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CHAIRMANS REPORT

As my two-year chairmanship draws to a close, I would like to take this opportunity of saying how privileged I feel to have been the first woman chairman of UKELA and to have held the post during a time when UKELA has moved to a new era of engagement and energy.

We are not sure yet who is to succeed me because it will be subject to election by Council members. I would however urge Council to consider a three-year term for the next Chairman in order that he/she might be able to have more time than I and my predecessors have had to engage in long term measures directed to the success of UKELA.

Best wishes to you all for a very happy Christmas and New Year.

Pamela Castle, Chairman.

EDITOR'S REPORT

Welcome to the first themed edition of E-law. This month we concentrate of contaminated land. Articles have been contributed by members of Ukela's Contaminated Land Working Party and my thanks are due to Matthew Townsend the convenor of the group who has co-ordinated the production of articles.

I hope that you find this months journal interesting and relevant and as ever look forward to receiving feedback from you.

Catherine Davey

COUNCIL ELECTIONS

Remember that elections to council will be held early in the new year. If you are interested in becoming a member of Council do please feel free to contact any current member of Council to find out more about the task.

Ukela is at a very important stage in its evolution and exciting times lay ahead for those who are willing to roll up their sleeves and get involved!

IS IT EASY RELIEF?

Joanna Enright
Solicitor, Environmental and Health & Safety Group
Ashurst Morris Crisp

The amount of contaminated land estimated to be present in the UK is 100,000 – 200,000 hectares whilst household growth is estimated at 4.4 million between 1991 and 2016. The government has had to address the need for clean-up and development of brownfield land, and one measure it introduced is a tax relief on certain costs incurred in remediating contaminated land (contained in the Finance Act 2001 (section 70 and Schedules 22 and 23 in particular)). The relief is designed to act as an incentive to clean-up contaminated land, rather than a regulatory "clamp-down", and is just part of a growing trend of using economic instruments to influence people's behaviour.

The tax relief on the qualifying remediation expenditure can be claimed for costs incurred since 11 May 2001 in three ways, which have been described elsewhere and are not repeated here. It is however, worth reiterating that there are three pre-conditions to claiming the relief:

1. land in the UK must be or have been acquired by a company as trading stock or as a fixed capital asset of a trade or Schedule A business (which includes letting the land);

2. all or part of the land must be contaminated, such that harm is being caused or there is a possibility of harm being caused, or pollution of controlled waters is being caused or is likely to caused by reasons of substances in, on or under the land at the time of acquisition (this is clearly a lower threshold than that in Part IIA of the Environmental Protection Act 1990); and

3. the company incurs qualifying land remediation expenditure in respect of the land in which the company has an interest (including an enforceable option to purchase land and agreement/contract for a lease).

There several requirements which must be met for costs to be "qualifying land remediation expenditure", and a few of interest are described below.

1. The expenditure must be directly related to the fact that the land is contaminated – the expenditure will not qualify if the work would have been done anyway – the costs must be additional to normal site preparation costs. However, if construction work is made more expensive because the land is contaminated and the main reason any works are done is land remediation (for example, soil disposal costs increase because the soil is contaminated), then relief may be claimed on those additional costs.

2. Works which restore the land to its former state or prevent, minimise, remediate or mitigate the effect of contamination qualify, and they can be on the site itself or adjacent land or controlled waters. In addition, such works can include preparatory works (such as site survey costs and consultants' fees), as long as actual remediation is carried out. Works on asbestos in buildings can also qualify, because the Revenue has stated that "land" includes buildings on the land. Hence, if asbestos is disturbed or becomes friable, the costs of any works required could qualify. Costs of monitoring asbestos would probably not qualify for the relief, although they may qualify elsewhere as an allowable expenditure.

3. The relief is not available if the land is contaminated as a result of anything done, or omitted to be done, by the company now owning / leasing the land or a connected person – the original polluter will not be able to qualify for the relief, but a subsequent purchaser may be able to (although a purchaser of shares in the polluting company will be excluded). This seems fair on the basis of the "polluter pays" principle, but provides no incentive for companies which hold contaminated land to remediate their own mess. This proviso also emphasises the need for environmental reports at the time of acquisition, in order to demonstrate that contamination was present then. Such reports therefore facilitate claiming the relief (particularly if the costs of the remediation works are quantified), and also assist consideration of whether an indemnity for the entire clean-up expenditure from the seller is necessary.

