration of actual or potential liability or that the contamination or any required cleanup influenced the negotiations except for the making good after the removal of the improvements and to the contrary we say the fact that the make good clause is in essentially the same terms in all five agreements infers that the parties didn't contemplate any remediation to any of the sites and that's reinforced by the surrender of lot 30 for example and to the extent that the failed post-1985 negotiations are relevant, Mobil never accepted responsibility for cleaning up contamination caused by others or for cleanup to better than the industrial standard and it's significant that they broke down over DAL's insistence on inserting express remediation obligations but even DAL's predecessors never asserted at the time that Mobil already had a remediation obligation of any kind and again there's been no attempt or had been no attempt to enforce remediation obligations against Mobil by any DAL predecessor until the 2000s and then we just refer to the tipping point in this context and also that the no breach if there's industrial standard would be relevant here as well.

The implied term, we say it wouldn't go without saying. Not reasonable and equitable, same reasons as before in that predecessors knew the contamination likelihood and DAL only needs the implied term because course of action previously available have gone stale, not necessary for business efficacy, the 1985 agreements have worked fine. The implied term is only needed to overcome a limitation defence and even if there was an implied term its scope would have to be limited for contamination for which Mobil was responsible since 1985, again none because of the tipping point and again no breach anyway because of the industrial standard. So unless I can help Your Honours with anything further at this stage, those are our submissions.

ELIAS CJ:

No thank you Mr Ring.

MR GALBRAITH QC:

Yes if Your Honours please, while unsurprisingly the appellant doesn't put its case in these unattractive terms, it does come down to being its principal proposition that it and its predecessors were at all times contractually entitled to discharge oil and chemicals onto the surface, draining into the subsurface of the demised land with only the obligation of 1985 to leave the surface looking nice, which are the words emphasised in the appellant's submission. I don't want to get into the detail of the argument at the moment but can I just

point out the fundamental difference between *Weatherhead* and the present circumstances. In *Weatherhead* the situation which caused or would have caused the, perhaps one could say the unfair burden on the tenant was the fact an earthquake occurred. The reason that there is a burden on Mobil in our respectful submission here is because Mobil has, over an extended period of time, dumped oil and chemical products into this land to the extent that the only way to remediate it is to remove the three and half metres of soil and replace. It's not a question of this is a rubbish dump and therefore the Board should bear the consequences. The consequences here by act of Mobil and it's quite a different situation from any of the cases that my learned friend is relying upon for escape from the obligation which we say exists under the contract or by implied term and with respect I'm not aware of a case where activity by action by the tenant which has been causative of damage had been regarded as not caught by an obligation such as keep or put and one of course sees why that should be.

Now the underpinning, at least in my understanding of the appellant's submissions, for that proposition is the assertion that there wasn't a conscious consideration by the parties in 1985 or for that matter I think appellant would say at any time during the history of the leases, of the need to remediate the hydrocarbon contamination which is now identified as having been caused by Mobil and on the evidence that appears to be correct. The parties didn't know and that was the finding in the High Court and confirmed in the Court of Appeal, at the time of the entering into the 1985 lease and obviously not at the time they entered the 1925 leases, that these premises were going to become so contaminated that the consequences would be those which we've discussed of removal of soil and replacement with clean soil.

ELIAS CJ:
When did it become known to your client? I mean is there evidence of that?

MR GALBRAITH QC:
Yes I'll take you to that, there was – I mean it's quite true, as my learned friend has said that there was sporadic knowledge of incidents from time to time but the evidence was quite clear that Mobil never reported incidents to the Board and so the Board was not kept up to date with what Mobil knew. Mobil was the party that was committing the spillage.

ELIAS CJ:
But when did the Board – when was the Board aware that the land was substantially contaminated?

MR GALBRAITH QC:

When it became aware that there needed to be remediation was some years after Mobil got a report in 1989 and I'm just trying to remember the date. I don't – the specific report which I'm going to take you to, in June '89, was given to the Board until 1996. So –

ELIAS CJ:

But I mean the point I suppose that would be made against you is that that might all be right but your client would've had a remedy in tort and it has not pursued that, so is it right to force everything into this rather unlikely clause?

MR GALBRAITH QC:

Well we've got to talk about the clause obviously but I think that tends to go more to the implied term argument and the short answer, in my respectful submission to that is that if you have a party like Mobil who doesn't tell you, okay the Board had some knowledge from newspaper articles et cetera and the other matters which my learned –

ELIAS CJ:

But you're saying 1996 it was known?

MR GALBRAITH QC:

Yes it was.

ELIAS CJ:

Right thank you.

MR GALBRAITH QC:

But my learned friend then says well too late, the damage has all been caused past the tipping point in the 1970s and so the fact you find out in 1996 that, you're out of time for your claim in waste.

ELIAS CJ:

What about discoverability?

MR GALBRAITH QC:

Well that's what you would get forced back into, those sort of most difficult arguments which is why, certainly when we come to implied term, I'll be saying one can see the common

sense and business efficacy of saying there should be an implied term because at least then if you're not told –

O'REGAN J:
Well except shouldn't properly advised commercial parties put their own terms in?

MR GALBRAITH QC:
I'm sorry – well that's of course the counsel of perfection that we always –

O'REGAN J:
Well they addressed the issue though, didn't they, I mean there is a clause dealing with this issue, it just hasn't dealt with it very comprehensively, that seems to be the problem?

MR GALBRAITH QC:
Well that's certainly part of the problem Sir, I don't disagree with that. And so we say and we did say below, as Her Honour Justice Glazebrook discussed with my learned friend, that going to this evidence of negotiation is not the appropriate way to construe the clause which with great respect isn't a clean and tidy clause, it says a lot of other things in the clause and it starts of course with good order which is quite different and so one can't lift from 6C into this clause what might or might not be an appropriate interpretation in 6C but again I'll come back to that.

In our submission and our submission was correctly recognised by the Court of Appeal that the true backcloth which was a term which the appellants have referred to, to this lease is to go back to what's the fundamental character of the lease, what's the obligation of a lessee not to cause waste and the fact that these are boilerplate provisions and so in my respectful submission the interpretation application of boilerplate provisions, they aren't construed in relation to something that the parties mutually recognised at the time, they are construed in *Hadley v Baxendale* [1854] EWHC J70 certainly so that the damage which is encompassed with it has to be of a type or nature which would accompany the activity and there's no argument here that the parties and my learned friend took you to the historians evidence and the references to dangerous goods and spillage and fire et cetera so that there was a recognition from day one that the risk here was of incidents of that type and so you don't have to foresee the quantum and that's the first principle of contract damage, you don't have to see to envisage the quantum or the particular way in which the damage may be caused, provided the nature or type is reasonably foreseeable, objectively reasonably foreseeable

and quite clearly it was that discharging oil or discharging chemicals into the ground could cause a fire for example as it did subsequently and so one should –

GLAZEBROOK J:
I'm not sure why you've got "reasonably foreseeable" in a contract interpretation. You might have to just go back a couple of steps on that because "reasonably foreseeable" would normally be in a –

ELIAS CJ:
It's damage he's talking about.

WILLIAM YOUNG J:
He's saying is why you didn't sue in waste, if you had sued for waste you would've got into a limitation, reasonable discoverability argument.

MR GALBRAITH QC:
Well they've got all that sort of problem and –

GLAZEBROOK J:
No I thought this was moving on to the contract interpretation point but maybe I've missed –

MR GALBRAITH QC:
No I was just talking about *Hadley v Baxendale* and the fact that you've got to foresee, it's got to be reasonably foreseeable the type of injury. That's all I was talking about.

GLAZEBROOK J:
Oh okay no I thought we'd moved on, that was all.

MR GALBRAITH QC:
It was a generality, not a specific. Now each of the leases and this is a matter that my learned friend addressed, in our respectful submission the Court of Appeal certainly accepted this at paragraph 49 of the judgment. The leases from day 1 included a provision that the lessee wasn't to create a nuisance or cause injury to the lessor. Now that it is in our submission simply a recognition of the fact that what lessor's interest is under a lease while the lease is running is of course its reversionary interest and so that's a provision which is intended to protect the reversionary interest of the lessor. It's akin to the obligation not to cause waste but this is a specific contractual provision in all of the leases that ran

throughout. So it was a boilerplate provision which existed from 1925 through and the terms of it are anything that may cause injury to the lessor. So it's encompassing, subject to any limitation that one might be able to read into that, because of objectivity, some objective provision. Certainly the Court of Appeal in 49 of the judgment said that was a term that was appropriate to encompass the sort of damage which has arisen or would arise from what would otherwise be permissible voluntary waste. Which is not 49.

GLAZEBROOK J:
But those weren't carried through to – were they carried through to 1975 and 1985?

