IN THE COURT OF APPEAL OF NEW ZEALAND

CA111/2014
[2015] NZCA 390

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

Hearing:	13 May 2015
Court:	Ellen France P, Harrison and Miller JJ
Counsel:	A R Galbraith QC and M C Smith for Appellant M G Ring QC and P R Rzepecky for Respondent
Judgment:	25 August 2015 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B Judgment is entered for the appellant in the sum of $10 million.

C The respondent is to pay the costs of the appellant for a standard appeal on a band B basis. We certify for second counsel.

REASONS

ELLEN FRANCE P AND MILLER J

(Given by Miller J)

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Introduction

[1] Mobil Oil New Zealand Ltd, which we will call Mobil NZ, and before it other companies in the Mobil Group occupied reclaimed land at Freemans Bay in the Waitemata Harbour from 1925 until 2011. They built a tank farm and other facilities for the bulk storage of petroleum products and chemicals delivered by ship to the Wynyard Wharf. Other oil companies and industrial uses occupied the balance of the reclamation, through which the Auckland region took its supplies of bulk fuel until the mid-1980s, when the oil companies commissioned a pipeline from the Marsden Point refinery near Whangarei to Wiri in south Auckland.

[2] Mobil, which name we will use to describe all the companies involved that were or became part of the Mobil Group, occupied two sites under 50-year leases from the Auckland Harbour Board, which owned the reclamation. The first site, at 164–168 Beaumont St, comprises 1.62 ha and was known to Mobil as the Auckland

Special Products Terminal (ASPT). It was used to store bulk chemicals as well as bulk fuels. The second, at 171 Pakenham St, comprises 1.349 ha. It was used to store bulk petroleum products.

[3] 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. 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.

[4] The Auckland Waterfront Development Agency Ltd (AWDA) is a Council-controlled organisation and successor in title to the Auckland Harbour Board. It is developing the land, which is now part of what is known as the Wynyard Quarter, for mixed residential and commercial uses that are sensitive, as the original heavy industrial uses were not, to pollution.

[5] AWDA brought this proceeding to recover $10 million, the agreed cost of remediating that part of the contamination caused by Mobil. The claim was brought not in the tort of waste, an action for which would be time-barred,[1] but in contract, under a set of tenancies pursuant to which Mobil NZ most recently occupied the sites. AWDA claims that the tenancies, which were executed in 1985, obliged Mobil NZ to deliver the land in good and clean order, meaning free of contamination other than that associated with the original reclamation, alternatively that the tenancies contain an implied term to the same effect. It failed in the High Court, Katz J finding that on their true construction the tenancies did not reach subsurface contamination.[2] AWDA now brings this appeal.

The reclamation at Freemans Bay

[6] Reclamation of land in the Waitemata Harbour began about 1859 with the objective of establishing a commercial port, which required that mudflats be filled to take breastworks and landings out to water deep enough to provide moorings.

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1 Limitation Act 1950, s 4.

2 *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2014] NZHC 84, (2014) 15 NZCPR 391 [High Court judgment] at [95].

Headlands were cut back to provide fill and level ground, and the harbour was dredged to create shipping channels and berthage.

[7] The land that concerns us forms part of a 67 acre reclamation at Freemans Bay which the Auckland Harbour Board completed between 1905 and 1917. It lies at the southern or city end of what became known as the Western Reclamation. Shipbuilding was prominent among the industries for which it was intended. Others were local building, engineering and timber milling.

[8] Fill used for the Freemans Bay reclamation came from various sources. It appears that most of it took the form of sand and shell recovered by suction dredger from the seabed, which required dredging to create deep water berthage. It cannot be assumed that all of this material was clean; the city's sewage was piped directly into the harbour at the time, as was toxic liquid waste from the Auckland Gas Company's works at Freemans Bay. Some of the fill comprised sandstone and earth recovered when a cliff at the end of Beaumont St was removed. Excavation material from building sites was also dumped, along with other waste from the gas works and some refuse.

[9] By 1919, oil companies were beginning to express interest in land for bulk oil storage facilities. The Harbour Board's engineer visited such facilities overseas, and in February 1920 the Board and the Auckland City Council sought his opinion as to the suitability of Freemans Bay for such facilities and his advice about draft regulations for supervision of the industry. Public safety considerations influenced the decision to locate the facilities at Freemans Bay, which was already used to store other dangerous goods. In 1925 the Inspector of Dangerous Goods recommended that an application to install bulk tanks be approved, noting that precautions in applicable by-laws included embankments to prevent outflow in case of accident.

[10] Bulk oil storage facilities were soon located at Freemans Bay. In many cases the oil companies were the first tenants. A substantial part of the Western Reclamation appears to have been reserved for them by the mid-1930s, and over succeeding decades their facilities were consolidated there.

The land and leases in issue

[11] The land comprises five titles, each of which became the subject of a separate tenancy agreement in 1985:

	Tenancy number	Legal description and area
Pakenham St	1	Lot 1 DP144810, CT NA85D/803. 7920 m^2
	2	Lot 2 DP144810, CT NA85D/804. 5570 m^2
Beaumont St: ASPT	3	Lot 4 DP135460, CT NA79D/771. 1000 m^2
	4	Lot 3 DP135460, CT NA79D/770. 4176 m^2
	5	Lot 2 DP135460, CT NA79D/769. 1.1063 ha

[12] Mobil NZ occupied the sites for many years, from dates between 1952 and 1963, and the lessees preceding it, although separate companies, had at some earlier date become members of the wider Mobil Group's Australian operations. The attached table records the position:

#	Lease Commenced	Tenant	Lease Transferred	Transferee
1	1925	Vacuum Oil Company Pty Limited	1953	Vacuum Oil Company (N.Z.) Limited
2	1951		1953	
3 & 4	1938 (2 leases)		1953	
5	1927	Atlantic Union Oil Company Pty Limited	1962	Atlantic Union Oil Company NZ Limited

The pre-1985 leases

[13] The first lease was granted in 1925 to the Vacuum Oil Company Pty Ltd. It was for a term of fifty years, presumably reflecting the specialised and long-term nature of the proposed use. Another 50-year lease was granted to the Atlantic Union Oil Company Pty Ltd in 1927. As noted, both of these Australian companies later

became part of the wider Mobil group. The assignees Vacuum Oil Company (N.Z.) Ltd and Atlantic Union Oil Company NZ Ltd became, presumably by amalgamation, Mobil NZ. Other parts of the sites were leased in subsequent years, notably in 1938. The terms of the later leases varied. It appears that an effort was made to ensure that they expired about the same time, in 1975. In that year the parties entered tenancy agreements expiring in December 1980, and thereafter Mobil held over until the 1985 tenancy agreements were signed.

