

CONTAMINATED LAND: THE KEY FACTS

What is it?

"Contaminated Land" is defined by Part 2A Environmental Protection Act 1990 as:

Any land which, by reason of substances in, on or under the land appears to be in such condition that:

- (a) significant harm to the environment or human health is either being caused or there is a significant possibility of such harm being caused or,
- (b) water pollution is being or likely to be caused.

How does it occur?

In order to prove that land has been "contaminated" a "significant pollutant linkage" will need to be shown. In order to show this, the following factors need to be present:

- (a) A **source** (i.e. a contaminant).
- (b) A **target** (i.e. a dwelling house or similar property)
- (c) A **pathway** from the source to the target (i.e. a risk of harm to the target from the source)
- (d) As a result of (a) - (c) above, **significant harm** is being caused, or there is a significant possibility of such harm being caused, or water pollution is being caused or likely to be caused.

How is it regulated?

By the relevant Local Authority (LA) or Environment Agency (EA). LA's inspect their areas carefully in order to identify any contaminated land and are required to keep public registers of any land that has been identified as contaminated.

Cleaning it up

Where land has been identified as contaminated, the LA/EA will serve a Remediation Notice for the contamination to be removed. This is not limited to clean up; it includes investigation, mitigation and monitoring of contamination. Failure to comply with the Remediation Notice is a criminal offence. The LA/EA also has the power to remediate the contamination itself and recover costs from the relevant party.

Who pays for it?

Liability for the remediation of contaminated land will be imposed as follows:

- (a) In the first instance on those who caused or knowingly permitted contaminated substances to be present in, on or under the land.
- (b) If no such person in (a) can be found, liability passes to the current owners and occupiers of the site regardless of whether they were aware of the contamination.

If a person or company is no longer in existence it is not capable of being "found". However, a company that is in liquidation, receivership or administration is still treated as being in existence and therefore capable of being found.

The liability of a seller in respect of a contaminated site can, provided certain conditions are satisfied, pass to the buyer so the buyer is deemed to have certain information about the contaminated state of the site at the time of the sale. This is known as the "sold with information" exclusion test.

However, it must be noted that a recent case still found a former site owner liable for a large proportion of the liability for bromide and bromate contamination. The "sold with information" exclusion test was only applied partially, meaning that the former site owner was still found to be proportionally liable. This therefore shows that the sold with information test is not always a complete defence to liability for the cost of remediation of the contaminated land.

In respect of liability the LA/EA does not need to prove that the person who caused the contamination intended to cause it, or was otherwise at fault, in order to require them to remediate the contamination.

Liability is also retrospective; remediation can be required in respect of contamination that was in existence prior to the entry in force of the regime. So an owner or occupier of land that is contaminated may be liable for the remediation of contamination that was caused decades ago by a previous owner or occupier.

Potential tax relief

Companies should be aware that they can claim a deduction in Corporation Tax for capital expenditure incurred in remediation of certain contaminated sites.

Summary

When acquiring any property, great care needs to be taken to identify whether or not the land may be contaminated and, if so, the potential implications in the future which might arise as a result of the presence of contamination. This is particularly important in the case of land being acquired for development purposes. It is therefore recommended that the buyer should instruct his or her solicitor to carry out appropriate environmental searches -and that further appropriate specialist advice is sought in the event that any issues are revealed by those searches.

For further information and advice regarding any of the legal aspects mentioned above please do not hesitate to contact us on 0115 9888 777 or email info@fraserbrown.com

