



Investing in UK Real Estate?

Environmental liabilities

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Overview

Environmental issues started to emerge as a significant commercial issue in property transactions in the 1990s. The number of environmental regulations has increased substantially over the past 20 years and this growth continues unabated. The trend has been towards the adoption of increasingly more stringent environmental controls. Legislation relating to climate change is also starting to impact on property assets.

There are broadly speaking two bases on which a person may be held liable in respect of environmental matters:

- **Environmental compliance** - liability for acts or omissions in the course of operating a business (for example, a failure to comply with the terms of an environmental permit or a breach of environmental legislation);
- **Contaminated Land** - liability as a result of the presence of contamination on or under land in which that person has an interest (for example, a requirement to clean up contamination on a site that is causing pollution of ground water). Please see additional article on contaminated land for further information.

The extent of which a buyer of a site will need to carry out environmental due diligence in respect of environmental matters will depend upon the particular circumstances of the property being acquired. When acquiring property, an assessment of risk of contaminated land liabilities should always be undertaken. (Please see additional article on contaminated land for further information).

The extent to which due diligence is undertaken in respect of operational/environmental compliance matters will depend on the circumstances of the acquisition. If a property is being acquired with the intention of maintaining the existing operations on the property, a more rigorous assessment of compliance matters will be appropriate.

Summary of main environmental compliance controls

Environmental controls of potential relevance to property include:

- All aspects of production, storage, disposal and transportation of waste are subject to detailed regulation;
- Producer responsibility - handling, disposal and take back obligations relating to certain materials such as waste electrical and electronic equipment, packaging waste etc;
- Discharges of trade effluent to public sewers and water courses;
- Heavy and light industry activities are regulated under the Environmental Permitting regime;
- Pollution of controlled waters (watercourses, ground water);
- Storage of oil;
- CRC Energy Efficiency Scheme and other climate change related regulations;
- Asbestos in buildings;
- Protection of designated conservation sites and protected species;
- Liability under the statutory nuisance regime;
- Liability to third parties under common law nuisance claims;
- REACH.

If a site is cleared for redevelopment, these matters will not be relevant. Where a tenanted site is acquired for investment purposes, it may be advisable for a buyer to commission a phase 1 report to assess the extent to which operations on the site comply with environmental laws and best practice. The usual lease requirement is for the tenant to comply with all environmental laws applicable to its operations. However, liability for contamination on the site which pre-dates the commencement of the lease may remain the liability of the landlord (depending on the precise terms of the lease), which reinforces the need for an assessment of contamination risk at the site.

Sanctions/Penalties in respect of environmental liability

Broadly speaking, sanctions/penalties in respect of environmental liabilities tend to fall into one, or more, of the following categories:

- Criminal penalties;
- Regulatory requirement to carry out cleanup works;
- Regulatory requirement to comply with an enforcement notice;
- Civil liability (damages, injunctions).

Criminal penalties

The sanction for breach of most environmental laws is prosecution by the relevant regulator in the criminal courts. This can result in fines being imposed and/or in the most serious cases imprisonment.

The Regulators may in certain cases prosecute the company's directors, managers, secretary or other officers if it can be shown that the offence was committed with their consent or connivance, or was attributable to their neglect.

Clean up requirements

Regulators have the power to require a clean-up of the contamination or pollution under a number of environmental regimes.

Enforcement notices

Regulators have the power in certain cases to serve an enforcement notice on an operator requiring it to rectify a breach of environmental law. Powers can include the ability to order the closure or suspension of an operator's activities until the breach has been rectified but this generally only applies in respect of heavy industry operations which are subject to strict environmental permitting controls.

Civil law

Third parties can bring claims under civil law (also known as common law) in the courts in respect of certain environmental matters. The most common ground for bringing a claim is under the law of nuisance eg in respect of migration of contamination onto another party's land or in respect of interference with the enjoyment of private property (noise, fumes, odours etc).

Scoping environmental due diligence

Scoping environmental due diligence at an early stage of a transaction or bid will: (a) enable resources to be directed to the relevant issues; (b) reduce the risk of delay to the deal; and (c) provide a buyer with the best opportunity to flush out any concerns at an early stage and allow an opportunity to negotiate with the seller. Scoping should be undertaken in consultation with legal advisors and environmental consultants.

Next steps

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