[14] The original 1925 and 1927 leases provided in cl 3 that the lessee would keep and maintain all "buildings structures fixtures and fences" in "good order condition and repair", and although it was Mobil that built the storage facilities the leases contemplated that they would be yielded up to the lessor in good order and condition on termination. The leases also provided that the lessee would not carry on any offensive or dangerous trade or business or do anything that might be or become a nuisance or cause injury to the lessor, with the proviso that the business of an oil merchant, including bulk storage, was permitted:

> 7. 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.

[15] All of the other leases or tenancy agreements granted until 1985 contained materially identical provisions. There is an exception; the 1975 tenancy agreement for Beaumont St provided that the tenant would keep and yield up in good order not only the fixtures but also the demised premises, which included the land. But nothing turns on this, because it is not now in dispute that the land was so contaminated by then as to require complete remediation.

Contamination of the land

[16] The evidence for Mobil was that it did not regard contamination as a normal incident of business. Procedures and systems were carefully designed to avoid it. A

retired career employee, Ian Wilson, deposed that in his experience since the mid-1960s Mobil was risk-averse and never considered spillage or contamination acceptable. He pointed out that oil companies have every incentive to prevent spillage; it is dangerous and also entails loss of valuable product.

[17] However, Mr Wilson also deposed that spillage could not be prevented entirely and there is evidence that poor maintenance and routine business practices contributed to it. Tanks and underground pipes were susceptible to corrosion, which resulted in a number of incidents. Water taken from the harbour was used in ways that released petroleum products to ground. For example, until about 1990 seawater "slugs" were used to clear lines before another product was pumped from ship to shore. The water would settle in the bottom of the storage tanks before being drained into the tank compounds, complete with any hydrocarbons that it contained. This practice was known as dewatering. Water was also sometimes used to assist in removing product, which floats on it, from tanks. More recently piggable lines were installed and employed to separate product types during pumping and separator systems (slops/swing tanks and oil/water separators) were used to treat water before discharging it to the harbour.

[18] Bunds were a design feature of tank compounds, used to contain spillage in the event of accident. These offered an indirect means of environmental protection. However, the compound floors were not sealed. In the 1990s the Pakenham St site received a major upgrade in which tank compounds were lined. It appears that product containment work was also done at Beaumont St, although it did not extend to the tank compounds.

[19] Mobil was not the only source of subsurface contamination. Contaminants could spread from other sites on the reclamation. In 1986 a neighbouring tenant, Shell Oil, experienced a major spillage of aviation fuel which is known to have added to accumulated contamination beneath the Mobil sites.

[20] It is now common ground that some time during the 1970s the land became so polluted as to require complete remediation. The Judge described this as the tipping point. She accordingly appears to have accepted that Mobil's activities from

1985 caused the lessor no loss, although no formal finding to that effect was made. As noted, the parties also agree that the cost of remedying contamination caused by petroleum storage on the sites, as opposed to contamination from other sources such as the original fill, is $10 million.

Knowledge of contamination in 1985

[21] It cannot be doubted that the Board understood from the outset that spillage was a risk associated with petroleum storage. That is shown by the precautions required of the oil companies. By way of example, we have noted that in 1925 the Dangerous Goods Inspector pointed to the need for embankments to prevent outflow in case of accident. The historical record also includes reports by Mobil of spills and contamination after the original leases were granted. In 1935 an explosion occurred in a City Council pumping station, caused by leakage from oil company pipes finding its way through saturated ground into the sewers.[3] There is evidence dating from 1963 of awareness, again on the part of the Council, that the reclaimed land was porous, so that spilled petroleum could reach the harbour.[4]

[22] However, the record is notable for the absence of reports from Mobil to the Board about spillage and contamination. The evidence of an historian, Dr Jennifer Carlyon, is that although the historical record indicated that the Board and the Auckland City Council were aware of some incidents, she was unable to locate anything that raised concern about long term contamination. The first indication of concern about subsurface contamination followed a major spillage on a nearby Shell site in 1986. The Judge found that:

> [35] Having carefully considered all the evidence before the Court, I have concluded that the appropriate inference is that, as at 1985, the Harbour Board was aware of at least some incidents over the past 50 to 60 years on or around the sites, as a result of which petroleum products had spilled or leaked into the ground. It probably did not, however, appreciate the full nature and extent of the contamination and its adverse effects on the subsurface of the land. I note in this context that the 1985 tenancy agreements were entered into prior to the modern era of heightened

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3 Letter from City Engineer to the Town Clerk regarding the Explosion at the Pumping Station (15 March 1935), Auckland City Council Archives 219-22-41.

4 K E Corbett "Comments on Consolidation of Oil Industry at Freemans Bay" 29 November 1963, Auckland City Council Archives 219-282p.

> awareness of environmental issues. For example, they pre-date the Resource Management Act 1991 by some five years.

and that finding is not challenged on appeal.[5]

The future of the terminals as at 1985

The Wiri pipeline

[23] By 1985 the future of the Freemans Bay terminal was in question. It remained in operation, but the oil companies had already begun to bypass it. They wanted to reduce their heavy dependance upon shipping and rail transport to service the growing demands of the Auckland region. In 1981 they had commissioned, with Government support, a shared terminal at Wiri that took its supplies through a pipeline from the Marsden Point Refinery.

