IN THE SUPREME COURT OF NEW ZEALAND

SC 107/2015
[2016] NZSC 89

BETWEEN	MOBIL OIL NEW ZEALAND LIMITED Appellant
AND	DEVELOPMENT AUCKLAND LIMITED (FORMERLY AUCKLAND WATERFRONT DEVELOPMENT AGENCY LIMITED) Respondent

Hearing:	20 April 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	M G Ring QC and J P Greenwood for Appellant A R Galbraith QC and M C Smith for Respondent
Judgment:	20 July 2016

JUDGMENT OF THE COURT

A The appeal is allowed, the judgment of the Court of Appeal is reversed and the judgment of Katz J (including the costs orders made by her) is restored.

B Mobil is entitled to costs in respect of the appeal to the Court of Appeal to be fixed by that Court and to costs of $25,000 and reasonable disbursements in respect of the appeal to this Court.

REASONS

(Given by William Young J)

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The appeal

[1] From the mid-1920s until 2005, properties in Pakenham Street and Beaumont Street, Freemans Bay, Auckland were used for the bulk storage of oil and associated purposes including distribution of oil and petrol (bulk oil storage). The land in question had been reclaimed from Waitemata Harbour by the Auckland Harbour Board in the early years of the last century. The initial use of the land for bulk oil storage was pursuant to leases from the Auckland Harbour Board to Vacuum Oil Co Pty Ltd and Atlantic Union Oil Co Pty Ltd. They were Australian companies and later became part of the Mobil Australia group. In the 1950s and 1960s the leases were taken over by similarly named New Zealand registered companies that were subsequently amalgamated to form the appellant, which accordingly succeeded to their liabilities. In contradistinction, the appellant has not succeeded to the liabilities of the Australian Vacuum and Atlantic Union Oil companies. In recognition of this distinction, we will refer to the New Zealand predecessor companies and the appellant collectively as "Mobil" and to the Australian Vacuum and Atlantic Union companies as "Mobil's Australian predecessors". The Harbour Board was the lessor under all relevant leases. These leases were replaced by tenancy agreements in 1975 and 1985 between the Harbour Board and Mobil.

[2] The Harbour Board was later disestablished. Its initial successor was Ports of Auckland Ltd (Ports of Auckland). At the time the litigation commenced and until

after the Court of Appeal decision, Auckland Waterfront Development Agency Ltd stood in the shoes of the Harbour Board. That company has since changed its name to Development Auckland Ltd[1] (Development Auckland) and we will refer to it in these reasons by its current name.

[3] The Pakenham and Beaumont Street sites are in the Wynyard Quarter area which is now being developed for mixed commercial and residential uses. These sites are heavily contaminated and, if they are to be so developed, must be substantially remediated – an exercise involving removal of soil to a depth of 3.5 m across both sites (approximately 2.5 ha) – and its replacement with clean material. This contamination mainly resulted from leakage and spillage of petroleum products associated with the activities of Mobil and its Australian predecessors although there are other contributing causes, in particular the nature of the fill used in the original reclamation and spillage of contaminants on adjoining sites.

[4] Under the original leases and the tenancy agreements entered into in 1975, Mobil was required to surrender to the lessor the improvements which it and its Australian predecessors had placed on the sites. The tenancy agreements which are primarily in issue in this appeal were entered into in 1985. The agreements provided, in different ways, for the removal by Mobil of the improvements from the land and, pursuant to what we will call "the clean and tidy condition", for Mobil during the tenancies to keep, and at their end to return the land, in "good order and clean and tidy".[2]

[5] The tenancies came to an end in 2011.

[6] In the High Court, Development Auckland contended that Mobil had been obliged to remediate the land so as to remove all contamination (other than that caused by the original fill) at the expiration of the tenancies. Development Auckland relied on two bases for this obligation; first, the clean and tidy condition; and secondly, in the alternative, an implied term. We have already explained what such a remediation exercise would involve. The cost to Mobil of such an exercise would

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1 Development Auckland Ltd is a council-controlled organisation: see s 6 of the Local Government Act 2002.

2 There were minor but immaterial variations of the clause across the different agreements.

have been in the order of $50 million. The actual claim, however, was for only $10 million. This figure represents the incremental cost to Development Auckland of remediating the land as part of its own development work compared to what that development work would have cost if Mobil had remediated the land itself.

[7] These claims failed in the High Court, with Katz J:[3]

(a) finding that on its true construction, the clean and tidy condition did not reach subsurface contamination; and

(b) dismissing the implied term argument.

A subsequent appeal to the Court of Appeal was allowed and judgment was entered for Development Auckland for $10 million.[4]

The occupation of the land by Mobil and its Australian predecessors

[8] The land in issue forms part of a 67 acre reclamation at Freemans Bay, known as "the Western Reclamation" which the Harbour Board completed between 1905 and 1917. Bulk oil storage facilities came to be located at Freemans Bay in the mid-1920s and from mid-1930s Auckland's bulk oil storage facilities were consolidated there. This was with the active encouragement of the Harbour Board.

[9] The first of the relevant leases was granted in 1925 (to Vacuum) with the second being granted in 1927 (to Atlantic Union). Subsequent leases were entered into in 1938 and 1951 with Vacuum. In 1953, Vacuum's interest in the leases was transferred to Vacuum Oil Co (NZ) Ltd and in 1962, Atlantic Union's interest in the lease of the Beaumont Street property was transferred to Atlantic Union Oil Co NZ Ltd. As noted, these companies were later amalgamated to form the appellant, which thus succeeded to their liabilities. For this reason we propose to treat Mobil's occupation of the properties as having commenced in 1953 and in 1962. In 1975, the

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3 *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2014] NZHC 84, (2014) 15 NZCPR 391 [*Mobil* (HC)] at [95] and [99].

4 *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZCA 390, [2016] 2 NZLR 281 (Ellen France P, Harrison and Miller JJ) [*Mobil* (CA)].

parties entered into two tenancy agreements which replaced four of the five leases.[5] The two tenancy agreements terminated in December 1980. From that time Mobil held over until the 1985 tenancy agreements were signed.[6] At that time some of the land was surrendered. Mobil stopped using the rest of the land for bulk oil storage in 2005 and handed it back to Development Auckland in 2011.

[10] Over the decades that the land was occupied by Mobil and its Australian predecessors, their activities resulted in substantial contamination. This was due to:

(a) leakage from tanks and underground pipes resulting from corrosion;

(b) the clearing of pipelines using seawater "slugs" which resulted in a mixture of water and hydrocarbons settling in the bottom of storage tanks and then being drained into the tank compounds;

(c) the use of water to remove petroleum products (which would float on the water) from tanks with the resulting mixture being discharged into the compounds; and

(d) spillage associated with Mobil's operations.

[11] Mobil and its Australian predecessors were not the only sources of contamination. The fill used for the reclamation included demolition debris, gas works waste, refuse from city tips and material extracted from the harbour in the vicinity of sewage and gas works discharges. As well, in 1986 Shell spilled a considerable amount of aviation fuel on adjoining land which also contributed to the accumulated contamination on the land leased by Mobil.