MR GALBRAITH QC:
No they changed, the wording did change you find in the more recent leases for example extensive clauses saying you've got to comply with every jolly regulation under the sun and any direction of Council and the bylaws and et cetera, et cetera and what you'll also find and this is in the Court of Appeal judgment because they went through this with some care, that the dangerous goods regulations back from 1908 and the bylaws from 1917 et cetera in no way permitted or allowed for spillage of oil, as you would expect because it's a dangerous good and so the so-called practice which my learned friend spoke of that the oil companies may or may not have adopted in those days, was in contravention of bylaws and the dangerous goods regulations, you just couldn't do it and so we've got an argument saying that one should interpret the provisions which were contained in the lease at that time as in some way contractually not preventing or not stipulating that the parties shouldn't commit what are otherwise, if I use the word unlawful activities, perhaps just use that term.

O'REGAN J:
So are you making a claim that they breached that covenant in the 1985 leases?

MR GALBRAITH QC:
I'm saying that Mobil was in breach throughout the period of all of these leases. I know there were different Mobils but it's relevant Your Honour and I think the Court of Appeal regarded it as relevant to the question whether it's appropriate to impose under the 1985 lease a liability for effectively damage which had been caused by the predecessor lessees, both Mobil Australia and Mobil New Zealand companies. And again just –

WILLIAM YOUNG J:
Was there a statute that preceded the Water and Soil Conservation Act 1967 because probably under that statute it would have required a consent to discharge waste to land?

MR GALBRAITH QC:

Yes it would have. I don't know – look I can't give you the precise answer.

ELIAS CJ:

The '67 Act I think was the first.

WILLIAM YOUNG J:

That's the Water and Soil Conservation Act 1967. So it may have been the first Act. So it may have been that that wasn't illegal unless caught by the dangerous goods or bylaws.

MR GALBRAITH QC:

I would have thought dangerous goods but I just can't give you a chapter and verse answer. I'll have a look over lunchtime and just remaining with boilerplate for a moment, the purpose of a boilerplate clause is of course to encompass what you think of and what you don't think of at the time. That's why you have a boilerplate clause, as I say provided it comes within the sort of *Hadley v Baxendale* bounds then that's the purpose of a boilerplate clause. It's the expected and unexpected, is the purpose of boilerplate clause.

ELIAS CJ:

Sorry I don't quite follow that.

MR GALBRAITH QC:

Well all I'm saying Your Honour is you have an all encompassing clause which uses things in the clause which say excluding liability for negligence for example. That's a boilerplate clause. It's saying you don't have to have thought about all the various type and ways you might cause negligence, just negligence is out and so that's the really the only point I'm trying to make.

ELIAS CJ:

They don't have to have thought of oil spills, is that what you're saying?

MR GALBRAITH QC:

Well I wasn't thinking of oil spills, I was just thinking generally that you don't have to have thought about what the particular form of negligence may be provided it's negligence, it's caught or it's excluded. So if you just excuse me being –

ARNOLD J:

Well just applying that here, are you saying you don't have to have thought about subsurface contamination?

MR GALBRAITH QC:

No, as long as you've thought of or as long as it's objectively contemplatable that damage of the nature that we talked about before from oil which is inflammable, just to take that one thing, then that's sufficient, you don't have to think about if somebody's striking a match or machinery that was setting it off or whatever else it was, it's that nature of that damage that may or that damage, that risk.

GLAZEBROOK J:

And what would get that here? Would it be a breach of the term to comply with regulations rather than the clean and tidy because I can't –

MR GALBRAITH QC:

We didn't have clean and tidy back when – the time I think that Justice Arnold is asking me about, we only had not to cause injury to the lessor back then and so –

GLAZEBROOK J:

Yes but you're not making that – sorry you're not making that argument in relation to the 1985 then?

MR GALBRAITH QC:

I want to come forward obviously to 1985.

GLAZEBROOK J:

All right, I'll wait and ask that question then.

O'REGAN J:

So in the end you're not making a claim that there has been a breach of the covenant not to or to stay in compliance with –

MR GALBRAITH QC:

No, no we haven't, no, no, no you're quite right Sir, I'm sorry I didn't answer it properly before. So if the Court would just excuse for a moment the triteness that I'm just going to express that when one thinks of a lease, what a lease is, it's only entitlement to use

somebody else's property for a period of time, that's what it is. I know there can be special terms but that's the nature of a lease and then of course it reverts to the lessor and so you've got the lessor's reversionary interest and the underpinning is that the lessee gets the use for a period but doesn't get any entitlement to change the character of the land or the building or whatever else which is being leased. Well one way that perhaps one can –

O'REGAN J:
Well that depends on the terms of the lease.

MR GALBRAITH QC:
Exactly, I accept that totally, so you –

O'REGAN J:
Well isn't that question begging because what we're trying to work out is what are the terms of the lease.

MR GALBRAITH QC:
Yes I'm just trying to talk generally but Your Honour is quite right because of course if you've got the lease of quarry for quarrying purposes then it is going to consume but forgetting that for a moment, perhaps one way of looking at it is just thinking about what the term of lease allows the lessee to do and in effect the lessee consumes the term of years that the lessor would otherwise have and of course subject to fair wear and tear then has to give the property back in the form that it was leased and that's how the doctrine of waste of course arose and it tended to arise way back in the dim dark days very much with life estates and the Court of Appeal we argued waste in the High Court despite the fact I note in the appellant's submissions there's some suggestion it wasn't mentioned in the High Court. We regarded waste as being an important contextual issue to interpreting the particular clauses which are used here and the relationship between the parties. The Court of Appeal took the research a bit further and as you will have seen has gone back to the Statute of Marlborough in 1267 which in this case we hadn't quite got back to but there it is and so waste has been almost from immemorial a restriction on what the lessee can do unless of course the lessee has some specific provision in the lease or in the terms of the life tenancy that permits the lessee to commit waste. The example that I just gave to Justice O'Regan that if the lease is for quarrying purposes then quite clearly the lessee is entitled to do something which otherwise would constitute waste.

But what we would say is that there has to be an unambiguous provision in the lease to avoid what has been recognised for centuries as the limitation on the use by the lessee of its interest for whatever the defined period of time is under the lease and that's why, in our submission, the Court of Appeal were correct to reject the appellant's submission which the High Court Judge had accepted, that merely leasing for the purpose of an oil and chemical storage use, licensed the lessee to conduct its operations in a way that permitted spillage, permitted failure of the tanks for leakage and permitted direct discharge of oil through dewatering and you'll see that in the Court of Appeal judgment, it's possibly just worth looking at given what my learned friend said, at paragraph – perhaps the proposition which was being argued for Mobil is at paragraph 38.

O'REGAN J:
Is in the High Court judgment?

MR GALBRAITH QC:
No this is in the Court of Appeal judgment Sir, so it's at page 16 of volume 1. So you'll see in paragraph 38 the Court of Appeal set out what they said the proceeding was concerned about with the obligations under the '85 tenancies but they say the predecessor leases matter because during their terms the relevant damage was done to the reversion and Mr Ring argued the leases assigned the risk of contamination to the Harbour Board because they licensed petroleum storage and contamination is a normal incident to that activity. Now just staying there for a moment, this is a binary case, damage has been done. It's either Mobil is going to pay for fixing it or the Harbour Board. Mobil caused it and the argument that was being presented was that –

ELIAS CJ:
Well that is perhaps a bit of an issue. I don't – I'm still quite confused about this chain of responsibility but anyway.

MR GALBRAITH QC:
If you just – my reference to Mobil is an all encompassing reference and I accept we've got to come back to that Your Honour but the lessees over the period of time undoubtedly caused the damage. Now the argument was that by the Harbour Board leasing for the purpose of an oil storage and chemical storage, that therefore it licensed the Mobil to discharge oil and chemicals into the land with no consequence and that argument wasn't accepted by the Court of Appeal. It was accepted by the High Court Judge and you'll see at paragraphs 43 through 45, after a discussion –

GLAZEBROOK J:
Paragraph 43, 45 of the Court of Appeal?

MR GALBRAITH QC:
43, 45, pages 18 to 19 of the judgment. After a discussion about waste, which I may come back to later, 43, "The tortious obligation not to commit waste differs from a contractual obligation to keep a property in repair and Courts are slow to exclude tortious liability. An action may be brought in waste although the lease contains a covenant to repair, the presence of which is insufficient by itself to exclude waste. But repair covenants usually cover the same ground, they are customarily included in leases and tenancies". For these reasons, as Dillon LJ put it in *Mancetter Developments v Garmanson and Givertz Ltd* [1986] 1 QB 1212 (CA) said, "Waste is a somewhat archaic subject, now seldom mentioned; actions in respect of disrepair are now usually brought on the covenant." It then goes on to say –

GLAZEBROOK J:
Does that mean people don't usually bring actions in the tort of waste because they bring them under the repair covenants which cover the same ground, is that the –

MR GALBRAITH QC:
Yes, yes and waste is now –

GLAZEBROOK J:
It's a slightly odd way of putting it but –

MR GALBRAITH QC:
Yes and waste now, it's been changed by the Property Law Act in 2007 so we're in a different regime.

ELIAS CJ:
I see that the leases exclude obligations under the Property Law Act.

MR GALBRAITH QC:
Yes and the reason they – well sorry there are a lot of reasons why they did that and one of the reasons is it excluded section 106 of the then Property Law Act which said you had an

obligation to repair but to the standard that was at the commencement of the lease. So that was excluded, among other provisions of the Property Law Act by those provisions.

