

The Big Spill: Damages for contamination to land

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A recent decision by the Supreme Court of Victoria highlights the importance of particularising claims for damages at an early stage of proceedings. The decision arose from contamination to land and highlights why ensuring correct identification of the heads of damages claimed reduces the risk of being unable to satisfy evidentiary burdens. Here, we discuss how Justice Digby's decision in *Winky Pop & Anor v Mobil Refining Australia Pty Ltd* demonstrates the danger in casting the net too widely.

The facts

The Plaintiffs, Winky Pop Pty Ltd and OR Australia Pty Ltd, are part of the Hallmarc Group; a group of companies that develop residential and commercial properties. The Plaintiffs own land in Williamstown North, Victoria (the land).

In December 2006 over 486,000 litres of petroleum hydrocarbon leaked from Pipeline 1 (**the leak**), owned and operated by the First Defendant, Mobil Refining Australia Pty Ltd (**Mobil**). The leak resulted in the nearby groundwater being polluted, including under the Plaintiffs land.

Mobil had undertaken cleaning up operations in accordance with the Environmental Protection Authority (**EPA**) requirements.

The Plaintiffs' Claims

The Plaintiffs claimed damages for negligence and nuisance and compensation under section 151 of the *Pipelines Act 2005* (Vic). Mobil accepted liability for negligence and committed to the ongoing clean up but denied liability in nuisance, which was ultimately abandoned as a claim by the Plaintiffs.

The Plaintiffs also claimed that the opportunity to develop the land for residential purposes at some time in the future had been lost as a result of the leak and that damages should be awarded on the basis of the value of the plaintiffs' preferred residential development, less the cost of development and the residual value of the land following the leak. The Judge rejected a claim for loss of profits as the case at trial was framed in terms of loss of a valuable opportunity to develop residentially.

The Defendants disputed the valuation methodology and contended that the appropriate form of damages was the costs reasonably incurred by the Plaintiffs in investigating the leak and the diminution in value of the Plaintiffs' land caused by the leak.

At the time of the leak, the land was vacant and the Plaintiffs were attempting to have the land rezoned from 'Industrial' to 'Residential'; subsequently abandoned due to the Plaintiffs' belief that there was no reasonable prospect of adequate remediation and decontamination of the land.

Negligence and Nuisance

Nuisance is open where it can be demonstrated that the acts caused physical injury to land, unreasonable and substantial interference with the use and enjoyment of land or encroachment onto land. The Plaintiffs claim in nuisance arose as a result of alleged interference rendering the land unsuitable for residential development.

Mobil denied the contamination caused by the leak unreasonably interfered with the Plaintiffs' use and enjoyment of the land. The Plaintiffs abandoned their claim in nuisance and sought damages for loss of opportunity.

Damages for torts affecting land

The Plaintiffs sought compensation for the lost development opportunity, to be assessed by reference to the profits associated with the higher density development. That lost profit was estimated at \$170,424,648 less \$9,938,500 for the post-leak value of the land. The Plaintiffs contended that this would place them in the same position they would have been in had the wrong not occurred, whereas damages for diminution in value would not restore them to the position they would have been in had the tort not been committed. Their position was that diminution in value, assessed by reference to market value, was largely irrelevant because they were not sellers of the land at the time the tort was committed; they were developers for profit.

Mobil contended that the normal measure of damages for torts affecting land was the amount of diminution in value of the land, or the cost of reinstatement of the land to the condition it was in before the tort, unless those costs were disproportionate to the diminution in value.

The appropriate measure of damages for torts affecting land

His Honour decided that the appropriate measure of damages for injury done to land is usually the diminution in the value of land or the costs of reinstatement. The Plaintiffs had not established that remediation or reinstatement of the land was not possible and therefore, an award of damages for a loss of opportunity when the Plaintiffs would retain the land and the opportunity to develop continued to exist would be likely to over-compensate the Plaintiffs.

At the time of the leak the Plaintiffs had no special value in the land as they had not decided when or how they were going to develop the land. Circumstances making diminution in value damages more appropriate and just than loss of opportunity damages included:

- consideration of the fact that pre-leak and post-leak it was uncertain how and when the land may be developed;
- enforcement of remediation by injunctive relief had been abandoned;
- remediation was likely to restore the land to its highest and best use; and
- there had been no demonstration that the land would not be somehow developed in the future and, therefore, diminution in value was more reliably and accurately ascertained, determined by the market at the relevant time.

Damages for loss of opportunity carried a significant risk that the Plaintiffs would, or may be, over-compensated if they ultimately developed the land in some way involving residential development in the future or alternatively, sold the land for a price which factored in potential residential development.

Reinstatement damages were not appropriate because Mobil was remediating the land and continued to be obliged to do so.

Damages for loss of opportunity

In order to establish loss of opportunity the Plaintiffs needed to prove, on the balance of probabilities, that before the leak, they would have sought to rezone and develop it residentially, there was a substantial prospect of acquiring benefits of some value at least arising from the residential

development and that opportunity had been lost. As the Plaintiffs were in the process of seeking approval for the rezoning of the land at the time of the leak, they had satisfied the first element.

His Honour found that it was most unlikely that the Plaintiffs would be able to achieve the residential rezoning of the land, or obtain the necessary development permits in the ascertainable future which rendered the prospect of acquiring benefits of some value negligible. The development opportunity was therefore not a realistic or attainable one and therefore not an opportunity that could be 'lost'. Further, there was insufficient evidence that the leak itself would prevent the land from being developed residentially.

Conclusion

From the decision it is clear that the Plaintiffs may have succeeded had rezoning and development been on foot so as to justify the loss of opportunity claim. How 'on foot' would also be an issue relevant to success and therefore care must be taken in formulating claims in this respect.

For more information or discussion, please contact HopgoodGanim Lawyers' [Planning & Environment](#) team.

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