[12] The evidence led by Mobil in the High Court suggest that at some time during the 1970s the land leased by Mobil had become so polluted as to require complete remediation before it would be fit for general use. In her judgment, Katz J described this as the "tipping point".[7] If the tipping point was reached in the 1970s,

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5 Mobil held over in respect of the fifth lease.
6 The agreements were backdated to 1981.
7 *Mobil* (HC), above n 3, at [72].

it would follow that the subsequent actions of Mobil caused no loss. Although she did not make definitive findings as to if and when a tipping point of this kind was reached, Katz J proceeded on the basis that Development Auckland had not set out to, and could not, establish any loss in relation only to contamination which occurred after 1985.[8] By the time the case was argued in the Court of Appeal, it was common ground that the tipping point was reached sometime in the 1970s.[9] We note in passing that a combination of a similar tipping point finding, along with the Limitation Act 1950, resulted in claims very similar to those of Development Auckland being dismissed in *BP Oil New Zealand Ltd v Ports of Auckland Ltd*.[10]

[13] In 1981 the major oil companies operating in New Zealand commissioned the construction of a shared terminal at Wiri to be supplied through a pipeline from the Marsden Point Refinery. The Marsden Point to Wiri pipeline was in operation by May 1986. At about the same time a pipeline was constructed from Wiri to carry aviation fuel to Auckland Airport. These developments substantially reduced the need for bulk oil storage at Freemans Bay.

[14] The major spillage of aviation fuel by Shell in 1986 to which we have referred led to investigations into contamination. As a result of reports obtained in 1989, it was appreciated that there was a significant issue. In the case of Pakenham Street, a report obtained by Mobil explained that a complete solution would require the removal of all contaminated material and backfilling with clean fill. It was noted that “[f]ull excavation of residual-saturated soils would be very expensive”.

[15] In subsequent negotiations during the 1990s between Mobil and Ports of Auckland (which by then had succeeded to the position of the Harbour Board) Mobil indicated a willingness to remediate for contamination which it had caused but no agreement as to the detail of this was able to be reached.

[16] As noted, by 2005 all operations on the two sites had ended and the tenancy agreements were terminated in 2011.

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8 *Mobil* (HC), above n 3, at [73].
9 *Mobil* (CA), above n 4, at [20].
10 *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC).

The contractual arrangements prior to the 1985 tenancy agreements

[17] The first leases were entered into in 1925 and 1927. They were for fifty years. Under them, the lessee was not to erect buildings or structures without the approval of the lessor to the plans and specifications having been first obtained. The lessee was required to keep and maintain, and at the end of the terms, surrender in "good order condition and repair" all "buildings structures fixtures and fences" as might be placed upon the demised land. Both leases also contained a clause in these terms:

> THAT the Lessee will not carry on or permit to be carried on upon the demised premises any offensive or dangerous trade or business nor do or suffer to be done upon the demised premises anything which may be or become a nuisance or cause injury to the Board or to the owners or occupiers of adjoining lands or suffer the demised premises or anything thereon being or erected to become or remain in the opinion of the Board unsightly or untidy provided that the business of an Oil Merchant at present carried on by the lessee including the storage of petroleum products in bulk shall not be regarded as an offensive or dangerous trade for the purposes of this clause.

[18] Further leases were entered into, with Vacuum in 1938 and 1951, in terms which were similar to the 1925 lease. Such differences as there are, are of no moment for present purposes and thus do not warrant discussion.

[19] Two tenancy agreements were entered into in 1975, one in respect of each site and these replaced four of the five earlier leases. Both contained a provision to the same general effect as the clause set out in [17].

[20] The tenancy in respect of Pakenham Street contained this provision:

> THE Tenant will throughout the said terms keep and maintain the demised premises in good order condition and repair and will so yield up the same at the end or other sooner determination of the said terms.

In contradistinction, the corresponding provision in the Beaumont Street tenancy agreement was in these terms:

> THE Tenant will throughout the said terms keep and maintain in good order condition and repair all buildings fuel storage tanks structures fixtures and fences which are now erected or placed upon the demised premises or any part thereof or which may be erected or placed upon the demised premises or

> any part thereof and will so yield up the same at the end or other sooner determination of the said terms.

[21] No explanation was given to us for why the Pakenham Street tenancy agreement contained an orthodox "good order and repair" condition which extended to the condition of the land, whereas no such clause appeared in the Beaumont Street tenancy agreement or in any earlier or subsequent leases or tenancy agreements.

The context in which the 1985 tenancy agreements were negotiated

Likely future uses of the land as envisaged in 1985

[22] It was recognised in 1985 that once the Wiri pipeline was completed (as it was the following year), Mobil would not require all of the land it then leased at Freemans Bay. It was, however, not contemplated that all the Freemans Bay storage facilities would be surplus to requirements. Indeed, in the early 1990s Mobil commissioned major upgrades to parts of the facilities.

[23] As at 1985, the land was still zoned industrial. Although the potential of the land for uses which might take advantage of its waterfront views and amenities was recognised, there was no developed plan for utilising the land for mixed commercial and residential use. Indeed, realistically, there was no point in engaging in such a planning exercise until it became clear that bulk oil storage activities in the area would stop. As we have noted, such cessation was not contemplated in 1985.

Knowledge of contamination

[24] The Harbour Board understood from the outset – that is from 1925 – that spillage was a risk associated with bulk oil storage. Over the following decades, the records show that the Harbour Board was made aware of incidents which had resulted in petroleum products going into the ground. At least from 1963, the Harbour Board was also aware that the reclaimed land was porous and that petroleum which was spilled on to it could reach the harbour. There is also evidence that in 1979, in the context of a proposal by another oil company to install new tanks, a dangerous goods inspector told the Harbour Board's solicitor that over the preceding years, the "area" (presumably the Western Reclamation) had become

saturated with petroleum products. It was, however, only comparatively late in the piece that the Harbour Board came to realise that this had produced a problem which, depending on the future use of the land, might require substantial remediation. Indeed, the first significant indication of concern about subsurface contamination was not until 1986, following the major Shell spillage to which we have referred.

[25] There is scope for argument as to the reasons for the Harbour Board's apparent lack of concern. At all times Mobil and its Australian predecessors were required to comply with dangerous goods regulations under which, arguably, they had an absolute obligation to prevent spills.[11] It may be that, in the absence of systematic reporting of spills by either Mobil or its Australian predecessors, the Harbour Board was not aware of the full extent of the problem. On the other hand, unless and until the Harbour Board came to think seriously about the land being used for purposes other than oil storage or other heavy industrial activity, there was no occasion to consider the extent and implications of contamination.

[26] A point much stressed by Mr Ring QC for Mobil is that no claim was made by the Harbour Board against Mobil in relation to the contaminated state of the land which was handed back to it in 1985. Nor do there appear to have been any complaints about contamination.

The liability, if any, of Mobil as at 1985

[27] Both Katz J and the Court of Appeal approached the case on the basis that the interpretation of the 1985 tenancy agreements might be affected by whether Mobil carried into the negotiations an accrued liability in relation to the existing contamination of the sites. The arguments in the High Court and Court of Appeal seem to have focused on possible liability for:

(a) breach of covenants (contained in the original leases and carried over to the 1975 tenancy agreements) not to permit anything which might cause injury to the lessor; or

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[11] This is discussed in *Mobil* (CA), above n 4, at [52] and n 38 specifically outlines the applicable regulations.

(b) the tort of waste.

[28] Although there was significant discussion in the judgments of Katz J and the Court of Appeal about Mobil's possible liabilities for breach of the covenant not to injure the lessor or in waste, we prefer not to get into this debate.[12] This is because, at the time the 1985 tenancy agreements were entered into:

(a) the scale and, more significantly, the implications, of the contamination problem was not appreciated by either party;

(b) mixed commercial and residential use of the premises was not then seriously contemplated;

(c) assuming a 1970s tipping point, any claim for damages in respect of earlier contamination would likely have been held to have been barred by the passage of the appropriate limitation period;[13] and

(d) there was no complaint about the contaminated state of the land which was handed back.

