

CONFIDENTIAL ITEMS 2003 – SEPTEMBER 2011

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommend-action to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
51	19 July 10	Morphett Street Soil contamination	Reason: h) legal advice	Documents attachments, minutes	No longer confidential	Extend Confidential Order to September 2017. The Chief Executive Officer be delegated the authority to revoke all or part of the order and directed to present a report containing the item for which the confidentiality has been revoked.	5 Sept 11	4 Sept 12	28/8/12

3. Note the further advice received from Graham Dart, Barrister that if it cannot be established that contamination has continued to flow on to

Council's land from the Gilbert Motors site during the last 3 to 6 years that Council's case would be unlikely to succeed due to the time limits imposed for legal action.

4. Note the advice from Coffey Environments that the date contamination flowed onto Council land would have a margin of error which is too great to support the time frame required for legal action to be allowed.
5. In view of the advice received determine that under the circumstances legal action against Gilbert Motors should not be undertaken to recover the costs incurred due to the impact of contamination on the Morphett St Stormwater project notwithstanding the evidence that the contamination has originated from the Gilbert Motors land.
6. Authorise the Chief Executive Officer to give Gilbert Motors the opportunity to make an ex gratia payment to Council towards the costs incurred by Council arising from the soil contamination without acknowledging liability (potentially for a purpose that would value add to the Gilbert Motors land on Adelaide Road) and in order to have Council maintain the confidentiality of this matter.

Seconded Councillor Zanker and CARRIED

16. CONFIDENTIAL REPORTS

16.1 REPORT TITLE: CONFIDENTIAL ITEM: MORPHETT ST - SOIL CONTAMINATION

DATE OF MEETING: 19 JULY

FILE NUMBER: 44/070/011

Strategic Plan Ref:

Goal Area 5 – Council Leadership

5.1 Sustainable community finances and assets.

Purpose:

To provide Council with information resulting from further investigations regarding soil contamination at the Gilbert Motors site.

Summary – Key:

Information gathering phase has now been concluded. Further investigation has highlighted that proving the date that contamination occurred would be a necessary precondition to commencing legal action. Also, if it cannot be established that contamination has continued to flow on to Council's land from the Gilbert Motors site during the last three (3) to six (6) years, Council's case would be unlikely to succeed due to the time limits imposed for legal action. If Council decides not to proceed with legal action there would be an opportunity for Gilbert Motors to consider making an ex-gratia payment on a confidential basis.

Recommendation

Section 90 (3) (h) Order

1. Pursuant to Section 90(3)(h)

Pursuant to Section 90(2) of the Local Government Act 1999 the Council orders that all members of the public except Chief Executive Officer, Acting General Manager Council Services, General Manager Vision and Compliance, General Manager Governance and Projects, Manager Governance and Business Processes, Minute Secretary be excluded from attendance at the meeting for Agenda Item Confidential Item – Morphett Street Soil Contamination.

The Council is satisfied that pursuant to Section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda item is information relating to legal advice, which will be discussed in detail with council members.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because a Council decision has not yet been made in relation to the advice and its subject matter.

Section 91(7) Order

2. **Pursuant to Section 91(7)**

That having considered Agenda Item Confidential Item – Morphett Street Soil Contamination in confidence under 90(2) and 3(h) of the Local Government Act 1999, the Council pursuant to Section 91(7) of the Act orders that the discussion, report, attachments and all minutes be retained in confidence and the revocation of confidentiality be delegated to the Chief Executive Officer to determine when there is no legal need for continued confidentiality, and that this order be reviewed every 12 months.