[24] This did not mean that the Wiri terminal would completely replace the Freemans Bay facilities. It was unclear in 1985 whether the pipeline would have all the capacity required for bulk petroleum products, and ships and trucks were still needed to convey bulk chemical products. But the parties recognised that Mobil would no longer require all of the land and further that some fixtures, particularly those that had reached the end of their useful lives, had become liabilities.

[25] As things turned out, the Mobil sites did become obsolete. 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 petroleum storage at

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[5] We note that in *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208 (HC), which also dealt with contamination in the Western Reclamation, Rodney Hansen J found that the lessor knew the land was being contaminated with petroleum products both as a result of occasional spills and as an inevitable incident of the permitted use: see [112]. His findings, which are stronger than those of Katz J, may be explained in part by the time period with which he was concerned. The question in that case was whether the lessor knew of contamination by 1989. It is not in dispute here that the lessor knew of its existence, though not its extent, by that date; the major Shell spill had occurred in 1986, and in April 1989 the New South Wales Department of Planning had produced a risk assessment for the lessor and local authorities that identified a risk of ground contamination from past incidents and a need for better safety practices: New South Wales Department of Planning "Western Reclamation Area Risk Assessment Study, Auckland, New Zealand" (1989).

Freemans Bay, which by 1999 was no longer used for petrol, aviation fuel or diesel. By 2005 all operations on the two sites had ended.

[26] However, that was not apparent in 1985. There was reduced activity at Pakenham St but the Beaumont St terminal was still in use for chemicals and solvents. The parties contemplated that new leases would be granted over parts of the sites for 10-year terms. As late as the early 1990s Mobil NZ commissioned major upgrades of parts of the facilities.

Planning schemes

[27] There is some controversy about just when mixed residential and commercial land use in what is now known as the Wynyard Quarter became a serious possibility and to what extent the parties would have taken a change of use into account in 1985. The first urban planning scheme appears to have been developed in 1938. Under that and all subsequent schemes until 1985 the land was zoned for industrial use and permitted the bulk storage of petroleum products. The industrial zoning was designed to preserve the area for port-related uses. Residential and mixed commercial uses would likely have required a change to the district scheme.

[28] A proposed regional planning scheme released in 1982 would have required for safety reasons that local authorities should encourage alternative siting for bulk petroleum storage, away from the port and central areas, but it does not appear that this document took effect; its objective depended in any event on there being alternative facilities and sites available. In April 1985 the Council produced a report on land use in Auckland which noted the Western Reclamation's considerable potential for uses that took advantage of its waterfront views and amenities.[6] But this amounts to what one of Mobil's planning witnesses, Lee Beattie, described as strategic or aspirational thinking. It appears that not until 1997 was anything formal done to set in train a change in land use.[7] The Judge found that there was no realistic possibility in 1985 of the land being used for residential or commercial purposes.[8]

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6 Auckland Regional Authority "Proposed Auckland Regional Planning Scheme: Section One" (April 1985) at [33].

7 High Court judgment, above n 2, at [81].

8 At [81].

The 1985 tenancies

[29] As noted, Mobil held over from 1980 until 1985. Negotiations for new leases appear to have been protracted. In 1979 Mobil pointed out that it no longer owned the fixtures, some of which needed renovation or replacement, and made it clear that its willingness to refurbish tanks or build new ones depended on long-term security of tenure. For its part the Board appears to have been anxious to ensure that it had the right to have all improvements removed on the termination of any new leases. Overhanging negotiations was the possibility that the terminal would be bypassed by some products, namely petrol, aviation fuel and diesel, when the pipeline from Marsden Point to Wiri was completed, which was expected to happen by 1984. The Board was concerned to protect its revenue against that eventuality. Eventually it was agreed that Mobil would surrender part of the two sites, which necessitated a subdivision, and would re-purchase assets that had reverted to the Board when the original leases expired.

[30] Agreement was substantially concluded by May 1984, but the subdivision had not been completed and that delayed the completion of new leases. The parties accordingly entered the 1985 tenancies, expecting that longer-term leases would be negotiated for the sites that Mobil intended to retain. All the tenancies were backdated to 1 January 1981 and provided that they would expire finally on 31 December 1993 at the latest. The terms otherwise varied. Tenancies 1, 4 and 5, which covered those parts of the two sites that Mobil intended to retain, were terminable on one month's notice. Tenancies 2 and 3, which covered those parts that Mobil intended to abandon, were terminable on six months notice. These latter tenancies further recorded that the Board intended to give notice of termination once the Wiri terminal "becomes operational".

[31] As noted earlier, fixtures had passed to the lessor on termination of the original leases. The tenancies altered that position in different ways. Tenancies 1, 4 and 5 all recorded that the lessee had purchased the then existing improvements (oil storage tanks, structures and other improvements) from 1 January 1981 for specified sums of money. They obliged Mobil to remove all or any of the said improvements on termination, or in the event of such improvements becoming obsolete. They also

permitted Mobil during the term, or within a reasonable time of termination, to remove the improvements that it owned on the condition that "upon completion of removal the site shall be left in a clean and tidy condition".

[32] Tenancies 2 and 3 did not deal expressly with ownership of fixtures. Rather, they 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…".

[33] 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.

[34] Finally, 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:[9]

> 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.

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[9] There are minor variations in the wording of the clause but they are not material. In the case of tenancies 2 and 3 the clause 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.

The tenancies did not define "the land hereby demised" but they did define "demised premises" so as to include the relevant area of land and all existing fixtures.

[35] We note for completeness that despite intentions, the leases were never terminated when the Wiri pipeline became operational and new leases were never negotiated. New Zealand has no legislation assigning responsibility for contamination predating the Resource Management Act 1991 and although Mobil intimated that it was willing to take responsibility for its own contamination the parties could not come to terms over remediation. Nor did Mobil ever surrender the land subject to tenancies 2 and 3. It simply held over under the same terms until the sites were finally vacated in 2011.