For these reasons, we think it unrealistic to treat the commercial context in which the 1985 tenancy agreements were concluded as encompassing an understanding by, or to be imputed to, the parties that Mobil was carrying an already accrued liability to remediate the land.

[29] In his written argument, Mr Galbraith QC for Development Auckland advanced a third possible basis for liability. He contended that Mobil and its Australian predecessors had been obliged, by implied term, to use the land only in a

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[12] See *Mobil* (HC), above n 3, at [47]–[53]; *Mobil* (CA), above n 4, at [38]–[54].

[13] In *BP Oil*, above n 10, Rodney Hansen J upheld limitation defences in similar circumstances. This was despite him approaching the case on the basis that Ports of Auckland could rely on the reasonable discoverability doctrine: see [93]–[114]. In light of the subsequent judgment of this Court in *Trustees Executors Ltd v Murray* [2007] NZSC 27, [2007] 3 NZLR 721, it is clear that this doctrine could not be relied on by the Harbour Board and its successors.

"tenantlike or husbandlike" manner, a proposition based on *Marsden v Edward Heyes Ltd*.[14] He also contended that where a lease is subject to such an implied condition, the delivery up obligations of the lessee encompass the remedying of any prior breaches. This proposition too is, to some extent, supported by *Marsden*.[15] On this basis he suggested that the contamination of the land was a breach of the implied condition to use the land only in a tenantlike manner and that the delivery up obligations of Mobil under the leases and 1975 tenancy agreements encompassed an obligation to put good the damage to the land resulting from contamination. If the delivery up obligations of Mobil extended to remediating the land, the Harbour Board's claims against Mobil would not have been barred by limitation in 1985.

[30] *Marsden* has been cited from time to time but its implications have not been teased out in the authorities. A number of issues arise in relation to its possible application in this case:

(a) The tenancy agreements in *Marsden* were not in writing and the only terms expressly agreed appear to have been in relation to the payment of rent. There is thus necessarily scope for argument as to the applicability of *Marsden* to a written lease which provides for repair and maintenance obligations and in particular to a lease which contains a provision as specific as the clause set out in [17]. Further, the tenancy agreements were all short term and residential.

(b) On one view of it, *Marsden* provides authority for the view that, contrary to the view expressed in *Defries v Milne*,[16] a covenant not to commit waste is to be implied into leases, effectively as a subset of the obligation to use premises only in a tenantlike manner. Indeed, it is cited in support of this proposition in *Hill and Redman's Law of Landlord and Tenant*.[17] This was not the view of Denning LJ in *Warren v Keen* where he stated that the obligation to use premises in a

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14 *Marsden v Edward Heyes Ltd* [1927] 2 KB 1 (CA) at 6 per Bankes LJ, at 7 per Scrutton LJ, and at 8 per Atkin LJ.

15 See below at [30](d).

16 *Defries v Milne* [1913] 1 Ch 98 (CA) at 108 per Farwell LJ.

17 John Furber (ed) *Hill and Redman's Law of Landlord and Tenant* (looseleaf ed, LexisNexis) at A[3361].

tenantlike manner did not impose liability for permissive waste.[18] As his judgment indicates, the cases in which the tenantlike obligation has been upheld have all involved buildings.

(c) Assuming there was a condition restricting Mobil and its Australian predecessors to only tenantlike conduct, there would remain an issue as to whether such condition had been breached,[19] an issue upon which there would be significant scope for argument, as illustrated by the differing approaches of the High Court and Court of Appeal on the related question whether the contamination of the land was authorised by the leases.[20]

(d) While there are passages in *Marsden* which support the view that there is a delivery up obligation of the kind postulated by Mr Galbraith,[21] the case is not clear authority on the point. In *Marsden*, the premises when let had consisted of a two story building in which there was a dwelling house and a store. What was handed back was a single story store. In these circumstances, the lessor might be thought to have had a legitimate complaint even though the conversion had taken place outside the limitation period so that an action for waste would have been barred by limitation.[22] Complicating the picture further is that the limitation point had not been raised at first instance, and one of the Judges was not prepared to engage with the question whether there was a relevant delivery up obligation.[23]

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18 *Warren v Keen* [1954] 1 QB 15 (CA). Permissive waste refers to the adverse consequences to premises of neglect on the part of a tenant as opposed to voluntary waste – such consequences as result directly from the actions of the tenant.

19 *Wycombe Health Authority v Barnett* [1982] 2 EGLR 35 (CA) at 37 per May LJ indicating that the obligation is rather minor.

20 See below at [41] and [45].

21 See for instance the remarks of Bankes LJ in *Marsden*, above n 14, at 6.

22 The judgment of Scrutton LJ at 7 stresses to the extent of the alteration, "[i]f a dwelling-house is let and something which is not a dwelling-house is delivered up, the contract to deliver up in a tenantlike condition is broken."

23 This was Atkin LJ at 8.

(e) In *Regis Property Co Ltd v Dudley*, Lord Denning observed that in *Marsden* the tenant had committed waste, a statement which, while correct, did not capture the basis upon which the case was decided.[24] He then went on to say that a tenant who has committed waste or has treated the premises in an untenantlike manner:[25]

> ... must execute repairs or else pay damages. But in doing so he is not fulfilling an obligation to repair under the terms of the tenancy, express or implied. He is only remedying his own breaches of his common law obligations as to conduct and user.

On this approach, it would appear that the limitation period in relation to untenantlike conduct would run from the time of the breach rather than termination of the lease; or, to put it another way, that the delivery up obligations of the tenant do not extend to the remedying of prior breaches of the tenantlike obligation.

(f) A delivery up obligation of the kind postulated by Mr Galbraith would be very awkward to apply in the context of the pre-1985 leases and tenancy agreements given the requirement to leave the improvements in place.

[31] Given the points just made and the fact that the case was not argued on this basis on the Courts below, we are not prepared to approach our interpretative task on the basis that at the time of the negotiations Mobil was subject to a liability to remediate the land on the basis proposed by Mr Galbraith and discussed at [29].

The 1985 tenancy agreements

[32] The 1985 tenancy agreements related to the five parcels of land which Mobil was then occupying. There are, thus, five separate agreements. They were all expressed to be effective as from 1 January 1981 and, if not earlier terminated, they were all to expire finally on 31 December 1993 at the latest.

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24 *Regis Property Co Ltd v Dudley* [1959] AC 370 (HL).
25 At 407.

[33] Tenancies 1 (in respect of Pakenham Street), 4 and 5 (in respect of Beaumont Street) were in relation to land which Mobil then intended to retain. These were terminable on one month's notice. It was envisaged that they would be replaced by more formal lease agreements. Tenancies 2 (Pakenham Street) and 3 (Beaumont Street) were in respect of land which Mobil intended to relinquish in the short to medium term. They were terminable on six months' notice and they recorded that the lessor intended to give notice of termination once the Wiri terminal became operational.

[34] Tenancies 1, 4 and 5 all recorded that the lessee had purchased the existing improvements (oil storage tanks, structures and other improvements) from 1 January 1981 for specified sums of money. They obliged Mobil to remove the improvements on termination. They also permitted Mobil during the term, or within a reasonable time of termination, to remove the improvements on the condition that "[u]pon completion of removal the site shall be left in a clean and tidy condition". The agreements, however, contemplated that Mobil, presumably with the consent of the Harbour Board, might not remove the improvements as it provided that if this happened, Mobil would not be entitled to compensation in relation to such improvements.