3. Note the further advice received from Graham Dart, Barrister that if it cannot be established that contamination has continued to flow on to Council's land from the Gilbert Motors site during the last 3 to 6 years that Council's case would be unlikely to succeed due to the time limits imposed for legal action.
 4. Note the advice from Coffey Environments that the date contamination flowed onto Council land would have a margin of error which is too great to support the time frame required for legal action to be allowed.
 5. In view of the advice received determine that under the circumstances legal action against Gilbert Motors should not be undertaken to recover the costs incurred due to the impact of contamination on the Morphett St Stormwater project notwithstanding the evidence that the contamination has originated from the Gilbert Motors land.
 6. Authorise the Chief Executive Officer to give Gilbert Motors the opportunity to make an ex gratia payment to Council towards the costs incurred by Council arising from the soil contamination without acknowledging liability (potentially for a purpose that would value add to the Gilbert Motors land on Adelaide Road) and in order to have Council maintain the confidentiality of this matter.
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Background

1. At its meeting on 19 April 2010, Council considered a confidential report regarding the Morphett St soil contamination which included legal advice from Graham Dart, Barrister (Attachment 1).

Apart from resolving to keep the matter confidential subject to review every 12 months Council also resolved to:

1. *note that a response has not been received from or on behalf of Gilbert Motors within the required 60 day deadline (Wednesday 7 April 2010) of the receipt of the letter dated 2 February 2010 issued by Thomson Playford Cutlers on Council's behalf to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST);*
2. *authorise Council officers to instruct Thomson Playford Cutlers to arrange for further investigatory work to be undertaken regarding the Gilbert Motors site (in conjunction with Council undertaking a comprehensive review of its records) to seek to establish as much history about the site as is possible;*
3. *note that a further report will be provided to Council as soon as the further investigatory work has been completed at which time it is anticipated that Council will be in a position to make a determination regarding proceeding with formal legal action against Gilbert Motors*
2. Thomson Playford Cutlers was instructed to undertake further investigatory work into the history of the Gilbert Motors site. Additionally Council records were reviewed for further useful information. This work did not reveal any further information which would be of use in a legal action to recover Council's costs.
3. Council staff identified that the assumption in the Graham Dart advice regarding the date contamination had flowed on to Council land was a key risk to the success of legal action.
4. Council staff attended a meeting with Thomson Playford Cutlers and Mr Dart to further discuss Mr Dart's advice and specifically the importance of Mr Dart's assumption the contamination had continued to flow on to Council's land from the Gilbert Motors site.
5. Mr Dart and Thomson Playford Cutlers readily conceded that if it could not be established that contamination had continued to flow on to Council's land from the Gilbert Motors site during the last three (3)

to six (6) years that Council's case would be unlikely to succeed due to the time limits imposed for legal action.

6. Mr Dart provided further advice to this affect (Attachment 2). Council staff discussed the practicality of proving that contamination had continued to flow on to Council's land from the Gilbert Motors site during the last three (3) to six (6) years with Coffey Environments (who have provided advice to Council on the Morphett St contamination). The Coffey advice is shown as Attachment 3 and confirms that it would be unlikely that this time frame could be proven due to the margin of error that applies to such investigation.
7. Council staff contacted the Environment Protection Authority (EPA) and received advice that Gilbert Motors is undertaking remediation of its site and has appointed an Auditor to oversee the process.
8. No further contact has occurred between Council and Gilbert Motors on this matter.

Discussion

9. The further investigations as per the previous resolution of Council have been undertaken and the information gathering phase of the process is now considered to be completed providing a sound basis for decision making by Council on the option of taking legal action against Gilbert Motors.

The further investigations undertaken included testing the reliability of the assumptions made in Graham Dart's advice.

Based on further investigation and advice from Graham Dart, Thomson Playford Cutlers and Coffey Environments it has become clear that successful legal action to recover the costs incurred due to the impact of contamination on the Morphett St Stormwater project would be contingent on Council to satisfactorily proving that contamination had continued to flow on to Council's land from the Gilbert Motors site during the last three (3) to six (6) years.

10. Coffey Environments reviewed the matter for Council and has advised that it would be unlikely that this time frame could be proven due to the margin of error that applies to such investigations.
11. New underground petroleum storage tanks were installed by Gilbert Motors in 1992. It is likely that the old leaking tank would have been decommissioned at that time and may have been emptied.
12. Gilbert Motors may be in possession of information which would assist a defence that contamination flowed on to Council's land up to that time (18 years ago) but not for the last three (3) to six (6) years as Council would need to prove to have its claim heard.

