

LEAGUE CRICKET CONFERENCE LEGAL UPDATE

Spring 2008

For many cricket clubs with their own grounds (whether it is freehold or long lease), they may not know the former uses that have been made of the land previously and what may have been dumped below the surface. This is particularly prevalent where a club's ground exists on former 'brown field sites' Liability as a land owner under Environmental Protection Law forms the subject of this quarter's review following a landmark decision of the House of Lords in late 2007 in the case of **R (National Grid) v Environment Agency**.

1. The Big Issue

1.1 How far can the current owner of land be liable for the clear up costs (remediation) for land contamination caused by a previous owner?

1.2 The Environment Act 1990 as amended by the 1995 Act, states that "the Appropriate Person" as defined under section 78F, is responsible for remediation. In priority order, responsibility lies with

1.2.1 The person or persons "who caused or knowingly permitted" the contamination- termed 'Class A Liability Group Persons' and

1.2.2 Where the person or persons at 1.2.1 cannot be found "after reasonable enquiry", "the owner or occupier for the time being of contaminated land" can be liable. Termed "Class B Liability Group Persons"

1.3 Land Contamination is defined to mean land which has substances "in, on, or under land" which could result in "significant harm" being caused or the possibility of being caused. The harm must be significant to "the health of living organisms" or interference with the eco systems or to the Property. Each Local Authority has a duty to assess whether land within its jurisdiction is sufficiently contaminated and keep a Register.

1.4 Where the person responsible for the polluting (the original polluter) is a Company which no longer exists, but whose undertakings have been transferred to a successor Company, can that successor Company ever be made liable under 1.2.1, even if the liability for remediation did not exist at the time the new Company took over the old Company? This is particularly relevant in the coal, gas, and steel industries which were privately owned, then nationalized and subsequently the subject of Privatisation

2. Background to the Decision in R (National Grid) v Environmental Agency

2.1. This related to land at Bawtry in South Yorkshire which had been owned by the Bawtry & District Gas Company (B&DGC) who built in 1915 a gas works. In 1931 B&DGC merged with the South Yorkshire & Derbyshire Gas CO who continued to use the land for the production of coal gas. Residual coal tar from the process was buried in containers beneath the surface of the land

- 2.2 In 1948, the nationalization of the gas industry resulted in the rights and liabilities of these private companies being vested in the State run regional Gas Boards,- here the land became owned by the East Midlands Gas Board (EMGB)
- 2.3 Gas production ceased in the 1950s and the land (with the residual tar below the surface) was sold for residential development in the 1960s, Kenneth Jackson Ltd subsequently building 11 houses, all privately owned.
- 2.4 Meanwhile the regional gas boards in 1972 were abolished and their Rights and Liabilities were transferred to the State run British Gas Corporation. In 1986 British Gas was privatized to become British Gas PLC who took on their predecessors Rights and Liabilities. In the 1990s such undertakings in respect of the storage of gas devolved on to TRANSCO and then to National Grid.
- 2.5 The question for the Courts was who should be responsible under the 1990 and 1995 Legislation for the cost of remediation of land (£7 million pounds), contaminated, many decades previously?
Should it be a) The Original Polluter (B&DGC) b) The ultimate successor in title of B&DGC- National Grid. c) the current owners of the land-11 house owners d) the Public Purse.
The Environment Agency sort to impose the liability on National Grid as the successor in title to “the original polluter”. Significantly they did not attempt to seek the costs from the owners of the houses built on the contaminated land

3. The Decision and its Implication

- 3.1 The House of Lords ruled that a successor in title of the original polluter could not be liable. If the Original Polluter no longer exists, the first category of Approved Person referred to at 1.2.1 on page1 cannot be pursued. That therefore leaves the second category at 1.2.2 – namely **the current owners of the land**
- 3.2 The Environment Agency in this case did not pursue the individual property owners, but the implication in the light of this decision is that they could in the future. ***So at what great a risk are Cricket Clubs as owners of land, to picking up the tab for land contamination clear up costs to clean up land contaminated by a previous owner who no longer exists ?*** The answer is that it is not clear, but the following useful points below should be considered
- 3.3 Section 78P(2) of the Act gives the Environmental Agency a discretion, having regard to the hardship that might be caused, not to pursue a current land owner for the whole of the costs, where land has been contaminated by a previous owner and the Local Authority or the Environment Agency carry out work and bill the current owners of the land . How these Public Bodies exercise its discretion as to when to pursue a current land owner in these circumstances, could be the subject of Judicial Review. **The Contaminated**

