

**Charben Haulage Pty Limited V Environmental Earth  
Sciences Pty Limited (2004) FCA 403 –  
issues on purchase of contaminated land**

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Buyers, sellers and anyone involved in the contaminated site industry need to tread carefully following this recent decision. In this case, the purchaser of 2 adjoining lots claimed against environmental consultants, EES and Caltex. Caltex owned and operated a service station on one lot and leased the adjoining lot for use as a mechanical shop. Both Caltex and the owner of the adjoining lot decided to sell and Caltex commissioned EES to produce reports regarding contamination on both lots and supervise remediation. EES produced 3 reports which declared the 2 lots suitable for “*any land use*” and “*residential land use in accordance with the relevant guidelines.*”

Charben purchased the 2 lots with the intention of developing them for a commercial use. It became clear that the land had not been remediated to the necessary level prior to completion of the contract. It also became apparent that EES had not undertaken sufficient investigation to be able to validate the land as suitable for the uses as it had stated.

The purchaser brought proceedings against both Caltex and EES making claims under the *Trade Practices Act* for misleading and deceptive conduct, breach of contract, negligent misrepresentation and negligence. These claims succeeded in part and judgment was entered in favour of the purchaser in the sum of \$2,147,800. Caltex’s cross claim against EES succeeded and EES was required to reimburse Caltex any amount it was required to pay to the purchaser.

#### **Claims under the *Trade Practices Act***

The purchaser made claims against both Caltex and EES under the *Trade Practices Act* for misleading and deceptive conduct arising out of statements in the EES reports as to the suitability of the land for redevelopment. It succeeded against EES but failed against Caltex. The Court concluded that EES had made significant misrepresentations in the reports. It found EES had no basis for a number of its statements as a result of deficiencies in its investigations. The Court found that the purchaser had relied on these statements and suffered damage as a result.

#### **Breach of Contract**

The purchaser claimed against Caltex for breach of contract for failing to complete the remediation of the site to the level promised in one of the contracts. The contract in question stated that Caltex would “*cause its environmental consultants*” to remediate the property to the level necessary for the purchaser’s proposed development. The court found that Caltex had not remediated the land to a level where the proposed use was available without further remediation. As a result of its successful cross-claim against EES under the *Trade Practices Act*, Caltex was able to shift liability and the sum of damages awarded to the purchaser for breach of contract by Caltex had to be paid to Caltex by EES.

#### **Negligent Misstatement**

These claims failed because even though Caltex knew purchasers would rely on the EES reports the Court found no evidence Caltex knew either report to be incorrect or misleading. The claim against EES also failed as the necessary relationship of proximity between EES and the purchaser could not be established. It found that EES had produced a technical report for a client knowing the report was likely to be passed on, but EES’s duty was to Caltex only.

## **Negligence**

The purchaser claimed that both Caltex and EES had been negligent in failing to take sufficient care when carrying out the remediation works on the site. Although the Court accepted that the inadequacy of EES's investigations had resulted largely from the deficient brief given by Caltex, it found that EES and not Caltex had specified the ambit of the required works and the claim against Caltex failed on this basis. In relation to EES, the court found that no duty of care to the purchaser existed.

## **Caltex cross claim**

Caltex cross-claim against the purchaser failed. Caltex had attempted to rely on a broad indemnity and release contained in the contract of sale between Caltex and the purchaser. The Court found that the general clause did not protect Caltex from the specific obligations set out in the contract regarding environmental remediation and the provision of the report.

The cross-claim against EES succeeded as the Court found that Caltex had been exposed to the action brought by the purchaser as a result of EES's contravention of the *Trade Practices Act* (above). This exposure occurred when EES supplied Caltex with the factually incorrect reports which were later relied on by the purchaser entering into the contracts. EES was ordered to pay Caltex the damages awarded to the purchaser for Caltex's breach of contract.

In response to Caltex's cross claim, EES sought to rely on its terms of engagement which apparently stated that its liability would be limited to the value of the fee for its services up to a maximum of \$50,000. The relevant provisions of the terms were not submitted into evidence and the court was not able to take this into account. Justice Wilcox commented that he had no choice but to disregard this issue as saw no reason to explore whether the limiting condition would have been overborne by the operation of the *Trade Practices Act* (under ss 68(1) and 74(2)) as claimed by Caltex.

## **Issues Raised by this Case**

For vendors this case raises a number of issues in relation to the use of consultant's reports. It is important to know what you want the report to achieve and to have the scope of the report clearly stated at the outset. Provision of the report to prospective purchasers must be considered. It is also important that obligations which can only be satisfied by third parties (for example consultants) are not assumed as contractual obligations by vendors. If provisions must be inserted to state that land will be remediated to a particular level, it may be better to treat this as a condition precedent such that if the condition cannot be satisfied the contract will terminate. This is better than creating obligations that may not be met.

For purchasers, it is important that they understands what they wish to do with the land and how best to use reports which have been prepared and provided by the vendor or its consultants. It is always advisable to retain an independent consultant to review the reports and carry out any further testing and reporting if necessary.