13. There is therefore a much higher risk that Council's legal action would not succeed than had been advised by Mr Dart in his initial advice. Indicative costs to Council of undertaking legal action were estimated to be in the region of \$200,000 by Thomson Playford Cutlers compared to a total claim of \$466,348 which incles legal fees of \$25,319.
14. The risks, costs and impact on senior staff resources need to be carefully weighed against the potential for cost recovery.
15. If Council decides not to proceed with legal action there is merit in giving Gilbert Motors the opportunity to make an ex gratia payment (i.e. no admittance of liability) towards the costs incurred on a confidential basis.
16. Based on some previous communications, Gilbert Motors may well be attracted to Council maintaining confidentiality and such discussion would include concepts that may be attractive to Gilbert Motors such as payment for a dedicated purpose eg Town Centre linkage to Auchendarroch / TAFE / Library with value add for their land on Adelaide Road.
17. In the absence of any such arrangement there would no longer be any reason for Council to maintain confidentiality of this matter. It would be in the community interest for Council to revoke the previous confidentiality orders.
18. From an overall project perspective the following is important to acknowledge:
 - The project has addressed a very long standing community issue and significantly reduced the risk of flooding occurring again in this part of the town centre which would have negative economic and social implications;
 - Council's liability exposure is significantly reduced;
 - The stormwater infrastructure is now all located on Council land guaranteeing ready access in the future as and when required for maintenance;
 - Development along Morphet Street has been able to proceed consistent with policy objectives in the Development Plan to achieve active street frontages creating more attractive and pedestrian friendly environments;
 - Significant town centre development sites such as the land parcels owned by the Herriots and Gilbert Motors are now no longer encumbered by stormwater drains, enabling better built development outcomes on these key sites;

- Through negotiation and innovation Council was successful in securing a total of \$550,000 excluding GST in contributions from the private sector to the design and construction cost of the project; and
 - The private sector contributions secured by Council in 2008 exceed the subsequent additional costs arising from soil contamination.
19. It is also important to acknowledge the lessons to be learnt from this experience. One example is that Council now has in place formal Project Management arrangements to ensure far more internal checks and balances are applied and greater attention is given to due diligence and the identification and management of possible project risks. Arrangements include preparation of a formal risk analysis and risk management strategies, peer review of design and documentation and specific consideration of risk transfer issues in joint infrastructure provision agreements.

Community Engagement:

Community Engagement is not required for this report.

Policy:

There is no Council Policy applicable to this report.

Budget:

Council has continued to incur legal costs during its investigation of the potential for legal action which have been absorbed in the 2009/10 budget. Neither the cost of legal action nor any potential recoveries have been allowed for in the 2010/11 Council Budget. If legal action were not pursued there would be no adverse budget impact. If legal action was pursued but was unsuccessful Council's costs would have an adverse impact on the 10/11 Council Operating Budget.

Statutory/Legal:

See legal advice at Attachments 1 and 2.

Staff Resource Requirements:

There would be a major impact on senior staff resources should legal action proceed.

Environmental:**Social:**

There are no social implications arising from this report.

Risk Assessment:

Risk assessment / issues have been addressed in the Discussion section of this report.

Asset Management:

The Morphett Street Stormwater Project has enhanced Council's Stormwater infrastructure and considerably reduced the risk of flooding in Morphett St in the event of a major rainfall event.