Land (England) Regulations 2006 state that Public Bodies should have regard to

- Where the owners are trustees (the officers of a cricket club)- the funds held by the Trust (the cricket club)
- Whether the current owner / occupier knew that the land was contaminated at the time they bought

- 3.4 The Authorities when dealing with a current owner may either do the works and seek to recover the costs or more likely serve a Remediation Notice requiring remediation works to be carried out. The procedure is
- Before serving a Notice, the LA has to give 3 months notice to the current owner, unless there is imminent danger of immediate harm.
 - The Notice must give a reasonable period of time for the owner to effect works
 - The Owner has 21 days from receipt of the notice to appeal to Secretary of State for Environment Transport and The Regions
- 3.5 The Judgment contains an important sentence from Lord Scott (Law Lord) It has been said “ *Parliament enacted the 1990 Act (with its 1995 amendment) on the principle that the Polluter should pay and that innocent owners or occupiers of contaminated land should not have to pay. I have no doubt that that was so and have no quarrel with that principle. But Transco was not a polluter and is no less innocent of having caused or knowingly permitted the pollution than the innocent owner or occupiers of the 11 residences*”
- 3.6 This is an area that needs to be carefully scrutinized, with the incidents and costs of land contamination rising all the time. ***How far will the Environment Agency pay the costs of carrying out of the work from the public purse?*** Parliament may come under pressure to legislate if too many innocent current day property owners pick up the tab because they are next in line for liability where the Original Polluter either cannot be found or in the case of a Limited Company is no longer in existence.

4. Club Good Practice and Comfort

4.1 The first thing that every Club should do is to ensure that it has adequate Insurance cover to meet the cost of remediation of contaminated land where they have concerns of prior usage of their ground. This Decision is likely to cause concern in the Insurance Market and may affect premiums.

4.2 Where a Local Authority or Environment Agency contacts you, refer the matter initially to your Insurer and only correspond with the Public Body with their agreement. Where possible use the 3 month prior notice period fully to establish whether the land is contaminated as defined at 1.3 above or seek to find the Original Polluter who has caused the pollution or previous land owners who allowed the pollution or who allowed it to remain on the land.

4.3. Remember that the land contamination must be major in the sense that if untreated, **significant harm** would be caused. Where land is contaminated, but there is no resulting harm, it is not contaminated for the purposes of the Law!.

The Regulations state that a Local Authority must assess

a) *the nature of the contaminants in, on or under the land*

b) *their concentration- are they confined or spread evenly*

c) *Is there a likelihood that the contaminants will spread?*

d) *Are the ground conditions and sub strata conducive to spreading?*

e) *What would be the consequences of an escape of contaminants .*

4.4 Note a Club as a Class B Liability Group (current owner) can never be liable for remediation works relating to the pollution of controlled water. It can only be liable if it is the Original Polluter.- **Section 161 Water Resources Act 1991**

4.5 A Club **cannot be made liable** as a current Occupier of the Land, where their occupation is pursuant to a Licence or Tenancy Agreement (short term leases to grounds of under 21 years as a general rule) and does not own any monetary interest in the land. Liability could only accrue if the Club can be shown to own some beneficial interest (monetary value) in the land.

4.6 Additionally a Club which has not contaminated the land also can only be at **risk** of liability if the Original Polluter (someone from the Class A Liability Group) "cannot be found" after "reasonable inquiry". Such words are not defined in the Regulations. However if the Original Polluter does still exist, 'the buck stops' with it regardless of whether it has any money. If it does not, then the cost of the remediation works lies with the Public Purse only. The wording of the Class A Group to include a current or former land owner who "*knowingly permits*" the contamination of land is wider than may appear as the Regulations state that it *covers not just the situation of the land owner who allows another party to place contaminative substances on or under the land, but also the later land owner who is aware of the residual substance on the land and chooses to do nothing about it.*

5. Conclusion

5.1 The House of Lords Decision has resulted in an unwarranted frenzy of anticipated claims. The incidents where liability is successfully brought against a current land owner who has not caused the pollution, will be rare

5.2 Check that your Club has adequate Insurance in place to cover the risk of liability applying. If Insurance is refused on a consistent basis or premiums 'shoot through the roof', then the issue would become much more serious for all of us.

This is a Summary of the legal position on Contaminated Land . Any Club or League requiring detailed advice should take professional advice or speak to their Local Authority. No liability is accepted either by the League Cricket Conference, its officials or the author

Malcolm Buck- Solicitor March 2007