

# Contaminated land redevelopment in 2008 – secure and sustainable?

Recent developments in case law look set to place liability for clean-up in the developer's court, and an absence of clear scientific guidelines means that remediation targets may be subject to change. **Mathew Hussey** of **Tysers** describes how environmental insurance can offset both legal and scientific uncertainties by actually insuring the site

What happened in the 2007 property arena and how may this impact on contaminated land development for 2008? I believe the liability 'hot potato' is now likely to be passed between fewer people. The developer and consultant/contractor look increasingly set to be prime targets. This article summarises a number of reasons why I believe this is the case and underlines the importance of why developers and consultants should explore environmental insurance to manage their risks.

## Bawtry and beyond

The first serious judicial examination

of the Part IIA regime (R. (*National Grid Gas plc (Formerly Transco plc) v Environment Agency* [2007] UKHL 30) – also known as the Bawtry case) finds one of the largest reported owners of potentially contaminated land in the UK not to be an appropriate person under Part IIA in respect of land that was sold before privatisation. The same may be the case for many statutory successors of nationalised corporations. The details of the case are beyond the scope of this article but the case indicates the courts are likely to see a developer as a knowing permitter.

To further exacerbate problems for developers the first case under the contaminated land regime (*Circular Facilities (London) Ltd v Sevenoaks District Council*) has raised more issues rather than brought clarity.

Overall, UK case law continues to be limited and future EU Directives vague in implementation. An important decision is awaited from the Secretary of State in relation to an appeal (Crest Nicholson/

Redlands) against a remediation notice. The case raises significant issues for developers and former landowners.

On the technical front a key issue is a lack of clarity and uncertainty that prevails with both the regulators and private sectors. This is mainly due to the fact that the science, specifically Soil Guideline Values (SGVs), that is supposed to underpin the whole process has yet to arrive to a significant degree. Consultants have to continue to

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rely on incomplete regulatory guidelines and their own methods whilst contracts for remediation become increasingly complex and seek to place more contractual liability on the consultant and contractor.

In reality, what 'safe and secure' actually means is yet to be resolved to any degree of confidence in both the legal and scientific fields. It is perhaps not surprising then that environmental consultants' professional indemnity insurance (PI) is coming under increased pressure as clients seek protection.

## Consultants' PI – secure and sustainable?

Clients seek consultants' PI as a safeguard against historical contamination problems, often under the misapprehension that PI offers them a benefit, in the form of environmental insurance. There is an increasing awareness of the limitations of this approach; a brief summary of some of these is provided below:

- PI is negligence-based cover, incepted primarily for the protection of the consultant against claims that they have been negligent in their work or professional duties. The burden of proof for negligence is extremely onerous.

- Collateral warranties are usually non-transferable, so persons outside of the original client will not receive any benefits from the warranty. If the collateral warranty is in breach of the terms of the PI policy then the policy is invalidated and the contractor or consultant will be left to defend and settle the claim themselves.

- Collateral warranties require PI insurance to be renewed annually for a period of 12 years

provided it remains "available at economic cost". Many consultants and contractors have relied on this 'concession' in recent years to reduce cost and consequently, quality of cover.

- PI cover is usually placed as annual cover rather than a one-off cover for the period of the contract, and the basis of the policy is 'claims-made'. This means that any claims have to be made during the policy period.

- The majority of environmental PI policies are placed on an 'aggregate basis', thus if the consultant has offered an identical limit of indemnity backing collateral warranties for a number of contracts over the policy period and suffered a claim or claims, there is a possibility that the aggregate limit of indemnity has been exhausted.

- Many contractors and consultants have exclusions under their PI policies for claims arising from 'gradual pollution' - the most likely cause of claims associated with intrusive site investigations or remediation activities.



**Transfer of liability– the flaws**

Currently a number of government and corporate contracts ask for unlimited transfer of liability in terms of time and duration. This approach has flaws – it is not sustainable business practice and, arguably, not secure. The type of company that accepts unlimited transfer of liability in terms of time and duration is likely to have agreed the same conditions with others. Some of the companies that do agree these contracts in terms of their risk profile have a very low credit rating and even blue chip companies (Enron, Marconi) have spectacularly hit the wall; few companies can sustain large claims.

Finance in 2007 dramatically changed. Companies that did provide company warranties or agree indemnities are perhaps not as solvent as they were only 12 months ago. As the 2007 credit crunch bites, nervous funders pull out of schemes. Some planned developments and remediation projects are now on hold, and sites remain untreated.

A number of UK brownfield developers that had agreed contractual liability in the pre-2008 rush to obtain land now are potentially owners of significant liabilities. A number of these companies literally have all their investment tied up in large brownfield sites. Their credit rating is likely to be under severe pressure, if rated at all.

In a property market that seemed to move forever upward ‘risk versus reward’ looked a good bet. But does the equation still work in the current economic climate? Will developers increasingly look to consultants for cost overruns and perceived wrong advice on the extent of liabilities and costs involved? The insurance markets traditionally find that claims increase as economic climate conditions worsen.

With the apparent enhancement of liabilities that developers now face, contracts with consultants are bound to become more onerous. Do clients really understand that indemnities and warranties

are worthless unless the other party has a secure and sustainable credit rating?

Apart from the legal and technical drivers mentioned above, I believe clients, especially funders, are saying that further security is required. Funders will be more cautious in tight markets and demanding. Chasing the consultants’ and contractors’ PI and warranties are primarily based on fault and negligence occurring, which is often difficult and costly to prove. Rather than paying for and chasing everyone else’s insurance, corporates, developers and consultants should seek an insurance policy that actually insures the site!

Insurance policies are based on financial loss occurring and streamline the process should a claim occur; instead of chasing multiple parties, there is only one party

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involved. Importantly, insurance companies are designed to take risks, monitored for credit rating and are regulated by the government in terms of solvency.

**Contaminated land insurance – secure and sustainable?**

The environmental insurance market is growing as, increasingly, contaminated land insurance is being used to take the risk rather than putting it onto another party or retaining the risk. The risk is transferred to an insurance company that is strictly controlled by the Financial Services Authority with a suitable credit rating. The insurance industry is the most regulated industry for the transfer of liability and risks. Most other companies have very limited requirements to keep long-term financial reserves in place for potential environmental liabilities.

In some circumstances policies can provide cover for up to 15 years, which includes protection against change in either

UK or EU law. Policies can cover for third-party and regulatory claims and can include consequential loss, property damage, bodily injury and remediation costs, technical and legal defence costs. Cover can be extended to both the vendor and the purchaser, funders and tenants with relative ease.

In addition commercial benefits can be gained by the client with an insurance policy. These may include:

- Achieving maximum asset value for sales
- Long-term policies that can be transferred with site ownership
- FRS12 provisions – insurance cover for a potential liability can improve the companies profit/loss sheet
- High credit rating and protection can secure funders and, in some instances,

reduce the level of the funder’s risk rating and therefore loan interest rates

- A long-term and sustainable approach – the insurance remains in tact even if a member of the

project becomes insolvent.

In lieu of sufficient science, guidelines or provision of environmental security clients should consider environmental insurance as a method of protection. This could be argued as the only real way of providing long-term protection on a sustainable basis.

For close to a decade Tysers has worked on numerous large-scale regeneration projects across the UK. Working with multidisciplinary teams Tysers has placed environmental insurance on some of England’s and Scotland’s largest regeneration sites with a range of clients from national house builders, commercial developers and funding institutions.

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