Key Contact

David Morton, Manger Projects, Governance and Projects

Manager or Sponsor of Project

Brian Clancey, General Manager, Governance and Projects

Attachments

- 1: Legal advice from Graham Dart, Barrister dated 22 March 2010
- 2: Legal advice from Graham Dart, Barrister dated 27 May 2010
- 3: E-mail from Coffey Environments dated 17 June 2010

CONFIDENTIAL

RECD 24/3/10

Attachment 1 to Item 16.1

GRAHAM DART*Barrister**Telephone: 61 8 8231 6033**Facsimile : 61 8 8231 7607***Kingston Chambers***47 Wright Street**Adelaide, S.A. 5000**DX 109 Adelaide**Mobile : 0414 362832**E-mail: gdart@kingstonchambers.com.au*

22 March 2010

P

Thomson Playford Cutlers
Solicitors
19 Gouger Street
ADELAIDE SA 5000

Attention: Mr Fraser Bell

Dear Sir

Re: **DISTRICT COUNCIL OF MOUNT BARKER /**
GILBERT MOTORS PTY LTD

I refer to our previous discussions in this matter.

You have recently provided a brief in this matter seeking advice in relation to a possible claim against Gilbert Motors Pty Ltd by the District Council of Mt Barker ("Council").

In this letter I set out the options available to Council.

BACKGROUND

The Council is the registered proprietor of certain land at Mt Barker, being the land comprising Morphett Street, Mt Barker. The Council determined to upgrade the storm water infrastructure along Morphett Street and in 2008 engaged a contractor for that purpose. The contractor commenced work in April 2008.

The contractor commenced trenching but soon became aware that the soil which was being removed from the trench was contaminated. Testing was carried out on the soil and it was established that the source of the contamination was hydrocarbons in the soil.

On the corner of Morphett Street and Adelaide Road is a BP service station. There has been a service station on the site for many years. The site has been owned and operated by Gilbert Motors Pty Ltd, the prospective defendant, since 1986. The service station is the obvious source of the contamination.

In or about 1992 a new underground petroleum storage system ("UPSS") was installed on the site. Recent testing has confirmed this system does not leak, the

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inference being that the leakage which caused the contamination must have occurred prior to 1992.

As a result of the discovery of the contamination the storm water project was delayed for a considerable period of time. Substantial additional expense was incurred in testing and subsequently removing the contaminated soil to a safe storage facility. In the result the Council has incurred a significant cost in excess of that budgeted for with respect to the project and would like, if possible, to recover that expense from Gilbert Motors.

ASSUMPTIONS

For the purpose of this advice I am asked to assume that:

- 1 The UPSS installed in 1992 does not leak and is not the source of the contamination.
- 2 The UPSS which were present on the land at the time Gilbert Motors became the proprietor leaked, and continued to leak, until replaced.
- 3 That the source of the hydrocarbon contamination detected in, on and under Morphet Street is a petroleum product which leaked from the old UPSS after Gilbert Motors became the registered proprietors of the relevant land.

POSSIBLE CAUSES OF ACTION

Environmental Protection Act

In the *Environmental Protection Act* there is a general environmental duty which provides that a person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes reasonable practical measures to prevent or minimise any resulting environmental harm.¹

It is a defence to a claim that the general environmental duty has been breached if:

- maximum pollution levels were fixed, or
- conditions of environmental authorisation were being complied with.²

I assume that the defences are not relevant on the facts known to me.

It is an offence to cause an environmental nuisance by polluting the environment intentionally or recklessly and with the knowledge that an environmental nuisance will or might result.³

¹ *Environmental Protection Act 1993* Section 25(1)

² *Environmental Protection Act* Section 25(3)

³ *Environmental Protection Act* Section 82

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The *Environmental Protection Act* provides that application may be made to the Environment, Resources and Development Court for orders in the nature of civil remedies.⁴

Of particular relevance is:

Section 104(1)(e). If a person has suffered injury or loss or damage to property as a result of a contravention of this Act, or incurred costs and expenses in taking action to prevent or mitigate such injury, loss or damage an order against the person who committed the contravention for the payment of compensation for the injury loss or damage, or payment of the reasonable costs and expenses incurred in taking that action.

A persons whose interests are affected by the subject matter of an application under the civil remedy provisions, i.e. in relation to injury or damage to property, has standing to bring an action. The Council, as the registered proprietor of the land, has standing.