ELIAS CJ:
Well all of them are I think.

MR GALBRAITH QC:
Yes all of them are, yes, no you're quite right but that meant that section 106, I think it's (v) didn't apply. So then you'll see in 44, they go on to talk about *Weatherhead* and I probably don't have to go to that. 45, "It is not waste to do something permitted under the lease or, as the Statute of Marlborough put it, by 'special licence had by writing of covenant'. We have noted that Katz J held that liability for waste does not extend to damage resulting from use that is reasonable having regard to the nature of the demised premises. However, that principle is better suited to those cases in which the court is deciding whether the lease permits the lessee's actual use." It then refers to *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 CPD 507, 511 and Lord Coleridge who said, "a tenant is not liable for the destruction of the property let to him if such destruction is in fact due to nothing more than a reasonable use of the property and any use of it is in our opinion reasonable provided it is for the purpose for which the property was intended to be used and provided the mode and extent of the user was apparently proper."

And then it goes on at 46 to say, "no doubt Mobil's particular use expressly authorised … We are concerned with a different question, whether contamination was authorised as an incident of that use. The leases being silent on the point, it is appropriate to inquire whether there was no other reasonable way in which the permitted use might be conducted. Only if the answer is affirmative should the lease be taken to have authorised what would otherwise be waste". That was a test applied in *Re Rotoiti No. 5B Block* [1923] NZLR 619 (SC) and that was a question about felling timber which would normally be waste because it was for farming and otherwise they couldn't carry on the farming, therefore it was permissible.

ELIAS CJ:
I might have missed a beat or two but I hadn't understood it to be being argued that the lease authorised the contamination.

MR GALBRAITH QC:
It was before the Court of Appeal, it was in the High Court.

ELIAS CJ:

Yes it might have been but I'm just querying why your –

MR GALBRAITH QC:

The reason, well one it was argued in the High Court and the Court of Appeal and the Court of Appeal held that the decision the High Court came to is wrong but it's relevant, Your Honour, because what my learned friend, what the appellant I'm sorry is saying really this is an open question as to how one should interpret the clauses, good order, clean and tidy et cetera. What I'm saying is that you have from, as I say, almost time immemorial, a concept that the lessee should not commit waste against the lessor's interests and that's the starting point and it's only if you've got some specific provision which says yes you can, the quarrying example I gave, that one should be starting with the presumption that the lessee isn't going to be able to do anything which is going to damage the lessor's reversionary interest and indeed I say that that's what the clause said about anything which might cause injury to the lessor.

O'REGAN J:

But isn't that covered by the tort? Why would we put that into the contract?

MR GALBRAITH QC:

Well it's covered by the tort Sir but the tort, I mean sorry the answer the first answer yes. The difficultly with the tort is that it has a period of limitation and it depends upon knowledge of the tort being committed and I know that in more recent decades we've – a concept of discoverability has arisen but that's caused plenty of trouble in various areas and it certainly didn't exist back in 1267, so that there is a significant reason why a Court should start, as I believe the Court of Appeal already did, on the premise that you would expect a – you wouldn't expect that actual activity by the lessee, in other words doing something which is unlawful and discharging oil directly into the ground or chemicals directly into the ground, is unlawful under the dangerous goods regulations from time immemorial, you wouldn't expect the lessee being entitled to do that contractually unless there was some specific, very clear provision in the lease because it's something which is going to harm the lessor's reversionary interest.

ELIAS CJ:

So you say it's not necessary to have a clause that the lessee is not to harm the reversionary interest and that's why it's not – I can't see it in this '85 agreement.

MR GALBRAITH QC:

No, no, all I'm really saying is that, whereas I think the High Court Judge started from the proposition that the lessor had to have something specific in there before you could impose this obligation on the lessee, all I'm saying is that when you come to approach the interpretation of the clause in the lease, you should approach it from the other end, if the lessee is going to say, well we're entitled to dump oil into your premises and never remove it, that the lessee has really got to point to something which gives it the legal right to do that and not to be responsible.

ELIAS CJ:

But I don't think it could possibly be contended that there is a legal right to contaminate.

MR GALBRAITH QC:

Well there's no legal – sorry, yes.

ELIAS CJ:

But the question is whether the remedies that might have been available apparently being statute barred by this clause can be loaded up with the obligation.

MR GALBRAITH QC:

Yes that's fair but when interpreting the clause, rather than with respect saying it can be loaded up with that obligation, is that one should interpret in that context of what – who's caused the problem, where is it indicated anywhere that the Harbour Board has taken on the obligation to allowing, as Your Honour is quite right, to say that the contract doesn't authorise the lessee to discharge oil but where has the Harbour Board said well if you discharge oil which we haven't stopped you doing it, we're prepared to pick up the bill for it because that's what it comes down to.

O'REGAN J:

Well it might not be, it might just be that they had rights and they didn't enforce them, so now they've lost them.

MR GALBRAITH QC:

Sure, the waste issue, yes.

GLAZEBROOK J:

Well they had rights in tort but if they had rights under the contract you wouldn't necessarily have to do it under straining the interpretation of a clause would you? Because couldn't you say well you breached the Dangerous Goods Act and you weren't supposed to, so any consequences of that we're going to sue you for under the contract.

ELIAS CJ:

Under an implied term in this case, isn't it?

GLAZEBROOK J:

No not necessarily, that would be an explicit term because you said you were –

ELIAS CJ:

But there isn't an explicit term in this case.

GLAZEBROOK J:

No, no you said you would comply with all of the consents et cetera, you didn't.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

And therefore that caused us damage.

MR GALBRAITH QC:

But again there's limitation provisions as of course Your Honour would be aware.

GLAZEBROOK J:

Well that's too bad then isn't it, in terms of limitation.

WILLIAM YOUNG J:

We don't have the dangerous goods regulations from the sort of 1920s and '30s do we?

MR GALBRAITH QC:

No we don't Sir.

WILLIAM YOUNG J:

Well do you say it was those regulations provided that there was to be no discharge?

MR GALBRAITH QC:

Well if you go back to – we haven't got them.

WILLIAM YOUNG J:

Is what you rely on set out anywhere?

MR GALBRAITH QC:

Your Honour's quite right but if you go back to that extract from Ms Carlyon's evidence, you'll recall that's referring to the dangerous goods regulations and storage but also the Court of Appeal did go and look at those 1908 et cetera regulations to see whether they permitted spillage and I'm just trying to find the footnote. Footnote 38 on page 22 of the judgment, "We found nothing that authorised spillage in the Explosive and Dangerous Goods Act 1908, Explosive and Dangerous Goods Amendment Act 1920, the Dangerous Goods Regulations 1928, Auckland City Council bylaw number 25 in respect of storage of dangerous goods 1917, the 1917 bylaw refers repeatedly to the necessity of avoiding the escape of liquor or vapour." And it's exactly what you'd expect. I mean the oil was recognised as a dangerous good and that's what that Carlyon extract shows.

WILLIAM YOUNG J:

Say it is the case -

ELIAS CJ:

Just pause, we'll have to – I'm sorry do want to answer the question?

MR GALBRAITH QC:

Oh yes sorry I've gone over time I'm sorry.

ELIAS CJ:

No, that's all right, I'm sorry that we can't resume till 2.45.

COURT ADJOURNS: 12.59 PM
COURT RESUMES: 2.52 PM
AUDIO RESTARTS: (15:07:02)

MR GALBRAITH QC:

...while it was operating was totally sealed. I won't shout now. And so it wasn't a problem because the contamination was confined within the seal, so yes you can use contaminated land for some purposes, as long as you put a load of concrete over the top of it but that's not a normal use of land and the footnote we've got there, footnote 29 or perhaps I should just say this, if Your Honours just have a look at some stage at paragraph 60, paragraph 60 I think it really is, is the one where the Court of Appeal dealt with the submission that was made that there was no foreseeable need for any remediation on the land on termination and the Court of Appeal said they're not prepared to accept that every future new industrial tenant would be indifferent to the contamination once made aware of it, any new use would have involved construction on the land and we observed that the evidence is to the effect that the contamination creates potential risk to future site occupants and workers from flammability or explosion of free product that is pulled underground and from dermal contact or inhalation, especially during site works. There are also risks to the environment, that's the leaching of the contamination into the waterways. These problems might affect any future construction done for or by a new tenant and our footnote 29 is a reference to the evidence and could I just give Your Honours a couple of other references and perhaps just take you to, in footnote 29 on our page 12, that first reference to Mr Moore's evidence, could you just, where it's got notes of evidence 196 – oh that's right, that one is fine.

The next line Hunt, volume 3, 1022, you might just like to look at pages 1048 and 1050, which just relate to cross-examination on the tipping point because the tipping point, well the Courts have generally been prepared to accept it was somewhere in that vicinity of perhaps the late 1970s. It's more arguable and you'll see that from the cross-examination of Mr Hunt but the two references I was going to take you to are in volume 2, which is the PWD report I referred to previously.

GLAZEBROOK J:

Sorry I didn't catch that page number.

