Contaminated land

Land contamination can be caused by many things. These can include naturally occurring substances in the land, e.g. arsenic, through to contamination caused by industrial processes, or even criminal activity, such as fly-tipping. However, the presence of contamination does not mean that there is necessarily a practical need, let alone a legal liability, for it to be cleaned-up.

In many cases, the existence of contamination can be entirely consistent with the current use of the relevant land. However, if there are proposals for redevelopment, then contaminated land may require "remediation" (clean-up) so that the land is suitable for its intended use. Remediation through the town and country planning regime as part of a development project is by far the most common driver for remediation and is encouraged by national statements of land use planning policy. Remediation notices issued under the contaminated land regime (see below) are comparatively rare, although remain a critical regulatory/enforcement tool.

The statutory "contaminated land regime"

The most seriously contaminated sites are dealt with through the statutory contaminated land regime which can be found in Part 2A of the Environmental Protection Act 1990. Part 2A was inserted into the EPA 1990 by section 57 of the Environment Act 1995. Part 2A is supported by Regulations, statutory guidance and technical guidance.

Under Part 2A, liability for the remediation of contaminated land or waters broadly falls according to the "polluter pays" principle. The "polluter" is the person (or persons) who "caused" or "knowingly permitted" contamination to remain on a site or to move (migrate) to other sites. A "knowing permitter" is someone who has knowledge of pollution on their land and who fails to take any action to remove or control it - the concept of knowingly permitting means subsequent owners of land can be held liable as
well as the original polluter.

If no polluter or knowing permitter can be found after reasonable enquiry (for example, due to the original polluting company having been dissolved), then the owner or occupier of the site may be liable to pay the remediation costs. *If more than one person is identified then it may be possible to apply certain tests to exclude people from liability.*

As noted above, Part 2A does not apply to all contamination - only the most serious forms, where:

- significant harm is being caused; or
- there is a significant possibility of significant harm being caused; or
- pollution of controlled waters (such as rivers or groundwater) is being, or is likely to be, caused.

The regulators of contaminated sites are either local authorities or, in the most serious cases, the Environment Agency (in England and Wales) or SEPA (in Scotland). Different rules apply in Northern Ireland.

**The Environmental Damage Regulations**

The Environmental Damage (Prevention and Remediation) Regulations came into force on 1 March 2009 and they implement the European Environmental Liability Directive (see links below). The Regulations provide that, for certain activities, where there is an imminent risk of environmental damage, steps must be taken to prevent such damage, and if environmental damage has already occurred, the operator of the activity must prevent further damage. The duties are backed up with criminal sanctions for breaches of the Regulations.

**Common Law Liability**

In addition to statutory liability, the common law, in the form of torts, remains an important aspect of contaminated land law, particularly for third parties harmed by, or suffering loss as a result of, contaminated land.

Nuisance - a person may be liable if he owns or occupies land and behaves in a way so as to cause foreseeable injury, loss or damage by creating a nuisance, for example by allowing contamination to migrate off-site either over a period of time or as a one-off event.

Negligence - unlike nuisance, a claimant third party does not need to have a legal interest in land to launch a claim in negligence. However a claimant must provide that the owner of the contaminated land owed him a duty of care which was breached.

Trespass - like nuisance, a claimant needs to have an interest in land to bring a claim successfully. A claimant will need to show that the contamination on the defendant's land has directly interfered with his property.

**Avoiding Liability for Contamination**

There are a number of practical measures which can reduce the likelihood of inheriting environmental liabilities when buying land - most notably, a buyer can undertake specialist searches or investigations. In more serious cases, buyers may be able to negotiate with sellers of contaminated land, who should bear the responsibility for any liabilities which might arise in future, or purchase environmental insurance.
Useful Links for Contaminated Land

UKELA's Land Contamination and Insurance Working Group

The Environmental Protection Act 1990 (note, this version is unamended)

The Environment Act 1995 (see section 57 for the text of Part IIA)

DEFRA's (Statutory) Guidance on Contaminated Land - note that DEFRA announced in February 2010 that this was to be updated

The Environmental Damage (Prevention and Remediation) Regulations 2009

Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remediying of Environment Damage

The Environment Agency's pages on contaminated land

European Environment Agency's environmental glossary of terms

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