An application for a civil remedy will, in the first instance, be referred to a conference under Section 16 of the *Environmental, Resources and Development Court Act* and will otherwise be determined under the normal provisions of that Act.

To succeed in the application for a civil remedy it must be established that Gilbert Motors contravened the *Environmental Protection Act*. In practical terms that means obtaining a finding that Gilbert Motors contravened the general environmental duty or committed an environmental nuisance.

The activity undertaken is the operator of a service station. The general environmental duty is breached unless the person takes all reasonable practical measures to prevent or minimise the resulting environmental harm.

It is clear that Gilbert Motors undertook activity from 1986 to 1992 which caused the contamination. It would be for Gilbert Motors to establish that they took all reasonable practical measures to prevent the tanks leaking between 1986 and 1992, and assuming that they would not be able to establish that, then they would have contravened their general environmental duty.

There are technical difficulties with seeking remedies under the *Environmental Protection Act*. The first is that the pollution complained of appears to have arisen by reason of activities undertaken prior to the commencement of the Act which was passed in 1993 but did not commence operation until May 1995.

The entitlement to claim a civil remedy will therefore only be available if Gilbert Motors are presently still contravening their general environmental duty, or creating an environmental nuisance by reason of the continuing escape of the contaminants

⁴ *Environmental Protection Act* Section 104

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from its site. I assume, but have no evidence, that the petrol which leaked from the UPSS prior to 1992 is still on the Gilbert Motors site and continuing to migrate off that site. If that is the case there is arguably a continuing breach of the general environmental duty and as well as seeking orders for the costs incurred to date, orders could be sought requiring Gilbert Motors to take appropriate action to prevent or mitigate any further environmental harm. Further consideration will need to be given to this issue.

PRIVATE NUISANCE

The tort of nuisance is a separate and distinct cause of action. In essence private nuisance ("nuisance") exists to provide a remedy in circumstances where there has been interference with the enjoyment of land. The tort of negligence and nuisance often overlap on the same factual basis, but as mentioned above, they are separate and distinct causes of action.

The causing of physical injury to land will found a claim in nuisance. All that the Council would need to establish here is that material damage to the land in Morphett Street resulted from the flow of hydrocarbons from the Gilbert Motors property to the road.

It is not necessary for the Council to allege or prove that there was any breach of duty by Gilbert Motors, nor any unreasonable use of the land, it is simply necessary to establish the material fact of damage to the land caused by the escape from Gilbert Motors' land of the hydrocarbon. It does not matter that whether or not the damage was foreseeable, nor the conduct of Gilbert Motors was reasonable.⁵ There is no need to establish any negligence on behalf of Gilbert Motors. A deliberate act, an act done in good faith or in a genuine belief that it was justified may still lead to a cause of action in nuisance.⁶

It seems probable that when Gilbert Motors took over the conduct of the service station the UPSS was already leaking. It can be assumed that that continued between 1986 and 1992. In that sense Gilbert Motors took over the nuisance when it acquired the property. Gilbert Motors will be liable if the nuisance was such that with ordinary care and the management of its property it should have realised the risk of its existence.⁷

The usual remedy in a nuisance case is an injunction to prevent the nuisance from continuing. That is not what is sought by the Council in this matter. It seeks damages.

⁵ See generally as to the cause of action *Kraemers v Attorney-General for the State of Tasmania* (1966) TSR 113 @ 118-121.

⁶ *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 @ 904.

⁷ *Sedleigh-Denfield* Supra @ 905.

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In a case of this type tortious damages are available if the cause of action is established. The Council is entitled to damages for whatever losses resulted to it as a natural and foreseeable consequence of the wrongful act of Gilbert Motors. The damages in nuisance are the same as for tort generally. In practise that means whether a claim is brought in nuisance or negligence, should the claim succeed, the damages would be the same.

The details of costings in the schedule in the brief dated 2 November 2009 all appear appropriate and would appear to fall within the definition of natural and foreseeable consequences of the wrongdoing of Gilbert Motors. The legal costs are the costs which might provide the most debate but I expect most would be claimable if arising directly as a result of the disruption to the project and the consequences of that.