[35] Tenancies 2 and 3 did not deal expressly with ownership of fixtures. So this meant that the Harbour Board retained ownership of them. However, these tenancies allowed Mobil to remove on termination all or any of the structures, buildings, plant, machinery or other improvements provided it was not in breach of its obligations, and further provided that it must remove them if the Board required it:

> … notwithstanding anything herein contained if so requested by the Board the Tenant will forthwith remove the same at the Tenant's cost the Tenant making good any damage caused by a removal under this clause … .

As with tenancies 1, 4 and 5, these agreements also contemplated that improvements might be left on the land as they provided that if this happened, Mobil would not be entitled to compensation.

[36] All of the tenancies permitted the storage, handling and blending of petroleum products but prohibited any noisy or offensive trade or business and

required Mobil to comply with all relevant regulatory requirements affecting the land or Mobil's use. They also excluded the covenants otherwise implied into leases under s 106 of the Property Law Act 1952 that would have required the demised premises to be kept and yielded up in good and tenantable repair having regard to their condition at the commencement of the tenancies.

[37] Finally, and most importantly, the tenancies all contained a repair clause dealing with Mobil's obligations to keep the land "in good order and clean and tidy" during the term and to deliver it in that condition on termination:[26]

> 9. AT all times to keep the said land hereby demised in good order and clean and tidy and free from rubbish weeds and growth and will at all times keep all buildings oil storage tanks structures fixtures and other improvements in or upon the said land in good and tenantable repair and condition to the reasonable satisfaction of the Board and will upon the determination of this tenancy or any new tenancy for any reason or cause whatsoever yield and deliver up to the Board the said land and any improvements left thereon in such good and tenantable repair and condition and clean and tidy to the reasonable satisfaction of the Board.

[38] None of the tenancy agreements were terminated when the Wiri pipeline became operational and new leases were never completed. Negotiations for such leases foundered in the 1990s, as we understand it, over insistence by the lessor that Mobil decontaminate the sites. In the result, Mobil simply held over under the same terms until the sites were finally vacated in 2011.

The judgment of Katz J

[39] Having referred to the contentions of the parties as to the ordinary meaning of the words used in the clean and tidy condition, Katz J noted:[27]

> [29] Unfortunately, this is not a case where the natural and ordinary meaning of the words is so apparent that there is no need to look any further to determine the meaning of the clause. Although, in my view, the natural and ordinary meaning tends to favour Mobil's interpretation, the words "good order" and "clean and tidy" are certainly open to meaning "free of

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26 There are minor variations across the tenancy agreements. In the case of tenancies 2 and 3 the clean and tidy condition is subject to cl 3, which provides that the tenant will not make alterations or additions to or remove the improvements without permission, entitles the tenant to remove improvements at the determination of the tenancy – making good any damage caused from the removal – and disentitles the tenant to compensation for any improvements remaining. See *Mobil* (CA), above n 4, at n 9.

27 *Mobil* (HC), above n 3.

> contamination, including historic subsurface contamination", in the right factual context. It is therefore necessary to consider the broader factual context in some detail.

[40] She identified three features of the factual matrix which she considered supported Mobil's position:

> [43] Firstly, as noted above, the Pakenham and [Beaumont] sites were already heavily contaminated at the outset of the 1985 tenancy agreements. The sources of contamination included toxic waste from the (then) nearby gas works, the activities of tenants who had occupied the sites for 30 to 40 years prior to Mobil, contamination that had spread to the sites from neighbouring sites, and Mobil's own activities on the sites. In my view it would be relatively unusual for a tenant to agree to remove historic contamination caused by entities for which it is not legally responsible. I would therefore expect any such common intention to be expressed in clear and unambiguous wording.
>
> [44] This view is further reinforced by the fact that the original 50-year leases for the Pakenham and [Beaumont] sites (and, it appears, for the tank farm sites generally) did not impose obligations on tenants in relation to the condition of the land (as opposed to buildings and fixtures). As a result neither Mobil, nor the original tenants under those leases, had any contractual obligation to remediate the land to its original 1920s condition on termination of those leases in the mid 1970s. Accordingly, if Mobil was to assume, in 1985, retrospective contractual liability for 60 years of historic contamination of the sites, this would have been a significant departure from the previous and historic basis of the parties' relationship. One would normally expect this to be addressed explicitly, rather than left for inference from the general wording of the clean and tidy clauses.
>
> [45] Finally, the 1985 tenancy agreements were short term periodic tenancies, terminable on either one months' or six months' notice. The shorter the tenancy, the stronger the inference must be against a common intention to impose onerous, extensive and expensive repair obligations on a tenant.

[41] She was doubtful whether, as at 1985, Mobil had any liability in relation to the then existing contamination. This was essentially because she thought that the contamination which had occurred was a reasonable incident of the use of the premises for bulk oil storage and thus permitted under the lease.[28]

[42] The obligation under the "clean and tidy" condition applied from the beginning of the tenancies. She saw this as favouring Mobil:

> [58] … if [Development Auckland's] interpretation of the clean and tidy clause is correct, then at the outset of the 1985 tenancies Mobil was required

[28] *Mobil* (HC), above n 3, at [51]–[52].

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

[43] She reviewed what she called the *Anstruther* line of authorities under which repair covenants in leases (addressed of course to buildings and not land) are usually construed by reference to circumstances as they were, but not necessarily the actual condition of the building, at the beginning of the lease.[29] She saw these cases as supporting an approach to the clean and tidy condition which required Mobil to do no more than deliver up the premises in a condition which would have been suitable for a tenant of the kind that might have been envisaged in 1985, which, in her opinion, was one who would use the premises for heavy industrial use.[30]

[44] Having concluded that the clean and tidy condition did not require remediation, she rejected the contention that it was an implied term of the 1985 tenancy agreements that Mobil would remediate any hydrocarbon contamination caused by it or its Australian predecessors' activities. She saw such a term as broader than, and thus inconsistent with, the clean and tidy condition and more generally was of the view that the conditions proposed in *BP Refinery (Westernport) Pty Ltd*[31] were not satisfied.[32]

The judgment of the Court of Appeal

[45] The Court of Appeal reviewed, at some length, the law of waste.[33] It took the view that the express permission in the leases to use the sites for the storage of oil did not amount to authorisation of incidental contamination. For very much the same reasons, it was of the view that there had been a breach of the covenant not to injure the lessor.[34] In the latter respect it expressed disagreement with the approach

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29 See *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 (CA).
30 *Mobil* (HC), above n 3, at [74]–[82].
31 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.
32 *Mobil* (HC), above n 3, at [84]–[91].
33 *Mobil* (CA), above n 4, at [39]–[46].
34 At [47]–[53].

taken by Rodney Hansen J in *BP Oil*[35] in relation to another contaminated site in Freemans Bay and a clause to the same effect as the covenant in issue in this case. It therefore concluded that in 1985, Mobil:[36]

> … confronted a legal risk, in the form of a potential claim that its neglect or practices, or both, amounted to waste that was not authorised by the original leases.

[46] The Court accepted that the standard required of the clean and tidy condition was to be measured against only what would be required for the bulk storage of oil:[37]

> … it does not follow that Mr Ring was correct to suggest that as at 1985 there was no foreseeable need for any remediation of the land on termination in 1993. As noted, Mobil NZ might be required to remove all its facilities on termination and a change of use was in contemplation for at least part of the land that it occupied. We are not prepared to accept that every future new industrial tenant would be indifferent to the contamination, once made aware of it (as they would have been by 1993). Any new use would have involved construction on the land, and we observe 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 has pooled underground and from dermal contact or inhalation, especially during site works. There are also risks to the environment. These problems might affect any future construction work done for or by a new tenant.