MR GALBRAITH QC:

Volume 2 at page 239.

WILLIAM YOUNG J:

PDP.

MR GALBRAITH QC:
Yes, PDP.

GLAZEBROOK J:
What do you take from the more arguable point? I mean what are we supposed to do with it is the question?

MR GALBRAITH QC:
Oh nothing really Your Honour I just couldn't resist saying it.

ELIAS CJ:
Sorry what's more arguable.

GLAZEBROOK J:
Well we've got findings below.

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
So you're not saying that we should be challenging –

MR GALBRAITH QC:
I'm not, no, no, no I'm sorry I just –

GLAZEBROOK J:
All right, just checking.

MR GALBRAITH QC:
It just was my cross-examination, sorry. The PDP report actually starts at 229 and there's a covering letter at 228 and the page references I'm just going to – I'm not going to drag you through the whole report but 239 is a discussion of acceptable levels of contamination and again I'm not going to take you through it but you can see in the second paragraph on 239 they talk about the hazards associated with the contaminated soil at a site intended for industrial development are somewhat different. Direct ingestion by children et cetera is not a hazard for industrial sites. Important hazards for industrial developments are those associated with short-term exposure to site workers, any hazards involving the construction

of building may involve fire, explosion of contact et cetera. Free product will enter construction excavations et cetera and at 278 and I should have identified this is a June 1989 report and this is when the detail of or better estimate of what was in issue starts to be identified. Just at 278, the only point – again there's quite a good description on 277, 278 about contamination incidents. You'll see the last sentence, second to last paragraph on 278 just talks about a source of soil contamination in the tank compounds could be leaded waste from tank cleaning operations, the sludge and scour removed from the tanks is considered hazardous principally because of volatile organic lead vapour. In the past lead waste often has been spread on compound floors to weather it to its less toxic form.

And while we're in that volume if you wouldn't mind going back to 227 because this is a memorandum from Mr Thurston who was the engineering manager on these sites for Mobil at the time and you'll see on 227 it's the short brief, he starts off saying, "This is the first note written on the requirements, scope of work and cost to clean up Pakenham Street. I am evaluating likely groundwater environmental consulting engineers at present. Their recommendations vary and no costs are known." And he says, third paragraph down, "I've talked, investigated, read activities, read our laws, worried about it and I feel I have a good background on the problem. Our laws lag behind say the United States for example their EPA requirement. Do not let that lead us into a false sense of security, there is a growing movement in New Zealand to increase the statutory requirements when it comes to the environment. I do not believe we have to have the site cleaned up in the next six months unless there are plans I am not aware of. If the site had to be cleaned for re-sale purposes, for example return of the lease to the HB, my very quick estimate is something like 500 to 850,000, big money I know but the contamination is significant." He's talking just about the Packenham site at this stage. The point about that really is that this was – it wasn't on Mobil's radar and it quite obviously wasn't on the Board's radar because they knew a lot less than Mobil at the time in 1985 which is exactly why you have a boilerplate provision because you know that there is spillage, you know that oil is a dangerous product, it's inflammable et cetera but you don't know the extent until somebody goes out there and starts making these investigations.

GLAZEBROOK J:

A boilerplate, there are a number of boilerplates, this one Mr Ring says, and I have some sympathy for that view, is not exactly at the higher end of make sure this is in a proper condition or something of that nature.

MR GALBRAITH QC:

I think that's a fair comment Your Honour and that we've all seen the sort of clauses that lawyers draft, for example for excluding liability for things and they go on and on forever and, you know, so I mean that is a fair comment in that way but our submission is that given what I said before lunch about where you would expect the responsibility to lie and who it is who is creating the problem, that when one comes to interpreting good order and clean and tidy and free of rubbish et cetera, in the context of this use which is a use which is recognised as dangerous and potentially, as I say, can create fires and has the other adverse effects, that it's a fair interpretation that that clause is meant to capture what actually happened here which was deliberate discharge and negligent discharge and negligent and careless discharge into the land. It's very hard to describe this land where at least $10 million plus has to be spent to allow it to now be used as being in good order, I guess is the short point.

So in 48 I've already talked about that, I needn't go over that and really what I've just said is really covered in 49 and 50. What you can't do though and what with great respect the appellant does try to do is to say, "Well look this was only a one month, two of these were just one month tenancies, sorry three of them were I think. Three of them were one month tenancies and one was a six month tenancy but if you go and look at the one month tenancies, you'll find I think it's clause 23 which says, "The idea is as soon as we can identify the boundaries of the subdivided land there's going to be a 10 year lease with a right of renewal in it." So these were simply stepping stones in between the previous 1975 leases and what was intended to be rolling out for another 20 odd years and the parties didn't recognise the scope of the problem at the time and one can't say well now that we know the scope of the problem, they can't have intended then to undertake that obligation. That's unfortunately, well would be unfortunate if it wasn't Mobil who had caused the problem but if the problem is larger in scale than was known at the time, well the fact of that largeness of scale can't be used to diminish the obligation, otherwise of course the best thing for – well no I won't say that.

So that's really what we said in 52. 53 is the *Weatherhead* point. Can I just say something about what we've said in 54 and I want to say a little bit more about that because one of the things which the appellants have said is that well if there is an obligation it's only an obligation to the extent that the remediation needs to be sufficient for a reasonable industrial user. Now as it is the Court of Appeal have held that a reasonable industrial user, because they're going to want to build a building or do something like that, you're going to have to do the full $10 million worth, that's what they've held but I do with respect take issue that proposition. It arises out of, as my learned friend said, out of the *Anstruther* case, *Anstruther*

decision and that is a decision about residential and it is a decision that should be confined to its particular area though I accept that the texts tend to cite it as the answer to everything.

ELIAS CJ:
Sorry where do we find that?

MR GALBRAITH QC:
You find it in the appellant's casebook volume 1 and it arose – it's a gloss on the *Proudfoot* case that I was talking about before. What happened in *Anstruther* was that there was a lease for 95 years of three newly erected houses, you'd never get that – well perhaps you would get that in New Zealand but - and what happened was that at the time that the lease was entered into the houses were in a salubrious area and by the time that 95 years ran out they were in an insalubrious area and so they had a repair clause and the argument for the tenant or the lessee was, well tenants of the type who would now want to lease these houses wouldn't care about whether they had a front door or the roof didn't leak or anything like that and therefore we only have to repair to some minimal state and the Court unsurprisingly said that can't be right, the contract you entered into and the obligation to repair the premises must relate to maintaining the condition, keeping and putting, if you can put it that way, the condition of the houses as they were first leased and in this context, because the argument tended to be around – relate to the class of tenants, in other words now you've got a lower class of tenant from the previous class of tenants, a deal of the judgment does refer to the class of tenants at the time that the lease was entered into because that was a distinction that the lessee was arguing for.

Now that may be fine in relation to a building such as this and I'll come back to that point in a moment but Lord Justice Atkins' judgment is really the one which has I think been regarded as the most authoritative or perhaps most analytical and while he felt that he had to take account of class of tenant because of the authority of *Proudfoot* which bound him, he said for his part he didn't actually find that helpful and if you go across in the judgment to page 733, you'll about the middle of the page there's a full paragraph and he says, "For my own part I should be very reluctant to introduce into covenance and leases considerations of fitness for a particular purpose which caused much difficulty in contracts of a different kind. Unguided I should have thought that the original and proper sense of tenantable was fit to be tenanted, that is occupied, and that the word meant no more than if it meant as much as habitable but *Proudfoot v Hart* binds me to hold that in the three years agreement it has reference to the reasonable requirements of a tenant of the class who would be likely to take it. Accepting that construction I have no doubt that the requirements of such a tenant are deemed to

continue the same during the term or if not are to be estimated by the requirements of such a tenant as would be likely to take a premises at the commencement of the term." Then he goes on to say, "Once one is extricated from the clutch of the hypothetical tenant I do not think there is much difficulty in construing the company in this case to well and sufficiently repair, maintain, paint, paper et cetera the premises. There is a very full discussion on what is meant by repair in the judgments of Fletcher Moulton and Lord Justices Buckley in *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 (CA) with which I respectfully concur. Repair is not confined to houses, it applies to chattels and it connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged. It involves subsidiary parts et cetera" and then towards the foot of that paragraph, second last sentence I think it –

ELIAS CJ:
It does not involve renewal of the whole.

MR GALBRAITH QC:
That's right because you're talking about repair.

ELIAS CJ:
Yes, I understand that but that's why I am not sure that these cases on covenance to repair are particularly helpful in this case because here you really are talking about renewal of the whole, the whole land.

MR GALBRAITH QC:
Well you're not actually, I mean you're talking about renewal of 3.5 metres of it, but land of course goes –

ELIAS CJ:
Oh I see a flake, yes.

MR GALBRAITH QC:
Yes it's only part of the land but just staying with this for one moment, if you just go down to the second last sentence there, you'll see he says, "I would myself prefer to eliminate the possible tenant and would be content with the arbitrator's earlier test when he was dealing with the pointing as being needful and necessary for the maintenance of the structure so that it may be expected to last for its normal life if properly kept in repair." That's not a bad, in my

respectful submission, not a bad test to apply and talking about normal life if kept in repair. So –

ELIAS CJ:
So what, for here?