The claim

[36] The fifth amended statement of claim pleaded that the clean and tidy clauses obliged Mobil NZ to deliver possession of the land in an uncontaminated condition on termination, save for any inorganic contaminants associated with the original fill, and so that it might be used for any permitted activity. In the alternative, AWDA pleaded an implied term that having regard to the risk of hydrocarbon contamination that would adversely affect the reversionary interest, Mobil NZ would during its occupation take all steps available to prevent contamination and would remediate any such contamination when the tenancies ended. The statement of claim did not specify what caused contamination.[10] Damages claimed comprised the full costs of remediation, some $48 million.

[37] All of these allegations were denied, Mobil NZ pleading that it had no obligation for contamination for which it was not legally responsible (such as that caused by Shell) and further that it need do no more than leave the land in a condition reasonably fit for industrial occupation, including petroleum storage, having regard to the contaminated state of the fill used in the reclamation. It contended that any contamination that it and its predecessor companies caused was

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[10] This distinguishes the case from *BP Oil New Zealand Ltd v Ports of Auckland Ltd*, above n 5, at [26]–[31], in which it was said that some of the contamination was caused by leaks from poorly maintained fixtures and that contamination might be harm consequential upon breach of a repair covenant.

the result of reasonable and permitted use. Mobil contends that the action is really a claim in waste, pleaded in contract only because a tort claim would be out of time.

Who assumed the risk of contamination under the pre-1985 leases?

[38] This proceeding is concerned with obligations created under the 1985 tenancies, but the predecessor leases matter. It was during their terms that the relevant damage was done to the reversion and Mr Ring QC argued that the leases assigned the risk of contamination to the Harbour Board because they licensed petroleum storage and contamination is a normal incident of that activity. It follows, he submitted, that the duty under the leases not to cause nuisance or injure the lessor did not extend to these risks, nor was there any liability in tort; and that formed part of the context for the 1985 tenancies, which should not be interpreted so as to hold Mobil NZ liable for contamination that happened before they commenced.

A lessee's or tenant's obligation not to commit or permit waste.

[39] Waste is any act or omission by the lessee or tenant that causes enduring change to the nature of the thing demised, to the prejudice of the holder of the reversionary interest.[11] It may be voluntary, meaning a positive act, or permissive, meaning an omission. An example of voluntary waste is damage done to the fabric of a building when removing a tenant's fixtures on termination.[12] The most common example of permissive waste is allowing fixtures to fall into disrepair.

[40] We adopt the following concise account of the history and substance of waste from *Principles of Real Property*:[13]

> The purpose of the law of waste is to achieve a balance between the interests of a limited owner, such as a life tenant or a lessee for years, and the

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[11] William Blackstone *Commentaries on the Laws of England* (15th ed, Professional Books, Abingdon (Oxfordshire), 1809) vol 2 at 280 defines waste as "a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder…", or more widely, "[w]hatever does a lasting damage to the freehold or inheritance." This definition is cited in *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212 at 1218. See also *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624 at 635; *Jones v Chappell* (1875) 20 LR Eq 539 (Ch) at 541; and *Meux v Cobley* [1892] 2 Ch 253 (Ch) at 263.

[12] *Mancetter Developments Ltd v Garmanson Ltd*, above n 11.

[13] Hinde and others *Principles of Real Property Law* (online looseleaf ed, LexisNexis) at [6.028] (footnotes omitted).

remainderman or reversioner by preventing the limited owner from either exploiting the property or allowing it to fall into a state of decay. The objectives of the rules relating to waste have been thus described:

> The law of waste is a part of the regulation of the relations between persons who simultaneously have interests in the same thing. Normally one of these persons has possession and the others are out of possession. Such a circumstance requires that the one in possession be forbidden such action as will diminish the market value of the other interests; and that he be required to act fairly in the maintenance of the property by the payment of current charges and the prevention of deterioration. … All of these detailed rules have a single underlying justification or objective which is to assure to each person, in a split ownership, the accomplishment of his reasonable desires to the largest extent that is consistent with the reasonable protection of the other interests.

At common law an action for waste lay only against lessees whose estates arose by operation of law, such as tenants in dower and tenants by the curtesy. No action for waste lay against a life tenant or a tenant for years because their interests were created by act of the parties, so that it was the grantor's or lessor's own fault if the commission of waste was not restrained by the inclusion of appropriate conditions or covenants in the instrument creating the life estate or lease. The common law rule was altered by c 23 of the Statute of Marlborough 1267, which provides that:

> ...[F]ermors, during their terms, shall not make waste, sale, nor exile of house, woods, men, nor of any thing belonging to the tenements that they have to ferm, without special licence had, by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

…

In the Statute of Marlborough 1267 the expression "fermors" includes life tenants and tenants for years, whether they hold by deed or otherwise; and the words "make waste" include both permissive waste and voluntary waste. The "special licence" mentioned in the Statute of Marlborough 1267 is commonly expressed by the well-known phrase "without impeachment of waste", which means that a life tenant is expressly permitted to do acts which would normally constitute legal waste without incurring liability.

[41] The Statute of Marlborough was part of New Zealand law until 2008,[14] when the Property Law Act 2007 declared that it should cease to have effect.[15] The Act provides that a life tenant or lessee is liable in damages for the torts of voluntary and

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[14] The Statute of Marlborough 1267 (Eng) 51 Hen III c 23 became part of New Zealand law by way of s 2 of the English Laws Act 1908 and remained in force through s 3(1) of the Imperial Laws Application Act 1988; it was recognised in *Marlborough Properties Ltd v Marlborough Fibreglass Ltd* [1981] 1 NZLR 464 (CA) at 475.

[15] Property Law Act 2007, s 365.

equitable[16] waste unless a term of the grant or lease excludes liability.[17] It also abolished the tort of permissive waste, leaving lessors to protect themselves under repair covenants.[18] Terms that the Act implies into leases unless otherwise agreed include a covenant that the lessee will not commit the tort of voluntary waste.[19] We note that the Property Law Act 1956, which was in force in 1985, did not imply such a term.