[47] The Court was not moved by the considerations referred to by Katz J in the passage set out above at [42]:[38]

> [61] Mr Ring also argued that the lessor cannot possibly have contemplated that the repair clause would reach the subsurface, for that would mean that Mobil NZ must remediate the land as soon as the tenancies commenced. That would put a stop to existing operations while the soil was removed: that being so, the lessee's obligations must be confined to the surface of the land. That submission was accepted in the High Court, but in our opinion it rests on hindsight — the nature and extent of contamination were unknown in 1985 — and ignores the commercial context, which establishes that at some uncertain but proximate date Mobil NZ intended to surrender part of the land and remove some of its improvements. The emphasis was on termination. The parties chose to include a similar clause in all the tenancies, including those for the land that Mobil intended to retain in the longer term. In the circumstances, we do not think it appropriate to read down the obligation that Mobil NZ assumed on termination.

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35 *BP Oil*, above n 10, at [37]. We note that Rodney Hansen J did not apply this conclusion to exclude liability for waste, see [71]–[75].

36 *Mobil* (CA), above n 4, at [54].

37 At [60].

38 Citations omitted.

[48] The Court set its task for itself in the following way:[39]

> [62] So the question remains what is meant by delivering the land in good order and clean and tidy. Does the obligation extend to the subsurface? As noted earlier, the repair clause employs ordinary English words and they are not terms of art; rather, they take their content from the context, which includes the terms of the tenancies, the parties' prior relationship, the condition of the land before that relationship began and its condition at commencement of the tenancies and on termination. The question is whether on a fair interpretation of the tenancies the remediation work required of the tenant can be considered reasonable.

[49] The Court saw the obligation as naturally extending to the subsurface and then went on to consider whether the obligation extended to contamination predating the tenancies. The Court reiterated its view that Mobil came to the negotiating table in 1985 with an actual or potential liability for prior contamination.[40] It was also of the view that the parties foresaw an actual or potential liability for clean-up costs, a view which it explained in this way:

> [67] By way of elaboration, cleanup obligations were an issue in negotiations, which led to Mobil NZ assuming under the tenancies burdensome obligations to remove structures that had previously passed to the lessor. The parties extended the repair clause to the land for the first time, and as noted earlier they excluded the implied obligation in s 106 of the Property Law Act 1956, under which regard must be had to the condition of the demised premises at commencement of the tenancy.

[50] The Court then went on:[41]

> [68] We also reject the view that it would be remarkable were Mobil NZ to accept a remediation obligation in short-term tenancies. That approach assumes that the tenancies must be considered in isolation. The parties actually saw them as a stopgap measure in a longstanding and continuing relationship that was about to undergo substantial change for the first time in many decades.
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> …
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> [70] As noted, though, Katz J considered it would be remarkable if Mobil NZ were to take responsibility for contamination caused by Mobil Group companies that preceded it in occupation. She observed that Mobil NZ went into occupation in 1952 and 1963 and some contamination presumably predated its occupation. Again, we respectfully take a different view. We find it unsurprising that Mobil NZ would willingly assume responsibility for the activities of other group companies, especially when it must have caused

39 Citations omitted.
40 At [66].
41 Citations omitted.

> much of the contamination itself. We find a degree of support for this perspective in the failed negotiations for new leases following expiry of the 1985 tenancies. In August 1993 Mobil NZ stated that it was willing to remediate its own contamination, but not that attributable to the original fill or tenants on other land whose contamination might have seeped onto the site. It explained that it took that approach not because the Resource Management Act 1991 by then required it but because it was committed to environmental excellence. Mobil NZ's approach was both commercially understandable, having regard to the legal risk that it faced, and responsible.

[51] The Court therefore concluded, that the clean and tidy condition required remediation of contamination caused by Mobil and its predecessors.

[52] The Court then went on to consider the implied term contended for by Development Auckland.[42] It expressed support for the Development Auckland's position but did not reach a final conclusion given its conclusion on the construction of the 1985 tenancy agreements.

[53] Harrison J dissented on the basis that he would have confined Mobil's liability to such damage as was caused by its post-1985 actions. He explained his approach in this way:[43]

> [79] The tenancies were designed to govern Mobil NZ's future use of the land. Thus cl 9 is prospective: it required Mobil NZ "to keep the said land hereby demised in good order" during the term of the tenancy. The only objective yardstick for compliance would be the land's condition on commencement. The lessee's obligation to yield up and deliver the land on termination "in such good and tenantable repair and condition" must refer back to its condition in 1985. An assumption of a retrospective liability for pre-existing damage, caused when the parties' rights and obligations were regulated by different contractual arrangements, would be a significant burden. An explicit undertaking would be required to that effect.
>
> [80] In my judgment it is not relevant that when negotiating the terms of the tenancies in 1985 Mobil NZ had an actual or pre-existing liability for its own contamination. As the majority emphasise when upholding Katz J's factual finding, the parties did not then appreciate the full nature and extent of the site contamination and its adverse effects on the subsurface. It is common ground that by the 1970s the land had become so polluted as to require complete remediation. I also agree with the majority that the existence of a new lease does not absolve a lessee from its own liability for past breaches. However, those factors reinforce the importance of determining Mobil NZ's liability in accordance with the relevant contractual instruments that were in effect when the damage was caused.

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42 At [71]–[74].

43 Citations omitted.

> [81] Even if cl 9 could be interpreted so as to impose retrospective liability on Mobil NZ for damage preceding 1985, I cannot locate an evidential basis for extending that date back before 1953 when Mobil NZ's predecessor, Vacuum Oil Company (N.Z.) Ltd, first took an assignment of four of the five leases from Vacuum Oil Company (Pty) Ltd. All those leases had expired by 1975 and rights of action under them would have been statute-barred by about 1981. There is nothing to suggest that in 1985 Mobil NZ would have become a volunteer to any liability owed by a different legal entity or entities — Australian companies within what was originally the Vacuum group, which later became the Mobil group.

Our approach to the case

[54] There are a number of features to this case that are material to both the interpretation and implied term arguments:

(a) There were multiple causes of the contamination:

  (i) the nature of the original fill;

  (ii) the activities of Mobil's Australian predecessors;

  (iii) activities on neighbouring properties; and

  (iv) the activities of Mobil.

(b) As the judgments below indicate, there is scope for legal and factual argument whether the contamination was authorised under the leases or tenancy agreements (as either a necessary or reasonable incident of the permitted uses). What is clear, however, is that contamination from the activities of Mobil and its Australian predecessors were *an* incident of the permitted use of bulk oil storage in an area in which the Harbour Board had actively encouraged oil companies to locate. Mr Ring for Mobil referred to there being in this sense an "economic mutualism" between the oil companies and the Harbour Board.

(c) It does not appear to be possible to attribute particular aspects of the contamination to particular parties. In particular, it would appear to

be impracticable to distinguish between the contamination caused by Mobil and that caused by its Australian predecessors.

(d) There is a legal but not necessarily moral disconnect between the original lessees – that is, the Australian Vacuum and Atlantic Union companies – and Mobil. While liable under the covenants in the leases from 1953 and 1962 Mobil was not liable in tort for waste or for breaches of contract in relation to the actions of its Australian predecessors. On the other hand, Mobil is, in a sense, related to its Australian predecessors and a majority in the Court of Appeal saw no reason to distinguish between them in terms of the scope of the remediation obligation to which it held Mobil.