MR GALBRAITH QC:
Well so the point that I would make with –

ELIAS CJ:
Because personally I see, in fact I almost asked a question but let it go, about this hypothetical reasonable tenant because it didn't seem to me to be very helpful but the point still remains and I'm not sure what you take from it for this case.

MR GALBRAITH QC:
Well I don't – I agree with Your Honour, if we are saying the same thing, I'm not sure but that I don't think the hypothetical industrial tenant is of any relevance at all because here we're talking about land and the point that Justice Atkins made about damage, land undamaged can be used for a lot of things, it doesn't have to be an industrial tenant. The industrial tenant only comes about through an external factor of zoning. It's got nothing whatever to do with the quality or the character of the object which is being leased and so if the zoning changes, well you can do something else with it but it doesn't change the land, the land is still the land and so it's quite clear here that the land has been damaged and that's the reversionary interest which the – well sorry the reversionary interest which the lessor should have is the land as is.

ARNOLD J:
So that does mean you're arguing that it should be remediated to a residential standard, not to an industrial standard?

MR GALBRAITH QC:
I would argue it's got nothing to do with residential, industrial, commercial or anything, it should be remediated.

ARNOLD J:

But there are differences. I mean as was pointed out earlier if you were remediating it for residences, you'll assume children running around and all that sort of thing, you wouldn't with industrial. So there are material differences aren't there?

MR GALBRAITH QC:

Well Your Honour's right and I have to concede that, I can't perhaps take it to the extent I was taking it.

ELIAS CJ:

And there is the word "tenantable" which does populate, doesn't it, the agreements we were taken to earlier? So it is not land for land's sake, it's land for tenancy purposes.

MR GALBRAITH QC:

I'm not sure – well no Your Honour is right. Let's just have a look. Your Honour is quite right, the – though to be fair I think the good and tenantable repair relates to the buildings et cetera on the land, rather than the land because you don't really think of –

ELIAS CJ:

Yes, yes it probably does. So, but I thought that one of those, well maybe I'm wrong, but one of those agreements did have tenantable in relation to land.

MR GALBRAITH QC:

Oh it does have "tenantable" in clause 9 but it says, "At all times keep the said land demised in good order and clean and tidy et cetera, will at all times keep all buildings et cetera and structures, fixtures in or upon the said land in good and tenantable repair and condition and then deliver up to the Board the said land, any improvements in such good", well I suppose you could say that, "deliver up to the Board the said land and any improvements left there in such good and tenantable repair and condition." But as I understood the Court of Appeal and I thought it was common between the parties, that it was agreed that the obligation going in is the same as the obligation going out, so you divide – you've got a good order and clean and tidy and weeds and that for land and you've got the same going out and you've got the tenantable for the buildings going in and going out.

O'REGAN J:

Well how does the initial contamination of the land fit into this analysis?

MR GALBRAITH QC:

It only fits in, Your Honour, in the sense that the fact that it's already contaminated, if we can put it that way isn't –

O'REGAN J:

I'm talking about the pre-25, the contamination that came from the actual reclamation.

MR GALBRAITH QC:

Oh I see, yes, yes, yes, yes.

O'REGAN J:

I mean presumably everyone accepts there has to be – you have to take that out of the play.

MR GALBRAITH QC:

Yes and that's why –

O'REGAN J:

Doesn't that undermine the rest of your arguments though? Because that means it's not tenantable or it's not in good repair on your analysis because presumably you couldn't use it for housing even with that level of pollution on it.

MR GALBRAITH QC:

The short answer is I don't know the answer but just assume that Your Honour is right which I think is the proper way to deal with the point, but that can be remediate – well put it another way, that may be as the situation would be in what I said before about the latent defects that neither party at the time of entry into the lease are aware of the latent defect which could be foundation or whatever else there might be and the Courts have in some circumstances been prepared then to read that as an exclusion from the obligation under the, whatever the least term might be and certainly one wouldn't quarrel with that because that would seem appropriate.

GLAZEBROOK J:

I suppose also if you do base it as you do at least partly on whose fault it was then that is clearly the fault of the – well it's certainly not the fault of the tenant.

MR GALBRAITH QC:

No can't blame Mobil for that, no.

ELIAS CJ:

But here on one view, perhaps this is a very narrow view, we have a new tenancy agreement in 1985, it's hard to see that, leaving aside the back history of who was there and whether they were related and so on because I'm still not sure about the legal path to all of that and when I asked you about that you said oh well it's only to stop you being too creative because you think there is a – the heartstrings are being pulled or something but if it's going to be more than that then I really would like to have chapter and verse because I'm not sure why you can't say look at this agreement in 1985, the landlord delivers this premise over, why should the tenant be responsible. Suppose there hadn't been any of that back story what would your argument be then? The landlord possessing deeply contaminated land, unloads it onto unsuspecting Mobil, what's your argument then?

MR GALBRAITH QC:

Well that would be a much harder argument to maintain.

ELIAS CJ:

By why should it be different in principle from what you're running here unless you can establish Mobil's responsibility for the contamination?

MR GALBRAITH QC:

Well – which I believe we can but leaving that aside, what would normally happen, one can say if you're going to be the tenant of hotel premises, get away from houses, the lessee will go and do due diligence on it and so they won't be able to come along and say, "Hey we didn't know that there was a whatever" because they will have done due diligence, that's exactly what happens.

ELIAS CJ:

But would the lessee have to remedy the land for the benefit of the landlord in that case, absent any back history of involvement with the land?

MR GALBRAITH QC:

Well probably is the answer subject to whatever the particular facts are which may be so, as I said like latent defects, may be so extreme that it's not regarded as appropriate but it's a little bit hard here to separate out the fact that Mobil did know because they'd done it but if it had been, say the land had been let to Luna Rossa for example and then Luna Rossa ran into –

ELIAS CJ:

Yes has to reinstate it.

MR GALBRAITH QC:

Yes exactly, that's the point I was just going to make, I mean that, I think they'd had a lot of difficulty before Your Honours at that stage probably.

GLAZEBROOK J:

Well you just say it's based on the keep means put.

MR GALBRAITH QC:

Yes.

GLAZEBROOK J:

And keep means put except in exceptional circumstances and the exceptional circumstances may be that the landlord knowingly let contaminated land to somebody who had no means of knowing it was contaminated, the latent defect thing and therefore the landlord can't say ha ha you have to reinstate.

MR GALBRAITH QC:

That's right.

ELIAS CJ:

But what's the legal route to that result?

GLAZEBROOK J:

Keep means put I think, isn't it?

MR GALBRAITH QC:

Well I think you could get caught under, well at least one possibility I suppose is under the Fair Trading Act representation silence, you know, you're representing this land as suitable for your use and in fact it's not and you know it's not because it's full of jolly oil or whatever else it might be, I don't think you'd get – well I think you'd be in some trouble.

ELIAS CJ:

No but we've got to compare the same sort of case. So you've got Luna Rossa out – or you've got the landlord – no you've got the landlord out of time and pursuing its remedies

with whoever did the pollution and you have the landlord then turning to Luna Ross and saying, “Well reinstate this land because that’s what your contractual obligation is.”

MR GALBRAITH QC:
But that’s when Luna Rossa says, “You didn’t tell me that this land was polluted or contaminated, you’ve represented it to me that it’s suitable for my use, you’ve said you can go ahead and use it for whatever, it wasn’t” and therefore you're caught under the Fair Trading Act and probably something else as well but certainly the Fair Trading Act I would have thought. I mean it’s a bit the other way round here, what we’ve got, I don’t want to take this too far, but what we’ve got is that if anybody knew best or better out of the two parties, it was Mobil. Mobil sign up and now they say hey we don’t have an obligation to fix this and you didn’t write it into the lease at the time specifically, I mean they're the ones who had all the knowledge, all the expertise. Mobil didn’t have just one site in New Zealand, they had sites all over the world. I mean the possibility that Mobil didn’t understand about contamination or put it another way the Auckland Harbour Board should be held to a higher standard than Mobil or a higher standard of knowledge than Mobil’s, a bit unlikely I think.

GLAZEBROOK J:
So the answer to that could be well Mobil keeping silent when it wasn’t specifically put in the lease, it doesn’t mean they’ve accepted the obligation.

MR GALBRAITH QC:
That's what Mobil would say, yes, I agree. So really, we just finish that section by saying that on the particular facts of this case, and I'm not saying that there could be different facts for a different case, there’s no need or reason to gloss the words good order and clean and this site, quite clearly, wasn't in good order and it's got to be fixed and quite why that should fall on the Harbour Board who are “the innocent party” in the whole thing.

So then the fallback position, as you know, was an implied term and we refer to the Canadian judgments and I will just take you to one judgment if you don't mind.

GLAZEBROOK J:
Did you want to say anything about the pleading point that was made by Mr Ring? A pleading point in terms of that that implied terms of the Canadian cases was not pleaded? Actually Mr Ring is looking puzzled so maybe he wasn't making a pleading?