4. Furthermore, the Revenue has stated, "If a company adds further contamination to land that it acquired in a contaminated state, it cannot then claim relief for any land remediation expenditure it subsequently incurs in respect of that land". This makes it essential for a purchasing company to act swiftly to remediate the acquired land before it adds any contamination itself (however, it seems that a pure "Part IIA knowing permitter" will still be entitled to claim the relief). Furthermore, this prohibition may make it difficult to claim the relief if, for example, any planning process is drawn out.

The relief does increase the value of brownfield sites, and thus assists achievement of the government's targets for redevelopment of contaminated land. However, the assessment of which costs qualify is not simple, and as parties become more aware of the relief, they will expect their advisers to understand the applicable conditions. In particular, parties must seek to ensure any contract gives the benefit of the relief to the appropriate party, and warranties, indemnities and pricing provisions should be drafted carefully.

Furthermore, the relief may encourage companies to use speedy remediation techniques (such as "dig and dump") as opposed to techniques which take a long time to work (such as bio-remediation) and therefore a long time to pay for, hence necessitating a longer wait before the relief can be claimed. Perhaps this downside can be addressed when the scheme is reviewed in May 2006.

BROWNFIELD LAND: A TIME FOR CHANGE

The Government should change existing legislation to release more brownfield land for redevelopment, argues Paul Davies of Macfarlanes

The latest English Partnerships Annual Report confirms that although there has been a considerable turnover of brownfield land there remains a significant hard core of problem sites which existing initiatives are failing to bring into productive use. With house building at an historic low during 2001, it stands to reason that only the most lucrative brownfield sites have been redeveloped. Left with the sites which will be more costly to redevelop, it is difficult to see how the current level of brownfield building can be sustained.

The statutory framework governing liability for contaminated land in the UK is provided by Part IIA of the Environmental Protection Act 1990. In summary, this provides that liability for the clean-up of brownfield land falls primarily on those who cause or knowingly permit contamination. If the current owner or occupier of the property is aware of historic contamination and fails to deal with it, he may also be liable as a knowing permitter (Class A Persons). If the relevant authority cannot identify a Class A Person, liability will fall on the current owner or occupier of the land (Class B Persons). For transparency, details of all remedial works carried out by the relevant authority or Class A or B Persons has to be recorded on a public register. However, what is sadly lacking is a formal process under which brownfield sites can be "signed off" as having been adequately remediated.

This lack of a definitive end to the clean-up process is one of the main stumbling blocks to brownfield redevelopment. Developers are reluctant to invest in brownfield redevelopment because of the difficulties they encounter in determining the full extent of their potential liability. This lack of finality has led some to question whether current legislation needs to be revised.

Although the concept of signing off appears straightforward the procedures are often complex and there are a number of approaches that may be adopted. At its simplest, signing off could take the form of an agreement by the Government not to pursue the land owner in respect of *specific* contaminants and *approved* remedial works. The other end of the spectrum would be a blanket agreement not to pursue liability claims against the land owner in respect of *any* future contamination issues.

As one might expect, the issue of signing off was debated extensively during the passage of Part IIA through the Houses of Parliament. It was argued that without such a procedure there would "remain a stain on the title of the property that would make it virtually unsaleable". Lord Northbourne, probably the greatest protagonist on this subject, suggested during the Report Stage that local authorities should have to issue a certificate of exemption once remedial works had taken place. His

later, more modest, proposal was that the local authority should be required to record on the remediation register what it had directed to be done and whether this was done to a standard that was acceptable. Although both amendments were subsequently withdrawn there remained a genuine concern that many sites were difficult enough to bring forward for redevelopment without adding to their problems.

It is worth noting that some local authorities have attempted to provide extra comfort to the parties involved in the redevelopment of brownfield land by voluntarily certifying that the clean-up has been completed satisfactorily. Whilst on the one hand this voluntary sign off should be applauded as a step in the right direction, the fact that additional works could be required demonstrates the need for a statutory sign off procedure which clearly sets out the circumstances in which further liability can be imposed.

