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Mobil not liable to pay Auckland Waterfront $10m in damages to remove or contain subsurface contamination

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A recent case has highlighted the kind of dispute that can arise over clean up obligations at the end of tenancies.

In the recent High Court case of Auckland Waterfront Development Agency Limited v Mobil Oil New Zealand Limited, Justice Katz dismissed Auckland Waterfront Development Agency's (AWDA) claim that Mobil was liable to pay $10 million in damages to remove or contain subsurface contamination at the end of its tenancy.

The Facts

From the 1950's to 2011, Mobil leased two properties at the western end of the port of Auckland. When Mobil left the sites at the end of its tenancy, the subsurface of the land was heavily contaminated.

The contamination arose from a number of sources including from when the land was first reclaimed, from occupiers unrelated to Mobil, from cross border contamination during Mobil's occupation and from Mobil's own activities during its occupation.

The case focused on the interpretation of a clause that obliged Mobil to deliver up the land in good order and clean and tidy.

If the Court was to find in AWDA's favour, Mobil would have been required to pay AWDA $10 million in damages.

The Issue

AWDA claimed that the clause obliged Mobil to keep and deliver up the sites free of all subsurface contamination, including historic contamination, but excluding that relating to the reclamation. Therefore enabling the landlord to use the land for any activity permitted as at the date of termination of the tenancy agreements, including residential.

Mobil submitted that the clause related only to the surface condition of the land, that regard must be had to the condition of the land and to the parties' intentions at the commencement of the tenancy, and that the intention was to deliver up the land in a suitable condition for industrial use.

Justice Katz

In determining the issues Justice Katz found that the ordinary and natural meaning of the words in the clause were not so apparent that the Court need not look further to determine. Therefore the Court had to look to the wider context including pre-contract negotiations, post contract conduct, that contamination existed at the time of entering the tenancy agreements, that the tenancies were terminable on one or six months notice and the common intention of the parties (assessed objectively) when they agreed the clause.

The Decision

Justice Katz found that AWDA's interpretation would have required Mobil in 1985 to immediately undertake extreme and expensive remediation works which was in her view untenable,

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commercially unrealistic, and not in accordance with the common intention of the parties.

In dismissing AWDA's claim, Justice Katz noted that "it would be unusual for a tenant to agree to remove historic contamination by entities which it is not legally responsible. Any such agreement would normally be expressed in clear and unambiguous wording".

Mobil was liable to put the land into a state of repair to ensure that the premises would be fit for occupation by a tenant who would have been likely to occupy the premises at the commencement of the tenancy agreements, i.e. industrial tenants. Mobil did not breach its obligations.

Note and Reminder

It was noted in the case that unlike many other jurisdictions New Zealand does not currently have specific legislation allocating liability for the clean up of historic contaminated sites (those that pre-date the coming into force of the Resource Management Act 1991).

This makes it even more important that parties before contracting to lease properties, turn their mind to the issue and clearly set out who is responsible for what and/or if there are to be any limitations that typically would be predicted on a soil assessment.

Update

AWDA are deciding whether to appeal the decision. Watch this space.

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