O’REGAN J:

No, I think what he was saying was the Court of Appeal found a different implied term from the one that was contended for in the pleading.

ELIAS CJ:
That was pleaded, yes.

MR GALBRAITH QC:
That's possibly right. Can I just check?

O'REGAN J:
They found there was an implied term not to commit waste and that wasn't what, that wasn't the implied term that the development Auckland said should be implied.

MR GALBRAITH QC:
Sorry, can I just check that? The implied term as it was pleaded, Your Honours, is found in volume 1 at page 101 but that's the fourth amended statement of claim which I think is the right one. There was an implied term of the leases that, "The defendant would, during its occupation, take all steps available to prevent contamination of the site by hydrocarbon pollution from its activities and on termination of its occupation would remediate any hydrocarbon contamination caused by its or its predecessor's activities."

Now my learned friend was absolutely right that that didn't exclude the – oh, no, that's right. No, it's only – so it was limited to whatever the parties argued between themselves. It was limited to any hydrocarbon contamination caused by its or its predecessor's activities so I'm not sure that that is –

ELIAS CJ:
So that really is waste by hydrocarbon pollution, isn't it?

MR GALBRAITH QC:
That's what it is, yes, right. And –

GLAZEBROOK J:
So the answer is it was pleaded?

MR GALBRAITH QC:
It was pleaded, yes.

GLAZEBROOK J:
And not quite in the same terms but effectively what the Court of Appeal found?

MR GALBRAITH QC:
I think to the same effect, and if I could just take you without dwelling on it. In our bundle of authorities, tab 12, and there are some other Canadian authorities which are also at tab following, but this is the latest of the authorities, at least we found 2007, *Canadian National Railway Co v Imperial Oil Limited* [2007] BCJ 2297.

ELIAS CJ:
Sorry, I was a bit slow?

MR GALBRAITH QC:
I'm sorry, tab 12 in our bundle of authorities, Your Honour, and it has got some similarities to our factual situation because you'll see behind tab 12, the first page of the case. "On the 1st of August 1914 the Grand Pacific Railway Company leased to the Imperial Oil Company a parcel of land for use for storing and distributing oil. The parties to the action and successors to those companies and varying portions of the land have continued to be leased since that time, the number of lease agreements over the years". Paragraph 2, "Over time Imperial constructed 16 above ground storage tanks". Three, "In 1993, Imperial decommissioned its operations, didn't seek to terminate its lease until August 2000, so it's got a lot of similarities". Four, "Two critical issues and the nature and extent of the contamination by hydrocarbons and metals contained in its soil and whether that contamination was caused by Imperial's use of the land. Between 1992 and 2002 Imperial retained environmental consultants to sample the soil at different locations", et cetera, et cetera, I don't think we need to dwell on that.

And then there's discussion of the background to the lease, but if you go across to page 4 of the judgment, paragraph 11, you'll see that the clause which was in issue there was, required Imperial within 30 days from the date of termination lease to remove from the demised premises all buildings, et cetera, restore the demised premises to the satisfaction of the lessor leaving the demised premises in a clean and neat condition, so in fact they don't have the good order but they have got clean and neat and so there was then a dispute and there was an argument about whether all the contamination came from Imperial's activities or not which needn't both us.

And then if one goes across to page 13 of the judgement, you'll see there that the second issue is whether on termination the '89 lease Imperial's obligations required restoration to its condition that commenced from the lease in '89 or at the time of the initial occupation. Clause 12 requires them to leave the premises in a clean and neat condition. Forty, talking about Imperial's submissions. The last sentence there Imperial, "Submits that in considering consecutive leases to the same tenant over a period of time, the proper approach is to hold that an act or omission of a tenant under a prior lease is not a breach of the current lease, unless the parties have expressly agreed it should be so." And then across to page 15, talking about, because this issue comes up in other situations, as Your Honours will be aware in *Gibbons* is a case that this Court dealt with on that subject.

Page 15, 44, "In cases where a tenant remains in possession of the property between the ending of one lease and the entering of a new lease, the courts have 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." It discusses that. Goes across page 16, paragraph 50, to discuss a case, *Progressive Enterprises Ltd v Cascade Lead Products Ltd* (1996) BCSC Vancouver C950537, where lead got spilled on the floor of these premises. It says on the top of the next page that, "It was held that was an implied term of the leases." That on termination the defendant would return the lands uncontaminated and refers to the *Darmac Credit Corp v Great Western Containers Inc* (1984) 163 AR 10, 51 ACWS (3d) 1170 (Alta QB) decision which is in this bundle, then refers to *O'Connor* in 51, again says that lead to a similar conclusion it's an implied term. That the parties intended the premises to be returned uncontaminated. And then if one goes across to paragraph 56, talking about *Westfair Foods Ltd v Domo Gasoline Corp*¸(1999) 133 Man R (2d) 77 which is a case that went the other way that my learned friend referred to in respect of knowledge and in 56 the third sentence refers to, "The lease required the tenant to restore 'the surface of the ground'… The lease said nothing about the subsurface of the land. The Court held that there was an obligation to repair the subsurface but it was sufficient for the tenant to have restored the site to meet 'appropriate and reasonable standards of clean-up'." Then 57 the conclusion that His Honour Justice Ralph came to, "In my view, the absence of an explicit reference to the subsurface of the property in the 1989 lease does not excuse Imperial of an obligation to remediate subsurface contamination caused by it." We obviously do have the subsurface which is leased here and the Court of Appeal held that.

ELIAS CJ:

But it was caused by it and I'm still troubled by the –

GLAZEBROOK J:
They do say "successor", is successor –

MR GALBRAITH QC:
No this was a successor because don't forget there were lots of leases between 1914 and 1989 in this Canadian also. Lots of leases.

ELIAS CJ:
Yes, but what's the – were they formerly successors to the lease in that case? I'm just, it's very light on legal analysis this…

MR GALBRAITH QC:
Well it depends what you're using it for though, Your Honour, because if one is using it as a, there's a legal obligation to assume the obligations of the previous leasees and I mean that's a legal question. We're using it –

ELIAS CJ:
Well that's how it's being used here isn't it?

MR GALBRAITH QC:
No, I'm using it here and saying that the –

ELIAS CJ:
No you are –

MR GALBRAITH QC:
Sorry, I am, yes, oh, this case.

ELIAS CJ:
– but in this case they are legal successors, aren't they?

MR GALBRAITH QC:
Ah, probably. I just –

GLAZEBROOK J:
But isn't the argument that the requirement under the current lease is to return it in an uncontaminated position.

MR GALBRAITH QC:
Right.

GLAZEBROOK J:
So it doesn't actually matter and you might get out of it if you can show that some totally third party had responsibility, so that's the argument.

MR GALBRAITH QC:
Yes, that's right.

GLAZEBROOK J:
Rather than, so normally you just have an absolute obligation to do that but if you can show that it had absolutely nothing to do with you at all in a factual sense, rather than a legal sense.

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
I'm not saying that I necessarily agree with that argument but that's what I understand the argument to be.

MR GALBRAITH QC:
Yes, yes.

O'REGAN J:
Yes, but that's effectively saying "put" means "keep" some times and not in other times.

ELIAS CJ:
Yes.

MR GALBRAITH QC:
It might well, its, it's like interpreting anything, it may in the particular circumstances and as I say the latent defect one is the one which the cases deal with. There's a case, for example, where the building was built on, it was wooden foundations built on some land which was going to rot the foundations and that was the lessor's "fault" and so it was held there that the

lessee didn't have to rebuild the whole building from the ground up because otherwise that's what they would have had to do so…

GLAZEBROOK J:
Well it always means put –

MR GALBRAITH QC:
Yes.

GLAZEBROOK J:
Unless there's an unfairness or a particular reason why it shouldn't. Is that more or less?

MR GALBRAITH QC:
That's really it, more or less, yes.

ELIAS CJ:
Well that's not a matter of construction of the terms of the agreement, that's a matter of fairness and equity in result, isn't it? I'm just –

MR GALBRAITH QC:
I understand what Your Honour is saying. I don't, if one reads all the cases, I don't think the cases, I think the cases treat it, both, different cases treat it different ways, but yes there are cases that say exactly what Your Honour has just said and there are cases which say that we have to interpret this in the context of the mutual understanding of the parties at the time et cetera et cetera, and therefore we'll read down effectively the, they can't have intended the, to accept this obligation in those particular circumstances, an obligation as extensive as that, and I suppose you get back to the *Hadley v Baxendale* in a sort of sense that if you weren't, there was nothing to apprehend that the foundations of the building were on –

ELIAS CJ:
We're talking about liability not extended damages here.

MR GALBRAITH QC:
Yes, but you're still talking about what are you liable for.

ELIAS CJ:
Yes.

MR GALBRAITH QC:
And so that's why I think some of the cases more treat it as interpretation and others treat it as, as you say, it couldn't be equitable to impose that obligation.

ELIAS CJ:
So the two critical issues identified in this case at paragraph 4 are the second one is whether that contamination was caused by IOL's use of the land?