Even if existing legislation is amended to include some form of sign off procedure this will only provide a partial solution. With fewer than expected sites being processed under Part IIA, the planning system will be a key driving force in cleaning up contamination. The Government has issued draft new planning guidelines to complement Part IIA, and these emphasise that the potential for contamination is widespread and needs to be considered at all stages of the planning and development process. Interestingly, broader objectives are set for clean-up, the guidelines stressing that planning controls should not deal solely with the significant risks as detailed in Part IIA. It is difficult to predict what this will mean in practice.

The continuing uncertainty which plagues the redevelopment of brownfield land in the UK cannot be resolved under current planning and environmental legislation. The Government must re-visit the issue of signing off or face the consequences.

A more detailed discussion of the issues raised in this article can be found in the next edition of Environmental Law Review published by Vathek Publishing.

TENANT'S LIABILITY FOR CONTAMINATED LAND

Laura Coates
Slaughter & May

Introduction

As local authorities make progress with implementing the Part IIA regime and begin to inspect their areas for contaminated sites, it is more important than ever that landlords and tenants fully understand their potential exposure to environmental liabilities and the way in which the terms of the lease interact with the provisions of the Part IIA regime.

The obvious advice to give is that tenants should ensure that any new lease contains clear provisions to the effect that liability for historic contamination rests with the landlord. The problem with this approach, however, is that it is only available in cases where there is a new lease under discussion and where the landlord and tenant have equal bargaining power.

In many cases, the tenant is likely to face a stark choice between accepting broadly worded standard covenants, or looking for another property with a more flexible landlord. In assessing whether to press on and accept the lease terms which are offered, the tenant needs to understand where liability may fall. In particular, for reasons discussed below, the tenant should be very wary of relying on what might seem to be favourable protections built into the guidance to Part IIA.

Tenant's liability and the Part IIA regime

The Part IIA regime sets out how to allocate responsibility for the remediation of contaminated land. Primary liability falls on the causer or knowing permitter of the contamination ('Class A person'), but if no Class A person can be found the owner or occupier ('Class B person') of the land may be held liable for remediation costs.

The guidance under Part IIA expressly addresses the position of a tenant who pays a rack rent and who has no beneficial interest in the land. [1] A tenant who meets the relevant criteria should be excluded from liability under Part IIA. As a consequence, it is common for Phase I reports prepared by environmental consultants for prospective tenants to state that any identified risks may be reduced if the tenant falls within the rack rent exclusion. It is also common for tenants to take comfort from this exclusion, when deciding whether to enter into or take an assignment of a rack rent lease in relation to a potentially contaminated site.

The problem with this approach is that it leaves open the question of whether the landlord can then pass liability down to the tenant under the covenant in the lease. In a nutshell, can the landlord rely on the covenants contained in the lease to override the rack rent exclusion in the guidance to Part IIA?

Leasehold covenants

A covenant commonly found in leases is that a tenant will "*comply with all notices relating to or affecting the demised premises*" (or words to that effect). There may even be express wording that this covenant applies to all notices, whether served on the tenant, the landlord or somebody else. (Other covenants may also be relevant.)

On the face of it, the wording of a covenant of this type would oblige the tenant to take responsibility for any remediation notice served on the landlord under the Part IIA regime for any contamination on the leasehold property, even if the notice was served on the landlord precisely because Part IIA envisaged that the landlord (rather than the tenant) should bear the liability.

There is an obvious risk in this situation that the provisions of the lease will allow the landlord to defeat the objective of Part IIA. Taking this into account, some authorities have suggested that even where the express wording of a tenant's covenant is clear and comprehensive, the terms of the lease may not be conclusive in allocating liability for remediation costs. It has been argued that a court may depart from the terms of a lease where statutory procedures provide an exclusive route of allocating liability.

Old case law

This issue of conflict between allocation of liability under statute and under the terms of a lease was addressed in some very old case law which is worth discussing briefly in this context.

In Monk v. Arnold [1902] 1 KB 761, the regulator served a notice on the landlord under the Factory and Workshops Act 1891 (the 'Act') requiring the landlord to provide a fire escape. The Act provided that "*if the owner alleges that the occupier…ought to bear or contribute to the expenses of complying with the requirement, he may apply to the county court…and the county court…may make such order as appears to the court just and equitable in all the circumstances of the case*." The lease provided that the tenant would pay all charges and outgoings required by statute whether imposed on the demised premises, the landlord or the occupier.