(e) There is a discontinuity between the original leases and the 1985 tenancy agreements, with the clean and tidy condition appearing (for the first time) in the 1985 tenancy agreements and those agreements providing for the removal of all improvements associated with bulk storage of oil. Such removal was presumably intended to clear the way for other uses of the land.

(f) There was a lack of a clear understanding in 1985 as to what those other uses might be and the extent and implications of the contamination problem were not fully appreciated.

(g) The was no claim by the Harbour Board that Mobil was required to remediate the land surrendered to it by Mobil in 1985.

[55] The language used in the 1985 tenancy agreements might be thought to indicate that the parties were not contracting with possible remediation of the land in mind. It seems clear enough that the contamination of the land was not seen as a problem warranting attention. As noted, there was no complaint about the contaminated state of the land which was returned to the Harbour Board. Had contamination been recognised as a problem, there are a number of possible ways in which it might have been addressed, either directly, in the form of a remediation

obligation of some sort, or perhaps indirectly, for instance with an adjustment to the rent.

A breach of the clean and tidy condition?

Some general comments

[56] Despite the repetition, we set out the clean and tidy condition again:

> 9. AT all times to keep the said land hereby demised in good order and clean and tidy and free from rubbish weeds and growth and will at all times keep all buildings oil storage tanks structures fixtures and other improvements in or upon the said land in good and tenantable repair and condition to the reasonable satisfaction of the Board and will upon the determination of this tenancy or any new tenancy for any reason or cause whatsoever yield and deliver up to the Board the said land and any improvements left thereon in such good and tenantable repair and condition and clean and tidy to the reasonable satisfaction of the Board.

There are some syntactical difficulties as the obligations of the tenant during the tenancy and those on termination are expressed in different ways. These, however, are of no moment to the resolution of the appeal. For present purposes it is sufficient to say that we construe the clause as obliging Mobil to keep, and at the end of the tenancy deliver up, the land in good order and clean and tidy and free from rubbish, weeds and growth.

[57] Two significant and inter-related points come out of this:

(a) the clean and tidy condition applied throughout the tenancies and not just on termination; and

(b) the clean and tidy condition as it applied during the tenancies was expressed in terms which required Mobil to "keep" the land in that condition.

[58] When used in clauses of a loosely comparable character, the verb "keep" can impose obligations which go beyond mere maintenance of the status quo at the time of the commencement of the lease, that is as imposing an obligation to put demised premises into a particular state, say good and tenantable repair, even if the premises

were not in that condition at the commencement of the lease. We will refer to some of the relevant cases shortly. "Keep" is, however, not a word which is apt to signify an obligation to effect transformative change. This is a point which rather favours Mobil.

[59] The words "good order" and "clean and tidy" can be construed as contended for by Development Auckland on the basis that land which is contaminated so as to be unsuitable for mixed commercial and residential uses is not "in good order" and is likewise not "clean" even if it is "tidy" in appearance. On the other hand, the same language is also susceptible to the interpretation advanced by Mobil in terms of which the obligation is confined to the surface of the land and in particular, its appearance. This is reinforced by the linkage with "free from rubbish weeds and growth".

[60] The expression "clean and tidy" is often found in agreements in relation to residential tenancies[44] or the short term use of facilities, for instance a community hall. In such instances it is used in a sense which is rather different from that contended for by Development Auckland. As far as we are aware, however, it is not customarily used in relation to land in commercial or industrial leases. Likewise the expression "good order", in respect of land, is also not commonplace in such leases.

[61] If the tenant under the 1985 agreements was not Mobil but another oil company which had not previously occupied the land, we doubt if it could have been seriously contended that the clean and tidy condition required that tenant to remediate the land so as to remove contamination which had occurred prior to the commencement of the tenancies. This suggests that the interpretation placed on the condition by Development Auckland is (a) heavily dependent on context and (b) less consistent with the natural and ordinary meanings of the words than that proffered by Mobil.

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[44] Section 116D of the Property Law Act 1952 implied into residential tenancies a covenant to "yield up the dwellinghouse (including any grounds) in a clean and tidy condition and free from any accumulation of tins, bottles, paper or other refuse or rubbish of any kind" having regard to the condition to the premises at the commencement of the tenancy. The corresponding provision in the Residential Tenancies Act 1986 is s 40(1)(c) which imposes a requirement on tenants to "keep the premises reasonably clean and reasonably tidy".

[62] We will refer briefly to the more significant of the cases dealing with the interpretation of broadly comparable clauses, particularly as to the connotations of the verb "keep" in such clauses. We will also discuss briefly a Canadian case which in some respects – but not others – was comparable to the present case. Of rather more significance, however, is the overall scheme of the 1985 tenancy agreements, to which we now turn.

The overall scheme of the 1985 tenancy agreements

[63] By the time the 1985 tenancy agreements were concluded, not all the land Mobil had been leasing was still required, other parts of the sites were required only in the short term and there was no certainty that the rest of the land would be used indefinitely for bulk oil storage.

[64] Consistently with this, the tenancy agreements contemplated removal of the improvements by Mobil at either its election or if required by the Harbour Board. The tenancy agreements also required that, after such removal, either the land was to be left in clean and tidy condition or for all damage associated with the removal of improvements to be repaired. All tenancy agreements nonetheless contemplated that the improvements might not be removed as they provided that in such event Mobil would not be entitled to compensation. The "good and tenantable repair" component of the clean and tidy condition applied to such improvements as remained on the land at termination.

[65] We agree with the majority of the Court of Appeal that the relevant commercial context includes the prior long term occupation of the land by Mobil and its Australian predecessors and the 1985 assumption that tenancies 1, 4 and 5 would be replaced by long term leases. But, that said, the short term nature of the tenancies rather counts against an interpretation of the clean and tidy condition so as to impose new and substantial remediation obligations, obligations which, if complied with to the letter would have cost Mobil many millions of dollars. It will be recalled that the cost of such an exercise, if carried out in 2011, would have been in the order of $50 million.

[66] We have set out the conflicting views expressed by Katz J and the Court of Appeal on the significance of the clean and tidy condition applying throughout the tenancies and not just on their termination.[45] On this issue we find the approach of Katz J to be the more persuasive. It is not a case of "reading down" (or reading up for that matter) the clean and tidy condition. What is in issue is what it means. Despite the awkwardness of the language of the condition to which we have referred, the use of the word "keep" shows that the obligations under it were applicable from the start of the tenancies until their termination. On the interpretation proposed by Mobil, this causes no problem as the condition is confined to the external appearance of the land. On the other hand, a construction of "good order" and "clean and tidy" which required remediation of the land in the manner proposed by Development Auckland would be fundamentally inconsistent with the commercial purpose of the tenancies. As well, there is the problem of reconciling a remediation obligation of the kind proposed with Mobil's obligation to deliver up to the Harbour Board such improvements as remained at termination of the tenancies in good and tenantable repair. This indicates strongly that the parties did not envisage that compliance with the clean and tidy condition would require removal of all improvements and suggests, instead, that the clean and tidy condition was not envisaged as extending to the subsurface of the land.

[67] This consideration is not conclusive in itself. The expression "clean and tidy" could conceivably be construed as having an ambulatory meaning, as confined during the tenancy to appearance of the surface of the land but extending to subsurface contamination on termination. Such an interpretation would require the same words when used in the same clause to have two distinct meaning, an approach which would require powerful justification. And, to our way of thinking, the context in which the 1985 tenancy agreements does not provide such a justification.