MR GALBRAITH QC:
Yes, because there was argument that some of the contamination came from other sources, and they resolved that and decided it was, in fact, caused by Imperial, but that's another issue.

ELIAS CJ:
Well except it's pretty fundamental to the result in that case.

MR GALBRAITH QC:
Yes, yes.

ELIAS CJ:
Okay.

GLAZEBROOK J:
Was that contamination caused by neighbours or pre-existing contamination?

MR GALBRAITH QC:
No it, sorry, there's more of an analysis of whether – it is the metal's contamination on the site and the question was whether that could come from the activities of Imperial or could have been –

ELIAS CJ:
They acknowledge the hydrocarbon contamination, didn't they?

MR GALBRAITH QC:
Yes.

ELIAS CJ:

But they denied the metal contamination.

MR GALBRAITH QC:

Yes, that's right.

ELIAS CJ:

That's what I'd read earlier.

MR GALBRAITH QC:

That's what that was about.

ELIAS CJ:

Well in this case –

MR BAILEY:

So the argument there was –

ELIAS CJ:

– do we have a finding of fact that Mobil caused the contamination?

MR GALBRAITH QC:

We certainly have, I believe it's accepted between the parties, I hope it is, that the hydrocarbon contamination is Mobil's problem and chemical contamination –

ELIAS CJ:

Well Mobil's probably but it's all very slippery. What's the finding? Can you just remind me, sorry, what the finding of fact is?

MR GALBRAITH QC:

Good question. I'll have to –

GLAZEBROOK J:

I'm not sure if it's ever suggested – if you look at Mobil in the wider sense I don't think it's suggested it could have been anyone else.

O'REGAN J:

Well there was the spillage by Shell –

GLAZEBROOK J:
Apart from the –

ELIAS CJ:
I'm not, it's not that Mobil in the wider sense. I would like to find…

MR GALBRAITH QC:
Well there was – well.

ELIAS CJ:
This lessee.

MR GALBRAITH QC:
Well you see the complication, sorry Your Honour, is this. That Mobil's case was, Mobil in the wider sense if I can just use that term, had done so much contamination to the site by the 1970s that it didn't matter a tinker's toss how much more oil they poured into it, because you were still going to have to do this remediation, so on the other hand there was plenty of evidence, well plenty of evidence, yes, there was plenty of evidence, I cross-examined on it, that Mobil continued to discharge oil by reason of spillage and other misdeeds, into the soil after the so-called tipping point had been reached, and the 1986 Shell one, which the, the jet fuel which leaked from the Shell thing, was way after the tipping point, so it doesn't matter a toss because you're already in the 1970s, on Mobil's own evidence, in a situation where the land was so heavily saturated by hydrocarbons and chemical discharge that it, nothing else you put in there made any difference. So that was Mobil's evidence and you'll see –

ELIAS CJ:
So what are the, can you just point me to the findings of fact in the –

MR GALBRAITH QC:
Well I just, well paragraph 3 for example of the Court of Appeal judgment, "The land is heavily contaminated by petroleum products, the result primarily of Mobil's activities until about 1970, by which time the land was so polluted as to require complete remediation."

O'REGAN J:
Sorry, what paragraph?

MR GALBRAITH QC:

Paragraph 3. "Mobil is not responsible for all the damage; some of the original fill was also contaminated, and spillage from other industrial uses on nearby sites has contributed to subsurface contamination."

O'REGAN J:

So the tenant under the 1985 lease, you're saying, hasn't made any, although they might have spilt more it hasn't made it worse?

MR GALBRAITH QC:

Well that's Mobil's evidence, yes.

GLAZEBROOK J:

And there were findings –

O'REGAN J:

Yes, but different iterations of Mobil are responsible?

MR GALBRAITH QC:

Yes.

O'REGAN J:

Right.

MR GALBRAITH QC:

I'm not saying we entirely accept, well that's what I said about the tipping point argument before, and you can have a look at my cross-examination if you want to, but…

O'REGAN J:

All right, but you're kind of using it in your favour here, aren't you?

MR GALBRAITH QC:

I am, yes, because that was my – no you're quite right, Sir, I am, and perhaps just note paragraph 5, the first sentence, "AWDA brought this proceeding to recover $10 million, the agreed cost of remediating that part of the contamination caused by Mobil." So there's the two factual findings.

ELIAS CJ:
And in the High Court?

MR GALBRAITH QC:
Good question.

ELIAS CJ:
You might have it in your submissions.

MR GALBRAITH QC:
I might. Well paragraph 2 talks about, that's on page 41, 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." A major spill from Shell. "Finally, significant contamination was caused by Mobil's own activities on the sites over the 50 to 60 years of its occupancy."

ELIAS CJ:
In sort of renewals of leases like this is it common to have no linkage in the –

MR GALBRAITH QC:
Yes because you get, the *Gibbons* case is a good example. I got fired after the Court of Appeal, when I lost in the Court of Appeal. The *Gibbons* case was an example where because there was a sublease and you can't have a sublease for the same period of time as the headlease, therefore there was a gap that was created between the renewal and the – and we succeeded in the High Court, lost in the Court of Appeal, and I got sacked and Mr Curry got engaged but they lost in the Supreme Court too, so it wasn't just me. But what the Court said there was you have to look at this, I suppose I'd use the term realistically, and the contention was it would be a continuing lease albeit that it actually provided that one sublease came to an end and after a gap of a day, I think, then the new one was to commence, but all provided for, of course, in the lease document.

ELIAS CJ:
Yes, yes.

MR GALBRAITH QC:
Which I don't think these do.

ELIAS CJ:
Which doesn't happen here.

MR GALBRAITH QC:
No, I don't think these do.

O'REGAN J:
But here we did have the assets actually passing –

MR GALBRAITH QC:
Yes.

O'REGAN J:
– the ownership of the assets actually going back to the Harbour Board in between the, before the 1985 lease, didn't we, so that there was that formality of a one lease has ended, it's all over, the Harbour Board has now got an untrammelled title, and then it's entered into a new lease.

MR GALBRAITH QC:
Yes, and that was because they were reshuffling everything because they were –

O'REGAN J:
Well it was also because they did it five years later and backdated it.

MR GALBRAITH QC:
That's also true. No Your Honour is quite right.

O'REGAN J:
So for five years presumably the Harbour Board nominally owned all those assets.

MR GALBRAITH QC:
Yes.

ELIAS CJ:

Could have inspected them.

MR GALBRAITH QC:

But, of course, the Mobil were still using them, you know, so it was business as usual as the – and those are the assets that had been there from day 1 or day 10 or whatever it might have been. So the, well that's really the, Your Honours were discussing with me this question, the third question which is does the remediation obligation relate only to the contamination since 1985, which is our pages 17 and 18, and I'm not sure there's much more that I can say about it unless Your Honours have further questions on that?

ELIAS CJ:

Any questions? No, no thank you Mr Galbraith. Well we were thinking of taking a short break but you won't be very long, will you, Mr Ring, you'd prefer to, we'll carry on I think.

MR RING QC:

There's only a few points that I wanted to cover. First, that pleading point. Your Honours the pleading point which is page 101, paragraph 25 of volume 1, it's not an implied term pleaded of an obligation not to commit waste because it seeks to hold Mobil liable for the contamination caused by its predecessors, and that's the key point. As the point has been made a number of times here today already, waste can only be committed by the perpetrator, and there can only be liability to the perpetrator, and it's for that reason that in my respectful submission there's been an undue focus and an undue thrust in my learned friend's submissions on waste because waste is not really relevant here.

There's just a, probably two or three points I wanted to make about that. First of all that most waste, as I said, can only require a tenant to remediate damage that it has caused. Second, by 1985 those rights which had arisen not to commit waste, if any, under the previous leases, had been lost, and after 1985 there was no more damage that could have given rise to a claim for waste under the 1985 leases.

ELIAS CJ:

I'm just wondering about that. I'm just wondering about some of the case law recently about doubling up on responsibility. It doesn't seem very attractive to say that if you pollute you're not responsible for the remediation because the land is so badly affected by earlier pollution.

MR RING QC:

But we're not saying that Your Honour. What I'm, all I'm saying in what I've just been talking about is that if there were obligations not to commit waste under the previous tenancies, under the original leases and into the 1975 leases, then those rights had been, they'd not been used by 1985 and they'd been lost because the tipping point had already taken place.

ELIAS CJ:

No, it's the tipping point argument I suppose I'm reacting to a bit. But anyway, that's fine, I understand.

GLAZEBROOK J:

Well it's a, I suppose the answer to that may be, well those rights have been lost but the rights, to the current tenant haven't been lost, and just because it was already polluted doesn't mean that you're still not, that you're still not in breach of the obligation not to pollute. Assuming there is an obligation not to pollute on the lease.

MR RING QC:

I accept that but it's all part of the point that Your Honour the Chief Justice –

ELIAS CJ:

It's still got to come out.

MR RING QC:

Yes, well –

ELIAS CJ:

The oil's still got to be extracted. It's a bit eggshell skullish.