The County Court held that although the lease contained an allocation of liability, the County Court had jurisdiction under the Act to come to its own view of what a fair allocation of liability should be and that allocation should prevail over the terms of the lease. Both parties appealed but the High Court confirmed the County Court decision. The High Court held that it was Parliament's intention that the County Court would have jurisdiction to decide what was just and equitable in the circumstances rather than make a ruling based on the strict legal rights of the parties under the lease. Effectively, the County Court's power under the Act overrode the leasehold covenant, although importantly it was confirmed that the Court was still obliged to consider the terms of the lease in coming to its decision.

The facts in Horner v. Franklin [1905] 1 KB 479 were very similar to Monk v. Arnold. In that case, the Court of Appeal held that Parliament had intended to allocate liability under the procedure set out in the Act and the only remedy the landlord had over the tenant was prescribed by the Act.

Application of the case law to the Part IIA regime

These old cases do not lend themselves to a straightforward application to the Part IIA regime. But they do raise the question of whether the provisions of the Part IIA regime, in particular the exclusion for tenants paying rack rent, could override leasehold covenants.

Under Part IIA, the guidance provides a mechanism which allows the enforcing authority to allocate liability and, at first glance, that would seem to be comparable with the position under the Act which gave rise to the old decisions discussed above. The big difference however is that the guidance, unlike the Act, does not provide for an overall review of what is just and equitable in all the circumstances; the guidance simply looks at the question of whether the tenant is paying rack rent and ignores other issues (such as the covenants in the lease).

It follows that it is likely that a Court would hold that the position under the Part IIA regime should be distinguished from the facts of the old cases. The key points of difference are (1) that an allocation under Part IIA is made by the enforcing authority (rather than a Court) and (2) the allocation is not made on the basis of

an overall review of all relevant factors. It is based solely on the factors set out in the guidance.

If it is correct that the position under Part IIA would be distinguished, then it follows that once liability has been allocated by the enforcing authority under Part IIA (ignoring the covenants in the lease), it is open to the parties to contest where ultimate liability should lie under the terms of the lease.

It is worth noting that this approach would be consistent with the separate provision of the guidance in relation to "agreements on liabilities".[1] This expressly provides that the enforcing authority will only take into account an agreement where none of the parties are challenging its application. As soon as the agreement is in dispute, the enforcing authority is not under any duty to take account of it and the dispute will be resolved separately between the parties in the Courts. This reinforces the view that Part IIA and the guidance are not intended to provide a comprehensive or exclusive means of allocating liability for contaminated land.

Implications

Going forward, it is clearly desirable that a lease should provide for a clear allocation of liability for contaminated land between landlord and tenant. In particular, tenants should be wary of accepting the standard wording of covenants, for example, in relation to responsibility for notices affecting the premises.

It is also important for prospective tenants to ensure that their due diligence is not based on any false assumption that the protections in Part IIA will be available and that the guidance will prevail over any provisions of the lease.

In particular, any contamination issue which is revealed in a Phase I investigation carried out for a prospective tenant should be assessed on the assumption that the landlord could pass liability to the tenant, unless the express terms of the lease preclude it. It is not safe to assume that, because the tenant will only be on site for (say) ten years at a rack rent, it faces a low or reduced level of risk. In a hard case, contaminated land liability may be allocated to the landlord as required under Part IIA, but then be passed down to the tenant under the terms of the lease.

[1]Paragraph D.89, DETR Circular 02/2000
[2] Ross: Commercial Leases (Pararaph E5, Division J, Contaminated Land)
[3] Paragraph D38, DETR Circular 02/2000

PART IIA – TIME TO COME CLEAN?

This article was written by Matthew Townsend a Senior Associate in Allen & Overy's Environmental Law Group. Matthew is also convenor of the UKELA's Contaminated Land Working Group.

In September the Environment Agency issued its eagerly awaited report summarising progress on the implementation of Part IIA of the Environmental Protection Act 1990 (more commonly known as the contaminated land regime). The report provides an overview of progress made in identifying and remediating contaminated land under Part IIA. The findings will prove to be something of a disappointment for environmentalists as they confirm what many of us suspected would be the case, namely, that the regime has not led to the wide spread clean-up of sites within the UK. Ironically, it may prove to be other legal and commercial considerations which provide more of a driver to addressing contamination than the most debated piece of environmental legislation in the last decade.