[42] An action for waste is an action in tort.[20] As Farwell LJ succinctly put it in *Defries v Milne*, "waste is not an action on covenant, whether express or implied."[21] The maximum extent of damages is not the cost of putting into repair but the diminution in the value of the reversion.[22]

[43] The tortious obligation not to commit waste differs from a contractual obligation to keep a property in repair[23] and courts are slow to exclude tortious liability.[24] 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.[25] But repair covenants usually cover the same ground and they are customarily included in leases and tenancies. For these reasons, as Dillon LJ put it in *Mancetter Ltd v Garmanson Ltd*:[26]

> Waste is a somewhat archaic subject, now seldom mentioned; actions in respect of disrepair are now usually brought on the covenant.

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16 Equitable waste is an unconscientious abuse of the immunity from waste of a tenant holding property subject to an express dispensation from liability for waste. See generally Hinde and others, above n 13, at [6.029(d)].

17 Property Law Act 2007, s 68.

18 Section 70.

19 Section 218 and sch 3, cl 7.

20 See generally Charles Harpum, Stuart Bridge and Martin Dixon *Megarry & Wade: The Law of Real Property* (7th ed, Sweet & Maxwell, London, 2008) at [3-090], citing *Mancetter Developments Ltd v Garmanson Ltd*, above n 11, at 1219 and 1222–1223; *Halsbury's Laws of England* (5th ed, 2012) vol 62 Landlord and Tenant at [576]; and Law Commission *The Property Law Act 1952* (NZLC PP16, 1991) at 184.

21 *Defries v Milne* [1913] 1 Ch 98 (CA) at 108. In doing so, he expressed disagreement with Lord Esher MR's characterisation of waste as an implied covenant in *Witham v Kershaw* (1885) 16 QBD 613 at 616.

22 *Whitham v Kershaw*, above n 21, at 618.

23 *Regis Property Co Ltd v Dudley* [1959] AC 370 (HL) at 407, citing *Kinlyside v Thornton* (1776) 2 Bl R 1111, 96 ER 15 (KB).

24 See for example *BP Oil New Zealand Ltd v Ports of Auckland Ltd*, above n 5.

25 *Marker v Kenrick* (1853) 13 CB 187 (Comm Pleas); but see the judgment of Kerr LJ in *Mancetter Developments Ltd v Garmanson Ltd*, above n 11, at 1222–1225.

26 *Mancetter Developments Ltd v Garmanson Ltd*, above n 11, at 1218.

[44] Further, it is well settled in New Zealand law that repair covenants are not to be interpreted in any technical way. In *Weatherhead v Deka New Zealand Ltd* this Court addressed the question whether earthquake strengthening work, the need for which predated the lease, was the responsibility of the tenant under a repair clause.[27] The Court adopted English authority to the effect that "repair" and its synonyms are ordinary words the content of which depends on context, and approved the following passage from the judgment of Hoffmann J in *Post Office v Aquarius Properties Ltd*:[28]

> … the whole law on the subject may be summed up in the proposition that 'repair' is an ordinary English word. It also contains a timely warning against attempting to impose the crudities of judicial exegesis upon the subtle and often intuitive discriminations of ordinary speech. All words take meaning from context and it is, of course, necessary to have regard to the language of the particular covenant and the lease as a whole, the commercial relationship between the parties, the state of the premises at the time of the demise and any other surrounding circumstances which may colour the way in which the word is used. In the end, however, the question is whether the ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done.

[45] It is not waste to do something permitted under the lease[29] or, as the Statute of Marlborough put it, by "special licence had by writing of covenant".[30] 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.[31] However, that principle is better suited to those cases in which the court is deciding whether the lease permits the lessee's actual use. So, for example, in *Manchester Bonded Warehouse* Lord Coleridge CJ held that:[32]

> …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 a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper.

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27 *Weatherhead v Deka New Zealand Ltd* [2000] 1 NZLR 23 (CA).

28 At [20], citing *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105 (Ch) at 107 (emphasis omitted).

29 *Meux v Cobley*, above n 11, at 263.

30 Statute of Marlborough 1267, cited in *Marlborough Properties Ltd v Marlborough Fibreglass Ltd*, above n 14, at 475.

31 High Court judgment, above n 2, at [51].

32 *The Manchester Bonded Warehouse Company Ltd v Carr* (1880) 5 LR CP 507 (Comm Pleas) at 512 (emphasis added).

[46] In this case there is no doubt that Mobil's particular use was expressly authorised under the leases. 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 test was applied in *Re Rotoiti No 5B Block*, in which the question was whether the authorised use, farming, allowed the lessee to fell timber, an act that would normally amount to waste.[33] Hosking J held that:[34]

> …the questions would be whether there was an intention that the lessee should have the profitable enjoyment of the land, and, next, whether that profitable enjoyment could be had in any reasonable way except by clearing the land of bush and of whatever timber the bush may comprise.
>
> …
>
> In view of these considerations, the next question, whether the reasonable enjoyment of the land with the surface covered as it is could be had without clearing it, answers itself.

To the extent that the High Court adopted a different test in this case, and in *BP v Ports of Auckland*,[35] we hold that it was in error.

Liability under the pre-1985 leases

[47] As noted, all of the leases are materially similar. We will focus on the original 1925 lease. We have quoted cl 7 at [14] above. It established three obligations:

(a) Not to carry on any offensive or dangerous trade or business, provided that the business of an oil merchant including the storage of petroleum product in bulk was not to be regarded as an offensive and dangerous trade for purposes of the clause.

(b) Not to do or suffer anything that might be or become a nuisance or to cause injury to the lessor or adjoining owners or occupiers.

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33 *Re Rotoiti No 5B Block* [1923] NZLR 619 (SC).
34 At 624–625.
35 *BP Oil New Zealand Ltd v Ports of Auckland Ltd*, above n 5, at [75], [135] and [178]–[179].

(c) Not to suffer the demised premises or anything on them to become in the lessor's opinion unsightly or untidy.

[48] As noted, the lease also contained a repair clause. Clause 3 obliged the lessee to keep and maintain all buildings, structures and fences in good order, condition and repair and to yield them up in that state on termination: this obligation did not reach the land. The lease also negatived or modified any provisions of the Property Law Act 1908 that were inconsistent with it.[36]

[49] On the face of it, the covenant not to injure the lessor is apt to cover what would otherwise be permissive or voluntary waste. Mobil's contamination appears to have been substantially attributable to leaking pipes and tanks that had been affected by corrosion, which would amount to permissive waste, and the practice of dewatering, which would amount to voluntary waste.