MR RING QC:

Well except in the sense that when the negotiations are taking place for the 1985 tenancy agreements, and the environment in which that's taking place, of course, is that until Mobil signs on the dotted line to a "make good" clause that "keep means put", it doesn't have any responsibility for the previous pollution.

GLAZEBROOK J:

But even accepting that it might still have responsibility for its pollution. The fact it didn't make it worse, does that mean that it doesn't have to pay or contribute…

O'REGAN J:
It'd just be a no loss argument, wouldn't it?

MR RING QC:
Yes it would.

O'REGAN J:
It's caused no loss. It's liable but it's caused no loss.

ELIAS CJ:
But if it's discharged hydrocarbon contaminants they have to come out. It may be that getting the last lot out is also going to remove what went in earlier, but does it matter? I'm just wondering about the way you're looking at it?

MR RING QC:
Well the way we're looking at it, Your Honour, is that as at, let's say as at 1980, before even the backdated beginning of the tenancy agreements. As at 1980 there was 2.5 hectares that could only be fixed by three and a half metres of excavation and everything else that goes with it, and although people may not have known that, or know to that extent, it was, in Your Honour's terms, it was contamination waiting to come out. The fact that then further damage, well I'm not going even to use the word "damage" because that then becomes debatable, the fact that further contamination is poured in there, doesn't change anything. It's still exactly the same scope of work, it's going to take exactly the same period of time, and cost exactly the same amount. So in legal terms, and in the terms that I'm more familiar with, in insurance terms we would say there's no damage.

ELIAS CJ:
But that's so if you're seeking damage but if you're seeking reinstatement isn't the lessor just perhaps lucky because you have to, what's the word, I can't remember what it is, reinstate, the one beginning with R –

MR RING QC:
Remediate?

ELIAS CJ:
Sorry, yes, you have to remediate in terms of the discharge that you've put into that land. If that means you have to, that you also take out a lot of other earlier contaminants well, so

what. It's – I'm just wondering about the static view of it as claim for damages and whether really it's slightly different. Anyway. I will think about it.

MR RING QC:

A couple of other points. My learned friend referred to the short-term lease point as being not necessarily valid because in the non-Wiri leases, on the Wiri tenancy agreements, they contemplated, even inside the agreements themselves, that the 10-year leases would be entered into. We say in answer to that that nothing much can be made of that in favour of DAL because the parties were assuming the obligations they were assuming under the 1985 agreements. The fact that they contemplated, and even contemplated it so strongly that they wrote it in the 1985 agreements, that they were going to enter into long-term leases, is neither here nor there on that. The fact is they entered into periodic tenancies and in the case of those ones tenancies that could be terminated on a month's notice, and the unreliability of that point of course is only reinforced by the fact there were no long-term leases, in fact, entered into, and here we are dealing with the parties' obligations and rights under those 1985 agreements. So we say nothing much can be made about the 10-year anticipation and this case has to be viewed on the basis that in assuming periodic tenancy obligations under the 1985 agreements, did Mobil assume the obligation to remediate hydrocarbon contamination caused by other people.

GLAZEBROOK J:

And does that, that's other people meaning the Australian people, or more widely?

MR RING QC:

I'm, by other people I'm in Your Honours the Chief Justice's cab, other people is everybody but Mobil New Zealand.

ELIAS CJ:

Even they –

GLAZEBROOK J:

That's up to 1975 then is it?

MR RING QC:

Yes, and what those factual findings that you were taken to make clear, and I'll just give you one more, I'm not sure that it adds anything but for completeness you may as well have it, that's the High Court judgment at paragraph 95(d), on the top of page 67. Make it very clear

that there were decades of contamination by legal entities that were not Mobil and for whom, for whose conduct Mobil were not legally liable for.

WILLIAM YOUNG J:
Do you accept that the New Zealand Vacuum and Atlantic companies are Mobil for these purposes?

MR RING QC:
I'm accepting the New Zealand companies are Mobil, yes, but they only became –

WILLIAM YOUNG J:
Yes, in the 1950s.

MR RING QC:
In the, they only became occupiers in the 1950s.

GLAZEBROOK J:
Sorry, I thought you were from 1975 when it was actually Mobil but you're actually going further back?

MR RING QC:
No, I am accepting that the companies that took the assignments in the 1950s and 60s –

GLAZEBROOK J:
Okay, that's what I thought you'd said earlier, but I thought you were going back just as, 1975, okay, everybody up to basically the New Zealand – it's Australia/New Zealand is your split.

MR RING QC:
The usual split between Australia and New Zealand. and also, which is made clear in all of the passages that you've been given to on those factual findings there is contamination caused by present and former neighbours as well, that is in the mix. So the question that really there needs to be answered is forget about waste, because waste is only about taking responsibility for your own contaminating conduct, didn't –

GLAZEBROOK J:

Well although, are you saying that you would take responsibility for Mobil New Zealand, for New Zealand conduct or not?

MR RING QC:

I'm talking about waste up until, the tort of waste in the leases and – or arising out of the leases and agreements up until 1985. So that includes the original leases that were Mobil Australia and the assignment of those leases in the 195s and 60s to the New Zealand, Mobil New Zealand entities, and also when it became Mobil itself in 1975, well by then we're at the tipping point.

GLAZEBROOK J:

Who's responsible for those or is nobody now responsible? Sorry, I'm just trying to get what you do accept and what you don't accept.

MR RING QC:

Yes, what I'm accepting is that there could well have been a liability under the tort of waste.

GLAZEBROOK J:

So you're talking about the tort?

MR RING QC:

Yes.

GLAZEBROOK J:

All right.

MR RING QC:

It could well have been a liability under the tort of waste against any particular entity that could have been proved to have caused particular damage, or damage over a particular period, but when we came to the 1985 negotiations that led to the 1985 tenancy agreements, we're actually talking about something different from the tort of waste. We're talking about Mobil New Zealand putting up its hand for the liability of those other entities. The historic contamination by other entities and the cutting edge of the question, the essential question that's been an issue here, the interpretation question, is whether by the make good clause Mobil was putting up its hand for not only anything that it was responsible for, but anything that anybody else was responsible for on those sites.

GLAZEBROOK J:

When you say "it" do you mean "it" from 1981, or is it 1981 isn't it, "it" from 1981?

MR RING QC:

Yes.

GLAZEBROOK J:

Or "it" New Zealand "it" from the 1950s or "it" for the – "it" in the manifestation of Australian "it" as well?

MR RING QC:

I'm talking about "it" being Mobil, accepting responsibility for the contamination conduct of parties for whose conduct it did not, at that stage, have any legal liability.

ELIAS CJ:

Has it acknowledged any, do the pleadings acknowledge any responsibility?

MR RING QC:

I don't remember that particularly but, I mean from Mobil's point of view, Mobil accepted responsibility for its own contamination –

WILLIAM YOUNG J:

Can I just put this slightly differently. Leaving aside a context to this case, do you accept that Mobil, as an entity, is responsible of such liabilities as the New Zealand Vacuum and the New Zealand Atlantic companies might have?

MR RING QC:

Yes.

WILLIAM YOUNG J:

Yes. And you say they don't have liabilities –

O'REGAN J:

You say they didn't have any liabilities in 1985 so what you're saying is Mobil started with a clean sheet in 1985?

MR RING QC:

Yes.

GLAZEBROOK J:

And why did it start with a clean sheet if it entered into the – because it certainly entered into the 1975 agreement, leaving aside tipping point.

O'REGAN J:

Because the waste liability had become stale.

MR RING QC:

Correct.

O'REGAN J:

By a limitation.

MR RING QC:

Correct.

GLAZEBROOK J:

But if it accepted it under a contract, what's it got to do with the tort of waste?

MR RING QC:

Well if it accepted it under a contract I agree, but that is where the interpretation point is because what is being said is that Mobil, having no legal liability, for those other entities conduct, is voluntarily putting up its hand and accepting that responsibility by contract. That's what supposedly clean and tidy means, according to the respondent.

GLAZEBROOK J:

Well if it does it does, if it doesn't it doesn't, but this is just an argument to say why would it, is it?

MR RING QC:

Well –

GLAZEBROOK J:

Why would it accept legal liability for conduct that was either limited, limited in terms of limitation periods, or for which it had no responsibility because it was a different entity, is that what the argument is?

MR RING QC:

That is the point.

GLAZEBROOK J:

So it's an aid to interpretation of the contract?

MR RING QC:

Yes.

GLAZEBROOK J:

Okay, got it.

MR RING QC:

Correct. It's an aid to interpretation and it's also, and if the parties expected that that's what the clean and tidy clauses were intended to do, you would have expected much more specific language to achieve that.

GLAZEBROOK J:

Though if you accept keep means put then there is that language as long as clean and tidy or good order means that?

MR RING QC:

That's right, but again if keep means put and everybody knows that the back lot is everybody knows keep means put then you've got the same inherent implausibility.

GLAZEBROOK J:

I understand that.

MR RING QC:

Unless Your Honours have anything further, those are my submissions in reply.

ELIAS CJ:

Thank you Mr Ring. Thank you counsel for your assistance, we'll reserve our decision in this matter and we'll adjourn.

COURT ADJOURNS: 4.15 PM