The Part IIA regime came into effect in England in April, 2000. It provides, for the first time, a statutory definition of "Contaminated Land" and requires local authorities to identify contaminated land in their areas. It provides a mechanism for determining who the liable person should be to remediate contamination found. The regime also specifically requires the Environment Agency (and SEPA in respect of Scotland) to prepare reports on the state of contaminated land in England and Wales (section 78 of the Environmental Protection Act 1990). The report published in September is designed to fulfil this obligation in respect of England (a separate report will be issued for Wales).

The report confirms that relatively few sites that have actually been identified as contaminated land under the regime and even less have been subject to remediation as a result of that designation. The report confirms that, by the end of March 2002, local authorities had designated 33 sites as contaminated land (11 of which had been designated as special sites and, as a result, the Environment Agency has become the regulatory authority). Since then, it is understood that the number of designated sites has actually increased to 40 (13 of which are special sites).

The low number of sites being designated (and cleaned-up) appears to be surprising in light of the Agency's publicly stated expectations about the number of sites which were likely to be subject to inspection and, importantly, remediation at the time the regime came into force. As at the end of March this year, the report confirms that remediation had started at only 7 of the 33 designated sites and these are all being dealt with through the approach of agreed remediation statements. However, the Agency estimates that somewhere between 5,000 and 20,000 hectares of land may be expected to be a problem in the future and are likely to require action under the regime. The sites designated as contaminated so far only form a small proportion of those figures.

One of the main reasons for slow progress under the new regime has been the time taken by local authorities to finalise the necessary strategies for inspecting their areas for contaminated land and actually getting on with that inspection. Under Part IIA, local authorities are required to adopt and publish a written strategy for inspecting their areas within fifteen months of the statutory guidance to the regime being issued (i.e. by July 2001). The Agency reports that 94% of local authorities had published their final inspection strategies by July of this year. As a result, it is likely that the actual inspection of local authority areas may not be complete until 2005 or even 2006.

In practice, there are a number of wider factors which are driving the clean-up of contaminated land rather than the much heralded Part IIA. In particular, the planning system has been the catalyst for the carrying out of site investigations and remediation for many developments requiring planning permission. It was, of course, clearly envisaged at the time that the contaminated land regime came into force that a considerable amount of clean-up would actually be done voluntarily under the planning regime. However, there has been a clear imbalance between the level and amount of debate which surrounded the introduction of Part IIA and its associated guidance (Circular 02/2000) and that which has centred on how the planning system should respond to contamination issues. Only recently has there been a more focussed look at the planning regime in this regard as the Government revisits PPG23 (the Planning Policy Guidance note on contamination) and looks again at the question of standardising environmental planning conditions. Too little attention has been paid to how the planning system is dealing (and coping) with contaminated sites and the hazards these may pose (see the article "Brownfield Land: A time for Change" by Paul Davies).

A large number of industrial sites regulated under the Integrated Pollution Control (IPC) regime (Part I of the Environmental Protection Act 1990) will also find themselves under the contamination spotlight when their operating permits need to be replaced with permits issued under the new Pollution Prevention and Control (PPC) regime. At the time of the application for these new permits, site operators are required to carry out a baseline environmental investigation in order to establish a detailed picture of the condition of the site. A similar baseline report will need to be carried out at the time the permit is surrendered. The purpose of these reports is to enable regulators and operators to determine what, if any, substances may have been introduced into the environment during the life of the process. However, they will have wider ramifications. Any contamination on the site at the time of the initial baseline report will, in most cases, be regulated under wider legal regimes such as Part IIA or section 161 of the Water Resources Act 1990. Again, the actual or potential disclosure of this information to regulators is likely to drive a more proactive approach to the management of perceived liabilities arising from existing contamination.

Perhaps because of a mixture of the carrot and the stick, we have clearly seen a greater willingness amongst industry and commerce to undertake the voluntary clean-up of contamination in order to manage future risks and get more value out of existing assets. Whilst no doubt encouraged by Government initiatives in this area (such as the availability of tax credits for the costs of any clean-up) there is little evidence that these, in themselves, have actually driven this shift in attitude. What appears to have contributed to the clean-up of sites so far has primarily been the requirements of the planning regime together with concern over risks from future liabilities and the desire to preserve corporate reputation. For these reasons, we should watch progress on the revised PPG23 carefully. The real impact of Part IIA may not be fully felt until local authorities have carried out their inspections and are in a better position to make actual site designations. The next Environment Agency progress report for England is due in 2007 and it may make very different reading.