There is a separate issue of course about an ongoing escape of hydrocarbons from the site, but that is not a matter on which advice is sought at this time. It should be borne in mind however that there is likely to be an ongoing issue with respect to that.

NEGLIGENCE

The other tortious remedy potentially available to the Council is a claim in negligence. The usual elements of negligence would need to be established, that is, Gilbert Motors owed a duty of care to the Council, the duty was breached and damages flow from that breach of duty.

It can be accepted that a duty of care would be established in this matter. The standard of the duty is that of a reasonable person. The law tries to balance the utility of an activity against the threat of harm caused by that activity.

To succeed in negligence, therefore, the Council would need to establish that Gilbert Motors, in maintaining and operating the service station, fell short of the standard of care that a reasonable service station operator would have applied to the conduct of the business and that the breach of duty was causative of the loss suffered by Council.

In order to determine what a reasonable person would do a Court needs to consider the magnitude of the risk, the degree of the probability of its occurrence along with the expensive, difficulty and inconvenience of taking alleviating action⁸.

The difficulty at the moment is we have no information about the conduct of the business by Gilbert Motors. In negligence it is not going to be enough simply to establish that damage has been suffered by reason of the escape of fuel from Gilbert Motors' site to the Council's land. It will be necessary to establish that the cause of the escape was the negligence of Gilbert Motors during the relevant period, which will be between 1986 and 1992, assuming the fuel in the ground leaked during that

⁸ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 @ 47.

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period. Until relatively recently special rules applied to the escape of dangerous substances from the property of one person to that of another. The situation is now subject to the normal rules of negligence.⁹

It might be that a breach of duty can be inferred from the simple fact that the UPSS leaked. For that argument to succeed it would need to be established that a reasonable service station operator would have maintained its tanks in a way to prevent leaking. Evidence would be required as to the standard of a reasonable service station operator which we do not have at this time.

TIME ISSUES

The fuel leak which has caused the damage is assumed to have occurred no later than 1992. That is a considerable period of time ago and causes difficulties. The law imposes various limitations on the time within which actions must be commenced.

In relation to a tort such as negligence or nuisance the limitation period is six years after the cause of action accrued¹⁰. In relation to the *Environmental Protection Act* an application for a civil remedy must be made within three years after the date of the alleged contravention, although the Attorney-General may authorise proceedings after the time has expired¹¹.

The Council, quite reasonably, was entirely unaware of the pollution on its land until the excavations commenced in 2008. Notwithstanding the fact, the law with respect to time limits can be unforgiving. If six years has passed since the cause of action accrued then the time limit has expired.¹² That is the case even if, as here, Council could not have been aware of the pollution at the time it occurred.

However, the question of time limits is not straight forward in this matter. No doubt Gilbert Motors would, if proceedings are issued, insist that the cause of action accrued, or the contravention of the *Environmental Protection Act* occurred, by no later than 1992. In that case the common law and statutory remedies would all be statute barred.

In relation to the tortious claims both negligence and nuisance are known as actions on the case. In relation to such torts damages are part of the cause of action, unlike a direct tort such as trespass, and therefore the cause of action does not accrue until the damage has been suffered. The Council's argument here could be that damage was suffered when the excavation works were carried out, that is 2008. It would follow that the six year time limit runs from that time and has not yet expired.

⁹ *Burnie Port Authority v General Jones Pty Ltd* (1994) 174 CLR 520.

¹⁰ *Limitations of Actions Act* section 35

¹¹ *Environmental Protection Act* section 104(20)

¹² *Cartledge v E Jopling & Sons Ltd* [1963] AC 758

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Gilbert Motors would argue that the damage was suffered when the land was injured by the contaminants, the date of which is probably uncertain but certainly more than six years ago. The fact that the damage to the land was not ascertained until 2008 is not a relevant consideration if the cause of action accrued at an earlier time. In my opinion a Court would find that the cause of action arose when the land was damaged by the hydrocarbons.