[50] However, Katz J appears to have reached the tentative conclusion that what was done was authorised as a part of the permitted use. She found that it is impossible to now determine whether Mobil's use was unreasonable, judged against the laws and standards of the time, but stated that it seemed likely that it was. She also found that petroleum storage carried with it the likelihood of contamination. She reached these findings when concluding that Mobil's use would not be actionable in the tort of waste, to which reasonable use is a defence.[37]

[51] We take the view that this was to apply the wrong test. We have explained that reasonable use is the relevant standard where the question is whether the lease contemplated the lessee's actual use. Where the use is specifically authorised, as in this case, and contamination was an incident of that use, the question is whether there was no other reasonable way of carrying on the permitted use.

[52] As to that, spillage and dewatering must be considered separately. So far as spillage, in which we include leaks, is concerned, it is one thing to recognise that

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[36] Section 84(b) of the Property Law Act 1908 implied a covenant that the lessee would keep and yield up the demised premises in good and tenantable condition and repair, exempting fair wear and tear and inevitable accident. The Act provided at s 10 for liability for equitable waste by tenants for life, unless there was an express intention in the instrument to allow equitable waste.

[37] High Court judgment, above n 2, at [51]–[52].

spills are a risk, quite another to regard them as a normal incident of business and so inherent in an authorised use. Petroleum products are inherently dangerous and especially so when stored in bulk, and there is no evidence that their spillage was ever authorised under governing by-laws and regulations.[38] As noted, the evidence is that Mobil itself did not regard spillage as a normal incident of business. Systems and procedures were designed to prevent it, as one would expect. To the extent that spillage resulted from corrosion Mobil would also have breached successive repair covenants in the leases.

[53] Turning to dewatering, there is no evidence that the lessor appreciated from the outset that Mobil would engage in dewatering followed by discharge into tank compounds. Katz J found that not until after 1985 did the Harbour Board appreciate the full nature and extent of contamination and its effect on the subsurface.[39] Nor does the evidence establish that these practices were necessary incidents of the permitted use. Specifically, it does not show that better dewatering practices, such as the techniques now used (piggable lines and separator systems from which water is pumped into the harbour), were not available from the outset. Nor does it show that dewatering necessarily entailed discharge into the tank compounds followed by leaching into the subsoil; for example, the tank compounds might have been sealed to prevent subsurface contamination and steps might have been taken to remove contaminated water.[40]

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38 We found nothing that authorised spillage in the Explosive and Dangerous Goods Act 1908, the Explosive and Dangerous Goods Amendment Act 1920, the Dangerous Good Regulations 1928 or (assuming it applied to Harbour Board land) the Auckland City Council By-Law No 25 In Respect of Storage of Dangerous Goods 1917. The 1917 bylaw refers repeatedly to the necessity of avoiding the escape of liquid or vapour. Regulation 105 of the Dangerous Goods Regulations 1958, which dealt with the maintenance of oil pipelines, required that on completion of pumping operations and before hoses were disconnected, all pipelines between wharves and bulk-oil installations should be cleared of product, flushed with water, and kept full of water, but this safety requirement did not permit spillage; on the contrary, the regulations went to some length to ensure that it would be avoided, requiring regular inspections and testing of lines. Nor does it appear that the Dangerous Goods Acts of 1957 and 1975, the Auckland Harbour By-Laws 1958 or the Dangerous Goods (Class 8 – Flammable Products) Regulations 1985 authorised spillage.

39 High Court judgment, above n 2, at [30].

40 There is a suggestion in the evidence of Mr Hunt that early dangerous goods regulations permitted or required dewatering. We found nothing to that effect in the dangerous goods legislation in force when the leases were entered or the Dangerous Goods Regulations 1928. As noted at n 38 above, the Dangerous Goods Regulations 1958 required that lines be flushed with water, but that is not synonymous with dewatering and the regulations did not authorise dumping of such water into compounds; further, the regulations specified that tank compounds be impervious to liquid dangerous goods (which would have precluded subsurface contamination)

[54] For all of these reasons, we are not persuaded on the evidence before us that the pre-1985 leases must be taken to have authorised either spillage or dewatering. Like Katz J, however, we need not reach a final view about this. It is enough for our purposes that as at 1985 Mobil NZ 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.

Liability for contamination under the 1985 tenancies

Claim of breach of leases

[55] We have referred to the material terms of the tenancies at [34]–[38] above. The argument focused on cl 9. That provision created the following obligations:

(a) At all times to keep the land in good order and clean and tidy and free from rubbish, weeds and growth;

(b) At all times to keep all buildings, oils storage tanks, structures, fixtures and other improvements in or upon the land in good and tenantable repair to the reasonable satisfaction of the lessor;

(c) Upon termination to deliver the land and any improvements left on it in such good and tenantable repair and condition and clean and tidy to the reasonable satisfaction of the lessor.

[56] We make several points about these obligations. First, they reach the land. That distinguishes this case from *BP v Ports of Auckland*, in which the repair covenants were confined to structures placed on it.[41] Second, in this respect the tenancies mark a departure from the pre-1985 leases, in which the repair covenants were confined to structures.

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that water was not permitted to accumulate but must be drained, and that any pipe used for drainage must incorporate a valve and a petroleum trap: see regs 81(1) and 82. To discharge waste water into compounds for settling seemingly would be to allow it to accumulate there. We note that the prohibition on accumulation of water also appeared in the 1928 regulations, at reg 69, but while those regulations contemplated that compounds must retain spilled liquids they did not specify that the compounds must be impervious.

41 *BP Oil New Zealand Ltd v Ports of Auckland Ltd*, above n 5, at [26].