The authorities

[68] It is well-established that an obligation in a lease to "keep" the demised property, or part of it, in a particular state is not necessarily discharged by maintaining property in, or restoring it to, its condition at the time the lease was

[45] See above at [42] regarding Katz J and above at [47] regarding the Court of Appeal.

entered into. This was the conclusion of the English Court of Appeal in *Proudfoot v Hart*[46] and there is earlier authority to the same effect.[47] Thus, an obligation to keep a building in "good and tenantable repair" may require a particular building element (say a dilapidated roof) to be replaced (for instance to prevent water damage to the interior of the building) with consequent improvement to the building.[48] The willingness of the courts to accept that obligations to "keep" in a particular condition can extend to improvement might be thought to provide some support for the Development Auckland argument. There are, however, two qualifications to the principle in *Proudfoot v Hart* to which reference should be made.

[69] The first is that obligations to keep in repair are usually construed by reference to the condition which would be required by reasonably-minded tenants of the kind envisaged at the commencement of the lease, an approach which, if transposed to the present circumstances, would suggest that the clean and tidy condition should be assessed against the reasonable requirements of an oil company engaged in the bulk storage of oil. This is a point which Katz J made.[49] As we have noted the Court of Appeal disagreed, being of the view that not "every future new industrial tenant would be indifferent to the contamination".[50] As the Court of Appeal pointed out an industrial tenant who proposed to build on the land would be required to engage in some remediation and for this reason, there is force in their view that the land, contaminated as it was, was not fit for general industrial use. The Court of Appeal did not, however, refer to the evidence which showed that portions of the Beaumont Street site were, after termination, able to be leased. As well, as Mr Ring pointed out, the cases do not require a standard which would satisfy every potential tenant but rather just a "reasonably minded" one. Further, and to our way of thinking, significantly, the claim for damages was calculated by reference to what

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[46] *Proudfoot v Hart* (1890) 25 QBD 42 (CA) at 50–52.

[47] *Payne v Haine* (1847) 16 M & W 541, 153 ER 1304 (Exch).

[48] Kim Lewison (ed) *Woodfall's Landlord and Tenant* (online looseleaf ed, Thomson Reuters) at [13.041]. This interpretative approach has the potential to operate unfairly against a tenant where the demised premises were not in good repair at the commencement of a lease. Section 223 of the Property Law Act 2007 now mitigates this potential unfairness by providing "a covenant to keep leased premises in good condition (or words to that effect) does not require the lessee to put the premises into good condition if they are not in good condition when the term of the lease begins". This section, however, does not apply to the leases and tenancy agreements in issue in this case as it affects only leases coming into effect after 1 January 2008.

[49] *Mobil* (HC), above n 3, at [80]–[82].

[50] *Mobil* (CA), above n 4, at [60].

would be required to make the land fit for mixed commercial and residential use, not industrial use.

[70] The second and, for present purposes, more important qualification is that "keep in repair" clauses are confined in their effect to what must have been reasonably within the contemplation of the parties at the date of the demise[51] and are thus construed so as not to require transformative change to be effected to the demised premises.[52] This consideration also supports Mobil as the interpretation of the clean and tidy condition proposed by Development Auckland would require a complete transformation of the site. It is also relevant to a submission advanced by Mr Galbraith, for Development Auckland, that provisions such as the clean and tidy condition – which he described as boilerplate in character – should be construed so as to cover uncontemplated as well as contemplated contingencies. At least in terms of its proposed application in the present case, Mr Galbraith's submission[53] is not consistent with the authorities to which we have alluded.

[71] *Canadian National Railway Co v Imperial Oil Ltd* concerned facts which in some, although not all, respects are quite similar to the present.[54] The context was that between 1914 and 2002 Imperial Oil had leased land from Canadian National Railway which it used for bulk storage of petroleum products. Under the last two leases, entered into in 1974 and 1989, Imperial Oil had undertaken that, at the termination of the lease, it would remove all improvements and "restore the Demised Premises to the satisfaction of the Lessor leaving the Demised Premises in a clean and neat condition".

[72] The phrase "clean and neat" standing alone, has very similar connotations to "clean and tidy". On the other hand, the obligation to "restore the Demised Premises" obviously went beyond mere delivery up of the demised premises (that is returning them to the lessor) and necessarily envisaged the carrying out of work

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51 *Woodfall's Landlord and Tenant*, above n 48, at [13.040]–[13.042].

52 *Brew Brothers Ltd v Snax (Ross) Ltd* [1970] 1 QB 612 (CA) at 639–640; and *Weatherhead v Deka New Zealand Ltd* [2000] 1 NZLR 23 (CA) at [18]–[29].

53 When considering the application of contractual provisions to circumstances not foreseen by the parties when contracting, the courts may have regarded to what the parties would have intended if they had addressed the possibility of those particular circumstances arising. See the remarks of Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [22].

54 *Canadian National Railway Co v Imperial Oil Ltd* 2007 BCSC 1557.

(which was required to be to the satisfaction of the lessor). To our way of thinking, the critical interpretative issue which the case raised was whether Imperial Oil was required to restore the land to its pre-bulk oil storage condition or merely to restore it to a "clean and neat condition" after the disruption associated with the removal of the tanks and associated infrastructure.

[73] This is not the way the Judge approached the case. He referred to *O'Connor v Fleck*[55] and other Canadian cases which support the implication of a term in leases requiring lessees to remediate contamination they may cause.[56] He then went on:[57]

> In my view, the obligation of [Imperial Oil] to remove the structures and materials from the premises and "restore the Demised Premises to the satisfaction of the Lessor, leaving the Demised Premises in a clean and neat condition" is sufficiently similar to the circumstances in *O'Connor* to lead to a similar conclusion: that it is an implied term of the lease that the parties intended the premises to be returned uncontaminated.

He went on to reject the complaint that this approach defeated limitation defences in relation to pre-1989 contamination and he concluded that that the implied term and perhaps the clean and neat condition extended to subsurface contamination.[58]

[74] We do not find that reasoning particularly germane to our task. The restore obligation cannot sensibly have been read as referring to the condition of the land in either 1974 or 1989 because at those times it was occupied by the bulk-storage infrastructure which had to be removed *before* restoration. If, on its proper construction, the obligation was confined to making good the disruption caused by removal of that infrastructure, there would be no room for the implication of a term requiring more extensive restoration. If, on the other hand, it required land to be restored to its pre-lease condition, there was no need to imply a term.

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55 *O'Connor v Fleck* 2000 BCSC 1147, (2000) 79 BCLR (3d) 280.
56 At [49]–[51].
57 At [51].
58 At [52]–[57].

Drawing the threads together

[75] We consider that Mobil's interpretation is more consistent than that of Development Auckland with the natural and ordinary meaning of the words used in the clean and tidy condition, that is "keep", "good order" and "clean and tidy". In their totality, these words are not easily susceptible to an interpretation which would require Mobil to transform the character of the land. Further, for the reasons explained, Development Auckland's interpretation would require that the words "good order" and "clean and tidy condition" have one meaning in respect of the obligations to which Mobil was subject during the tenancies and another on termination. We see no commercial or other context which would require such an approach. In particular, we do not consider that it would be right to construe the condition in a non-natural way for the purpose of avoiding the limitations defences available to Mobil against proceedings for the tort of waste. We therefore conclude that in this case the clean and tidy condition did not impose the remediation obligation contended for by Development Auckland.

Should a term requiring remediation be implied?