However there is a further argument in the Council's favour on the time point, which is most applicable to a claim in nuisance, and is that there is a continuing cause of action. If it can be established that fuel is continuing to escape from the Gilbert Motors' site to Morphett Street then the cause of action is continuing, and in effect a new cause of action arises every day.¹³ In those circumstances the six year limit has not yet expired and the Council would be entitled to recover all damage suffered in the six years prior to the institution of proceedings, which would include the 2008 expenses.

Whilst the *Limitation of Actions Act* limits a claim in tort to six years, the Act also provides that the Court may extend the limitation period in certain circumstances.¹⁴ An additional way in which the Council could avoid any difficulties with limitation periods is if it discovers a new material fact.

In practise what that would mean is for the Council to obtain a further report from an appropriately qualified environmental consultant that the pollutants are continuing to escape from Gilbert Motors land and that further damage is being suffered by the Council. The procurement of such a new material fact by the Council would allow the Council a further twelve months to commence action from the date of receipt of that information. It would also allow the seeking of injunctive relief to prevent the further damage to the land as well as a recoupment of the expenses incurred by Council in 2008.

If there is a continuing escape from the land then the general environmental duty provided for in the *Environmental Protection Act* is also being breached and therefore the three year limitation in that Act would not yet have expired.

In any proceedings Gilbert Motors will attempt to take all the time points. For the reasons set out above however it is unlikely that time points will result in the Council being unable to pursue an action to judgment.

CONSIDERATION OF THE CAUSES OF ACTION

As set out above there are three possibilities for recovering of the Council's expenses incurred in this matter. In my view the most straight forward cause of action to pursue would be that of nuisance. It is an old cause of action and not often litigated any more because of the proliferation of statutory remedies. However in this case it

¹³ *Earl of Harrington v Corporation of Derby* [1905] 1 Ch 205

¹⁴ *Limitation of Actions Act* (1936) Section 48

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seems to provide the simplest way home for Council. It does not require the establishment of a breach of any duty or negligence. It simply requires establishment of the fact that by reason of an escape from the site of Gilbert Motors physical damage has been suffered to the Council's land.

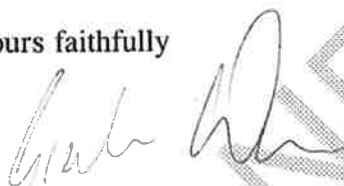
In relation to the action under the *Environmental Protection Act* and the tort of negligence a breach of duty needs to be established over and above the fact of the injury to the Council's land. It would add to the cost and complexity of any litigation, because Gilbert Motors will say that whilst the damage was suffered by reason of an escape from its site, that did not occur as a consequence of any breach of duty and therefore no remedy is available to Council.

A remedy sought pursuant to the *Environmental Protection Act* must be in the Environment Resources & Development Court. That Court does not have an accrued jurisdiction and therefore it could not adjudicate on a nuisance claim if that was brought in conjunction with a claim under the legislation. The Council will therefore be forced to choose between remedies.

I would recommend that a nuisance claim be pursued in the District Court if Council determines to litigate in this matter. It would be possible to plead both nuisance and negligence in the same proceedings.

I would be pleased to discuss the matter further to determine the most appropriate way for Council to recover its expenses in this matter.

Yours faithfully



GRAHAM DART

Attachment 2 to Item 16.1

GRAHAM DART

Barrister

Telephone: 61 8 8231 6033

Facsimile : 61 8 8231 7607

Kingston Chambers

47 Wright Street

Adelaide, S.A. 5000

DX 109 Adelaide

Mobile : 0414 362832

E-mail: gdart@kingstonchambers.com.au

27 May 2010

P

Thomson Playford Cutlers
Solicitors
19 Gouger Street
ADELAIDE SA 5000

Attention: Mr Fraser Bell

Dear Sir

Re: DISTRICT COUNCIL OF MT BARKER / GILBERT MOTORS PTY LTD

I refer to our conference in relation to this matter on 7 May 2010.