[57] Third, so far as delivery up on termination is concerned the land is the principal focus of the clause. That is so because, as noted earlier, the Wiri terminal had led the parties to contemplate surrender of part of the land and perhaps Mobil's eventual departure from the reclamation. Other provisions of the tenancies accordingly contemplated that Mobil might, and would if required, remove all of its improvements, in each case leaving the site in clean and tidy condition. Hence cl 9 refers, when addressing termination, to "any improvements left" on the land.

[58] Fourth, there is a degree of ambiguity about the obligation on termination because it rolls up the discrete obligations for land and structures that the clause imposes during the term. In our opinion the standard required in relation to the land remains the same; it is to be delivered in good order and clean and tidy and free from rubbish, weeds and growth. It would be surprising had the drafter intended to set a lower standard on termination. The obligation is qualified, however, in that the lessor may insist on the work being done to a reasonable standard only.

[59] The qualification is significant because we accept that as at 1985 residential and light commercial use was not reasonably in prospect. The likely alternative use would have been an industrial one, consistent with the land's zoning at the time, meaning that the reasonable standard under the tenancies would reflect the less sensitive requirements of industry.

[60] However, 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.

[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,[42] 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.

[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.[43]

[63] In ordinary usage an owner's interest in land includes the subsurface.[44] The question, accordingly, is whether an owner who leases land for a given use should be taken to have parted for the term with something less than its entire interest. As to that, Mobil did not confine its activities to the surface; it built the improvements, necessarily using the subsurface to create foundations, bury pipes and presumably to

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42 High Court judgment, above n 2, at [58].

43 *Brew Brothers Ltd v Snax (Ross) Ltd* [1970] 1 QB 612 (CA) at 639–640, per Sachs LJ, adopted by this Court in *Weatherhead v Deka New Zealand Ltd*, above n 27, at [18].

44 The maxim 'Cujus est solum, ejus est usque ad coelum et ad inferos' is a general common law rule that the owner of the soil is presumed to be "the owner of everything up to the sky and down to the centre of the earth": Hinde and others, above n 13, at [6.004]; and *Corbett v Hill* (1870) 9 LR Eq 671 (Ch) at 673. In *Mitchell v Mosley* [1914] 1 Ch 438 (CA) at 450, Cozens-Hardy MR stated "the grant of the land includes the surface and all that is supra — houses, trees, and the like … and all that is infra, i.e. mines, earth, clay etc."

build bunds, and the tenancies authorised it to remove its improvements. These circumstances distinguish the case from that of the tenant who makes no improvements but merely occupies premises already erected by the landlord.

[64] Further, much of the contamination with which we are concerned must have resulted from petroleum products being discharged or spilled onto the surface, from which they found their way into the subsurface; put another way, damage to the subsurface is a direct consequence of contamination of the surface. Some of the contamination appears to have occurred when buried pipes leaked directly into the subsurface. For all of these reasons we see no justification for excluding the subsurface from the tenancies and hence the repair clause; on the contrary, we consider that the lessor must be taken to have parted with the whole of its interest in the land for the term of the tenancies.

[65] The next question is whether the obligation extended to contamination predating the tenancies. We begin with the Judge's reasons. Katz J found that it would be unusual for a tenant to assume responsibility for historic contamination caused by entities for which it was not legally responsible, especially when entering a short term tenancy, and further that the pre-1985 tenancies imposed no obligation affecting the land.[45] She reasoned that Mobil would not have been liable in tort for waste either, because the damage that it did was not unreasonable against the environmental standards of the time. As noted, she also accepted Mobil's submission that the parties cannot have intended that remediation should be undertaken at the commencement of the tenancies. There was no express reference to such obligation in negotiations. Against this background, she held that the "largely boilerplate" language of cl 9 did not extend to subsurface contamination.[46]

[66] We have already taken the view that Mobil NZ came to the negotiating table in 1985 with an actual or potential prior liability for its own contamination. On the evidence we are not satisfied that the pre-1985 leases excluded liability for contamination; on the contrary, they contained a covenant prohibiting any injury to the lessor and that is apt to include damage of the kind done here. We acknowledge

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45 High Court judgement, above n 2, at [43]–[46].
46 At [36].

that a materially identical clause was interpreted differently in *BP v Ports of Auckland*, but Rodney Hansen J rested his conclusion on the proposition that contamination was permitted as an incident of the authorised use.[47] For the reasons given earlier, the evidence does not show that the actual causes of contamination, principally spillage and dewatering, were authorised as the only reasonable way of conducting the permitted use. The extent and measure of Mobil NZ's liability in tort or contract may have been unknown, but we repeat that we are concerned only to identify the context for the 1985 tenancies, and it is enough for that purpose that the parties foresaw an actual or potential liability for cleanup costs. When the tenancies are read as a whole against the background of the original leases, it is manifest that they did.

[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.

[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.

[69] Like Katz J, we adopt Canadian authority to the effect that a new lease does not excuse a tenant from its own liability for past breaches. In *Canadian National Railway Company v Imperial Oil Ltd* the Supreme Court of British Columbia confronted a similar set of facts, in which Imperial Oil's bulk storage activities had contaminated land leased to the company under successive leases granted since 1914.[48] The question was whether a repair or "clean and tidy" clause in the final lease, which was granted in 1989, by which time the land was contaminated,

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47 *BP Oil New Zealand Ltd v Ports of Auckland Ltd*, above n 5, at [37].
48 *Canadian National Railway Company v Imperial Oil Ltd* 2007 BCSC 1557.

required that the land, including the subsurface, be remediated to its condition in 1914. Ralph J refused to apply the legal fiction that on termination the land is notionally restored to the lessor with the lessee being deemed to assume possession on renewal, characterising that approach as impractical and commercially unreasonable.[49] In this case that approach would also be inconsistent with the tenancies themselves, for the reasons just mentioned.

[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.[50] 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 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]

Claim of breach of implied term

[71] We turn to AWDA's alternative claim that the tenancies ought to have a covenant against waste implied into them. Canadian cases have opted for an implied term in connection with express repair obligations. In *Imperial Oil*, for example, Ralph J held that the repair clause justified an implied term that the premises would

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49 *Canadian National Railway Company v Imperial Oil Ltd*, above n 48, at [44]–[48].