[76] The implied term contended for was that Mobil:

> … would during its occupation take all steps available to prevent contamination of the sites by hydrocarbon pollution from its activities and on termination of its occupation would remediate any hydrocarbon contamination caused by its or its predecessors' activities.

[77] The first part of the proposed term as to "during its occupation" would be in the nature of covenant against waste by contamination. This part of the proposed implied term is of no particular moment as Development Auckland did not, at trial, seek to mount a claim in relation to contamination which occurred when the land was occupied pursuant to the 1985 tenancies. We do, however, have distinct reservations whether such an obligation could be implied. The orthodox position is that covenants against waste were not implied into leases at common law.[59] Although the Property Law Act 2007 now implies an obligation not to commit voluntary waste, this applies only to leases entered into after 1 January 2008. As

[59] See *Defries*, above n 16, at 108 per Farwell LJ; although compare *Marsden*, above n 14, and the discussion above at [29]–[30].

well, the proposed implied term would sit alongside and supplement, and therefore not be consistent with, the clean and tidy condition.

[78] In relation to the termination obligations, the postulated term would require Mobil to remediate contamination which occurred prior to the entering into of the contracts in issue and at times when, under the contracts then in force, there was no remediation obligation. The obligation would extend to contamination caused by Mobil's Australian predecessors despite Mobil having no legal responsibility for their actions. The term contended for is thus not of a general kind which the courts could legitimately treat as implied as a matter of law into long term leases of land for industrial purposes. Rather, Development Auckland must argue that the circumstances associated with the 1985 tenancy agreements warrant the implication of such a term as a matter of fact or interpretation.

[79] In *BP Refinery (Westernport) Pty Ltd*[60] Lord Simon of Glaisdale said that the following conditions must be satisfied before a term may be implied in a contract:

> (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[80] In *Attorney General of Belize v Belize Telecom Ltd* (*Belize Telecom*)[61] Lord Hoffmann commented on the "business efficacy" and "so clear it goes without saying" pre-conditions in this way:[62]

> It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p. 459) when he said that in that case an implication was necessary "to give effect to the reasonable expectations of the parties."
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> The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64, 68:

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[60] *BP Refinery (Westernport) Pty Ltd*, above n 31, at 283.
[61] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988.
[62] *Belize Telecom*, above n 61, at [23]–[25].

> "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men"
>
> Likewise, the requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean.

Lord Hoffmann then went on to say:[63]

> The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant.

[81] Under *Belize Telecom*, implication arguments are to be determined as a matter of interpretation. This approach been referred to with approval in this Court[64] but has been significantly qualified by the recent decision of the Supreme Court of the United Kingdom in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*.[65] There is thus scope for argument whether adoption of the undiluted version of Lord Hoffmann's interpretation approach is appropriate. That said, however, we regard the present issue as most sensibly addressed by way of interpretation. This is because the primary argument for Development Auckland rested on the clean and tidy condition – a generally expressed provision which could have, but has now not, been construed so as to address contamination. In concluding that the clean and tidy condition does not require remediation, we took into account the same contextual considerations as are relied on by Development Auckland in support of its implied term argument. Our conclusion that those contextual considerations do not warrant construing the clean and tidy condition as applying to

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63 At [27].

64 *Nielsen v Dysart Timbers Ltd* [2009] NZSC 43, [2009] 3 NZLR 160 at [25] per Tipping and Wilson JJ and at [62] and [64] per McGrath J.

65 *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843. See also David McLauchlan "Construction and implication: In defence of *Belize Telecom*" [2014] LMCLQ 203.

contamination is necessarily inconsistent with the implication of a term which would supplement the clean and tidy condition.

[82] For the sake of completeness we note that the implied term proposed does not satisfy at least three of the pre-conditions stipulated by Lord Simon:

(a) While it is true that the contamination was largely caused by Mobil and its Australian predecessors and those predecessors are, in a sense, related to Mobil:

   (i) Mobil has no liability for the actions of its Australian predecessors;

   (ii) the contamination was an incident (necessary/reasonable or otherwise) of a use which the Harbour Board authorised under the leases and tenancy agreements;

   (iii) the leases and tenancy agreements in place at the time the main contamination occurred did not require remediation; and

   (iv) remediation would not have been required if the land had continued to be used for bulk storage of oil and similar heavy industrial purposes.

   It is therefore not necessary to imply the postulated term to give business efficacy to the tenancy agreements. The agreements are perfectly effective without it.

(b) An implied term in the 1985 tenancy agreements requiring remediation of contamination which had occurred under other contractual arrangements is far from obvious. As well, it is far from obvious that such a remediation obligation should extend to contamination caused by Mobil's Australian predecessors. More generally, the absence of complaint about the contaminated condition

of the land surrendered in 1985 suggests that a remediation obligation was not so obvious as to go without saying.

(c) As indicated, the proposed implied term would impose obligations which go beyond and, in that sense, contradict the clean and tidy condition.

[83] As noted there is a line of Canadian authority which proceeds on the basis that where the activities of the lessee are likely to result in contamination of the demised premises, a term to remedy contamination may be implied.[66] We do not find this line of authority of much assistance in the present circumstances. This is for a number of reasons. The jurisprudence as to this is not entirely consistent and there is some authority which supports Mobil's position.[67] In some of the cases which support the implication of a term, there were express provisions requiring (or arguably requiring) remediation.[68] The cases also address a particular problem which arises out of the tendency of Canadian courts to see the condition of the demised property at the time the lease is entered into as the reference condition for maintenance and repair obligations.[69] In the case of successive leases, this creates the potential for limitation problems which the courts have sidestepped by either treating successive leases as if they were one or implying a term that all lessee-caused contamination be remediated.

[84] As we have already pointed out, the pre-1985 leases and tenancy agreements did not impose a remediation obligation. As well, there is the further complicating factor that Mobil is not responsible in law for the activities of its Australian predecessors.

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66 One of these cases is *O'Connor v Fleck*, above n 55, to which we have already referred. Other cases include *C & M Holdings Ltd v Tiffany Gate Ltd* 2004 Carswell Ont 9330 (ONSC); appeal allowed on other aspects in *C & M Holdings Ltd v Tiffany Gate Ltd* 2006 Carswell Ont 7411 (ONCA); *Progressive Enterprises Ltd v Cascade Lead Products Ltd* [1996] BCJ No 2473 (BCSC); and *Darmac Credit Corp v Great Western Containers Inc* (1994) 163 AR 10 (ABQB).

67 *Westfair Foods Ltd v Domo Gasoline Corp* (1999) 133 Man R (2d) 77 (MBQB); appeal dismissed in *Westfair Foods Ltd v Domo Gasoline Corp* (1999) 142 Man R (2d) 70 (MBCA).

68 This was the case in *Imperial Oil*, above n 54; and *Darmac*, above n 66.

69 See for instance *Vicro Investments Ltd v Adams Brands Ltd* [1963] 2 OR 583 (Ont HCJ); *O'Connor v Fleck*, above n 55, at [48]; *Manchester v Dixie Cup Company (Canada) Ltd* [1951] OR 686 (ONCA); and *Royal Trust Co v R* [1924] CarswellNat 13 (Can Ex Ct).

Disposition

[85] The appeal is allowed, the judgment of the Court of Appeal is reversed and the judgment of Katz J (including the costs orders made by her) is restored. Mobil is entitled to costs in respect of the appeal to the Court of Appeal to be fixed by that Court and to costs of $25,000 and reasonable disbursements in respect of the appeal to this Court.

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