



Investing in UK Real Estate?

Contaminated land liabilities

June 2010

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In common with most industrialised nations, the UK has a legacy of contaminated land, particularly in urban areas. Over the past 20 years, remediation techniques have made considerable advances to enable solutions to be found for even the most heavily contaminated sites. A buyer of a site should seek to establish through environmental due diligence: (a) the risk of any contamination being present on the site which could give rise to liability; and (b) the cost of any necessary remediation works.

Regulatory framework relating to contaminated land

In the UK, there are two principal regulatory routes through which contaminated land is usually remediated.

Firstly, land which is proposed for redevelopment (for example redevelopment of an industrial site for residential use) will be governed by the planning system. Standard planning conditions are usually imposed which require: (a) ground investigations to be undertaken to assess the need for remediation; (b) approval of a remediation strategy by the regulator; and (c) production of a validation report following completion of remediation works for approval by the regulator.

The standard of remediation required will be influenced by the nature of the end use (for example, residential use with gardens will require a higher standard of remediation than development of a business park covered by hardstanding).

Secondly, liability for contamination can also arise under a complex system of environmental laws. These fall under two broad categories:

Clean Up requirements under Statute/Regulations -

Regulators have the power to require the clean up of contamination if it is causing significant harm or water pollution. There are complex rules on allocation of liability between current and previous owners of sites which allow, in certain circumstances, liability to be imposed on previous owners and those parties that originally caused the contamination. However, it is not safe for a purchaser of UK property to work on the basis that previous owners of the site would be liable for any historic contamination. From a risk assessment

prospective, a buyer should work on the basis that upon becoming the owner of a site it is likely to take on all, or a significant element of, liability for any contamination problems at the site. The buyer's environmental due diligence is therefore critical to assessing this risk.

Sanctions for breach of environmental laws in the UK is prosecution by the relevant regulator in the Criminal Courts. Owners of land deemed to be contaminated land will be served with a notice by the Regulator requiring remediation works to be undertaken and criminal proceedings will only be initiated if there is a failure to comply with such notice.

Civil Law - third parties can bring a claim for environmental nuisance where contamination migrates from a site on to a neighbouring site. For example, where contamination which is present on property A migrates onto property B, the owner of property B will be entitled to sue the owner of property A for damages (examples of heads of damages would include clean up costs, reduction in value of property, business interruption).

Environmental Due Diligence

Obtaining information on the extent of contamination on a site and the risks it poses is the central task of environmental due diligence for a purchaser of land. Environmental reports undertaken by environmental consultants are the principal tool for assessing this. Lawyers then apply the legal framework to the technical data obtained by the report to assess the overall risk of liability.

Three types of report can be commissioned, depending upon the level of complexity and the issues:

- **Desktop report** - this involves a review of publicly available materials such as public registers and historical maps (principally by providing a risk assessment based on current and previous uses of the site being assessed, surrounding land uses and the environmental sensitivity of the site eg identifying where a major aquifer underlies the site). This is a useful and cost effective (around £300) tool which in many cases will be sufficient to confirm that a site is at a low risk of attracting liability for contamination.

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- **Phase 1 report** - this involves the same as a desktop report but includes a site visit and in some cases an interview with relevant site employees. As well as assessing contaminated land liability, a phase 1 report will also assess compliance issues (eg waste management, storage of hazardous materials etc)
 - **Phase 2 report** - this normally follows a desktop or phase 1 report where concerns are identified. It involves intrusive investigations (sinking of bore holes or digging of trenches in order to carry out laboratory analysis of the ground conditions). A phase 2 survey will provide far greater certainty of risk. The difficulty with a phase 2 survey is that it would normally take at least a month for the results to be obtained. This timeframe can be problematic in the context of a transaction. Where a site has a history of contamination problems, phase 2 reports are often made available by sellers to potential buyers to demonstrate the extent of contamination and further reports may be produced confirming what remediation works have been undertaken. In such cases, obtaining collateral warranties from the sellers consultants and remediation contactors should be considered. The buyer should also engage its own environmental consultants to audit the quality of the reports undertaken for the seller.

Contractual Protection

If a buyer's environmental due diligence identifies concerns relating to contamination, the following options should be considered:

- a) Negotiation of a price reduction (to reflect potential clean up costs identified by the buyers environmental consultant);
- b) Provision of indemnity by the seller in respect of any contamination costs;
- c) Require the seller to undertake remediation works to an agreed standard;
- d) Obtain insurance cover (historically this has been an expensive option but a wider range of products is starting to emerge on the market; or
- e) Withdraw from the transaction (if the risks are considered unacceptable or the seller is not prepared to offer (a) - (d) above.

The appropriate strategy to follow will very much depend upon the commercial context of the transaction and the nature of the risks identified by the due diligence exercise. A buyer will need to have regard to any funder requirements in respect of contamination and should also consider the impact of any risks identified on future resale, lettings etc.

Next steps

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