The purpose of the conference was to discuss issues arising from the advice I had previously given in relation to the possible causes of action that the Council may have against Gilbert Motors.

The advice identified a number of possible causes of action, including a claim in negligence and also a claim under the *Environment Protection Act*. On the facts known it seems likely that the underground petrol storage system installed on Gilbert Motors' land in 1992 is sound and not the source of the soil contamination. Logically that means that the contamination on Council's land has arisen from leakage on the Gilbert Motors' site before 1992.

As mentioned in the advice this potentially causes problems with time limits. The time limit to bring a claim in nuisance is six years, and under the *Environment Protection Act* the relevant time limit is three years.

In my advice I assumed that the contaminants have, since 1992, continued to escape from the Gilbert Motors' site onto the Council's land. If that is the case then Gilbert Motors are continuing to contravene the *Environment Protection Act* and breach their obligations in relation to nuisance and no time limit issues arise.

The critical fact then is the assumption that contaminants have continued, since 1992, to escape from the Gilbert Motors' land onto the Council land. At the moment there is no evidence to support that assumption. Evidence would need to be

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obtained from an engineer with suitable qualifications to provide an opinion to sustain the assertion.

If the assumption cannot be made good by expert evidence then the Council's prospect of success in the proposed litigation would be significantly diminished. If no evidence can be obtained to establish that the escape has continued to occur Gilbert Motors would most likely succeed in a defence that each of the causes of action are statute barred by reason of the effluxion of time. In those circumstances a Court would not consider the merits of the Council's claim and would simply rule that the Council's right to bring the action has been barred. The Council's claim would be defeated and one would expect costs would be awarded to Gilbert Motors.

The making good of the assumption therefore is a critical matter without which Council ought not institute proceedings.

Yours faithfully

GRAHAM DART

Attachment 3 to Item 16.1

David Morton

From: Peter Berndt [Peter_Berndt@coffey.com]
Sent: Thursday, 17 June 2010 2:39 PM
To: David Morton
Cc: David Tully
Subject: TRIM: Morphett Street - age of spill
TRIM Record Number: 10/30804

David,

We've discussed your site and the possibility of obtaining and providing information about the likely date that the groundwater impacts migrated beneath the roadway in Mount Barker (Morphett Street). As we discussed over the phone, Leeder Consulting can conduct project age analysis and provide an indication of the likely age of the spill. However, this requires either separate phase hydrocarbon (fuel floating atop the groundwater table) or elevated adsorbed concentrations in soil. According to the information we have reviewed for the site, some separate phase is present in the vicinity of the service station, but not along Morphett Street. The soil concentrations we observed from the samples we tested during our work there were unlikely to be sufficiently high to allow Leeder to conduct their determination.

If this information was available, it would provide information on the age of the fuel, when the original spill occurred. If the tanks at the service station were replaced 10-12 years ago, then it is likely that the product ageing would show product that is at least 10-12 years old. The ageing can provide information about the age of the product but won't provide any information about when the impact migrated beneath your site.

Also as we discussed over the phone, the information provided by Leeder is usually based partly on information we provide to them:

- When do we think the spill occurred;
- What is the product type;
- What are the groundwater conditions at the site (water quality as well as contaminant distributions); and
- Other information that's available.

Their reports usually state a likely product age plus or minus some years. Typically, the plus/minus is of the order of 5 years (or more). As such, I would be surprised if a report from Leeder would provide definitive information. The information from Leeder would likely demonstrate that the impacts originated at the BP at some time greater than 10-12 years ago. I don't think this information is currently in dispute so it may not be useful to your cause.

Feel free to contact me if you require additional information.

PETER BERNDT
Project Manager

Coffey Environments
Level 1, 2-3 Greenhill Road Wayville SA 5034 Australia
T +61 8 7221 3500 F +61 8 8172 1968 M +61 408 805 441
coffey.com



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