50 High Court judgment, above n 2, at [69].

51 Having regard to the parties' stances before us, it may appear surprising that agreement was not reached. It appears that at that time Ports of Auckland Ltd demanded that Mobil NZ should take responsibility for the full cleanup costs notwithstanding that some were attributable to other causes, including the Harbour Board's original decision to use contaminated fill.

be returned in uncontaminated condition.[52] That approach can be traced to the judgment of the Alberta Court of Queen's Bench in *Darmac Credit Corporation v Great Western Containers Inc*, in which Lutz J held that:[53]

> [60] In my view, in today's commercial world, unless a lease provides otherwise, it is implied within a lease that lands are to be returned uncontaminated. Contaminated lands are not saleable lands. Perhaps, when this particular Lease was entered, environmental concerns were minimal, but they have become prominent in recent years. Although environmental damage was not directly addressed when this lease was entered, the tenants are responsible for any contamination they cause.

That passage shows the Court has taken a policy approach, the need for which may have become apparent only after the lease was entered, justifying its decision by the proposition that contamination damages the reversion, as measured by the land's value, and the presence of an express repair clause (requiring, in that case, that the premises be returned in the physical condition in which they were leased).

[72] *Darmac* was followed in *Progressive Enterprises Ltd v Cascade Lead Products Ltd* and in *O'Connor v Fleck*, both judgments of the Supreme Court of British Columbia, and distinguished in *Westfair Foods Ltd v Domo Gasoline Corp*, a judgment of the Manitoba Court of Queen's Bench.[54] In *Westfair*, it appears that provincial legislation implied a covenant against waste but Morse J found that it was not breached because the tenant had not acted negligently; further, the landlord knew of the likelihood of contamination from day to day operation of the permitted use, that of retailing petrol.[55]

[73] There are good reasons for fixing an implied term. The ancient law of waste remains centrally relevant to the relationship of landlord and tenant;[56] they have quite different interests in the same land and premises, and the law balances those interests. The tenant's obligation not to commit waste is also self-evident, meaning

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52 *Canadian National Railway Company v Imperial Oil Ltd*, above n 48, at [49]–[51].

53 *Darmac Credit Corporation v Great Western Containers Inc* (1994) 163 AR 10.

54 *Progressive Enterprises Ltd v Cascade Lead Products Ltd* (1996) 67 ACWS (3d) 575 (BCSC) at [29]–[35]; *O'Connor v Fleck* 2000 BCSC 1147 at [150]–[160]; and *Westfair Foods Ltd v Domo Gasoline Corp* (1999) Man R (2d) 77 (MBQB) at [27]–[30].

55 Law of Property Act of Manitoba RS M 1987 c L-90, s 13(1); and *Westfair Foods Ltd v Domo Gasoline Corp*, above n 54, at [38]–[41].

56 Although it has been modified by statute, as it is in the case of permissive waste, see Property Law Act 2007, s 70.

that parties must normally be taken to recognise it even if they did not define its parameters in their particular circumstances. The traditional insistence that waste is a tort, to be distinguished from repair covenants, has become academic in most cases. To categorise the obligation not to commit waste as a term implied by law unless excluded by agreement is a straightforward way of implementing it in a relationship governed primarily by contract. That is the approach adopted by the Property Law Act 2007.[57] However, it is not the approach historically taken in New Zealand, which has until recently continued to follow English law.

[74] On the view we take of the case, however, we need not decide whether a term ought to be implied. The obligation is express. Under the repair clause in the 1985 tenancies Mobil NZ assumed responsibility for delivering the land, including the subsurface, in clean and tidy condition having regard to its condition when Mobil's use first began in 1925.

Decision

[75] The appeal is allowed. We declare that Mobil NZ breached the repair obligation in the 1985 tenancies by failing on termination to remediate hydrocarbon contamination of the land caused by Mobil NZ and its predecessor companies in the Mobil Group since their occupancy began in 1925. The parties having agreed that the cost of such remediation is $10 million, judgment may be entered for that sum. There is no claim for interest.

[76] AWDA will have costs of the appeal as for a standard appeal on a band B basis. We certify for second counsel.

HARRISON J

[77] I agree with the majority that this appeal should be allowed. I agree with their reasoning, except to the extent to which I shall shortly outline, and I adopt

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[57] Property Law Act 2007, s 218 and sch 3, cl 7.

Miller J's comprehensive analysis of the factual background.[58] It provides the necessary context within which all issues can be appropriately addressed.

[78] Where I depart from the majority is with its construction of cl 9 of the tenancies so as to extend Mobil NZ's liability to remedy pre-existing contamination of the sites.[59] While I agree that the provision requires Mobil NZ to rectify any contamination caused to the sub-surface of the land during the term of the tenancies, I am unable to construe it as imposing an absolute duty to return the land on termination in any better or improved condition than it was at the date of commencement.

[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.[60] It is common ground that by the 1970s the land had become so polluted as to require complete remediation.[61] 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.[62] However, those factors reinforce the importance of

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58 Above at [6]–[35].
59 At [65]–[70].
60 At [22].
61 At [20].
62 At [69].

determining Mobil NZ's liability in accordance with the relevant contractual instruments that were in effect when the damage was caused.

[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.

[82] I would add that if cl 9 was to be construed narrowly, as Mr Ring submitted, then I agree with the majority that a term should be implied into the tenancies imposing a liability upon Mobil NZ for commission of waste.[63] I am not convinced by the policy-based reasoning of the relevant Canadian authorities but I agree with Miller J's principled approach for implying a term.

[83] I appreciate that adoption of my analysis would cause AWDA difficulties in proving that any breaches by Mobil NZ of its 1985 tenancies has caused it loss given that, first, as noted, the sites required complete remediation by the mid 1970s and, second, the parties agreed remediation cost figure of $10 million does not apportion loss between damage incurred before and after 1985. However, I would have remitted the proceeding to the High Court to hear further evidence upon and to determine questions of causation and quantum.

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63 At [71]–[73].