

# FEATURE: Environmental Insurance and Contaminated Land Liability in 2008

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Mathew Hussey, Associate Director of Tysers explains what happened in the 2007 Brownfield Property Arena and how this might impact environmental insurance for 2008. In 2008, the liability 'hot potato' is now likely to be passed between fewer people. The developer and consultant/contractor look set to increasingly become prime targets. Below are a number of reasons why this may be the case and underline the importance of why consultants should explore how environmental insurance can be another 'tool in the box' to manage both their and the clients risks.

## **The financial situation**

On the commercial front, 2007 saw no win no fee lawyers increase activity in the UK targeting environmental claim opportunities with success on both insured and uninsured sites. Claims on corporates can often lead to the corporate seeking compensation for those seen as having advised (or not) on these risks. The consultant will often be the first in the line of fire.

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 are pulling out of schemes. Some planned developments and remediation 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.

## **The law**

The case of **R. (National Grid Gas Plc (Formerly Transco plc) v Environment Agency ([2007] UKHL 30)**, the first serious judicial examination of the Part IIA regime, found 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 nationalized corporations. The details of the case are beyond the scope of this article but the case indicates the courts would see a developer as a knowing permitter.

Overall UK case law continues to be limited and future EU Directives appear vague in implementation. An important decision is waiting from the Secretary of State in relation to an appeal (Crest Nicholson Redlands) against a remediation notice. This case raises significant issues for developers.

## **Regulation**

On the technical front, the expected 2007 release of the 'Way Forward' guidelines, key to the consultancy industry, has not yet been released and appears 'on hold'. The UK government continues to avoid the real thorny

issue of contaminated land risk. As a result, consultants have to rely on incomplete regulatory guidelines and their own methods whilst at the same time contracts for remediation become increasingly complex and seek to place more contractual liability on the consultant and contractor.

## **The property market**

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

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 substantial credit rating?

Apart from the legal and technical drivers mentioned above - clients, especially funders, are saying that further security is required. Funders will be more cautious, and demanding, in tight markets. Consultants and contractors indemnities 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 can streamline the process should a claim occur. Also, instead of chasing multiple parties, an insurance policy means there is only one party involved. Importantly, insurance companies are designed to take risks, monitor for credit rating and are regulated by the government in terms of solvency.

Numerous large scale regeneration projects across the UK have successfully used and implemented environmental insurance on some of England's and Scotland's largest regeneration sites with a range of clients from national housebuilders, commercial developers and funding institutions.

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