EASTERN COUNTIES LEATHER AGAIN

By David Cuckson, Partner & Head of the Environmental Law Group, Stephenson Harwood

(Note: This article is based on one which first appeared in Property Law Journal, 14 October 2002, published by Legalease Limited)

"The polluter pays principle" is enshrined in UK law as part of our signing up to the EU treaties. However, it is possible in certain circumstances for the seller of contaminated property to pass on to the buyer ongoing responsibility for the historic contamination. On the other hand, as part of the deal, the seller may agree to continue to carry the liability, at least for a limited period, and to indemnify the buyer in respect of liabilities which may arise after the sale. The terms of such an indemnity are usually embodied either in the sale and purchase agreement or in a separate pollution indemnity agreement. The interpretation of the wording of one such indemnity was the subject of litigation in the case of *Eastern Counties Leather Plc v. Eastern Counties Leather Group Limited*. The Court was asked to rule on whether the indemnity applied to the particular circumstances, to enable the indemnified party to be reimbursed its losses by the seller.

Eastern Counties Leather famously avoided liability in nuisance for the pollution of water which was being abstracted for supply to the public by Cambridge Water Company. However, this still left Eastern Counties Leather exposed to the possibility that the National Rivers Authority and subsequently its successor body, the Environment Agency, would take action under Section 161 of the Water Resources Act 1991 to carry out works of remediation and recover the cost from the person or persons responsible. Accordingly when Eastern Counties Leather Plc was sold by its parent company, Eastern Counties Leather Group Limited, the Group agreed to indemnify the Plc in a Pollution Indemnity Agreement for any "demands, claims, actions or proceedings" arising out of these acts of pollution.

However, what was not foreseen at the time of settling the form of the indemnity was that the Environment Act 1995 (by inserting Section 161A into the Water Resources Act 1991) would extend the power of the regulatory body to include a new power to issue a works notice. This can require the person addressed by the notice to carry out remediation and/or preventive works. Further, it is the Agency's practice to seek to achieve its objective by persuasion where possible, only resorting to the issue of a formal notice as a last resort. All this does not sit neatly with the reference to "demands, claims, actions or proceedings" in the Pollution Indemnity Agreement, and a dispute on the interpretation of these words and their application to what was now happening in practice ended before the High Court.

It is worth recalling that the act or acts which led to the water pollution happened many years before. Perchloroethane chemicals used in the tannery works were spilt on the floor of the tannery premises. Enough of the chemicals seeped through the floor, penetrated the chalk under the premises and migrated through an underground aquifer at least 1.3 miles to a point where Cambridge Water Company had a bore hole to abstract water. As most lawyers will now recall, the Court found that at the time when the spillages were agreed to have occurred, the level of pollution suffered at the point of the bore hole did not breach any statutory water quality standards. Subsequently, these standards were raised, and as a result the bore hole could no longer be used for the supply of drinking water. This gave Cambridge Water Company its problem. However, the Court held that this result was not reasonably foreseeable at the time of the spillages, and therefore Eastern Counties Leather was not liable to compensate Cambridge Water Company.

The House of Lords gave its decision in December 1993. In 1994 Eastern Counties Leather Group Limited transferred control of Eastern Counties Leather Plc, which was the company primarily responsible for the water contamination, to certain third parties. As part of this arrangements the Group agreed to enter into the Pollution Indemnity Agreement referred to above, primarily to deal with the water pollution issue. The indemnity was expressed to expire on 30 March 2000. By a letter dated 1 March 2000 ("the March letter") the Environment Agency asked Plc to prepare a statement outlining its proposals for containing the source of the contamination and carrying out the work necessary to improve ground water quality following the pollution

incident. The letter went on to state that in default the Agency would serve a notice of the required works under Section 161A of the Water Resources Act 1991 and the Anti-Pollution Works Regulations 1999.

Plc contended that the March letter constituted a "claim" for the purposes of the Pollution Indemnity Agreement, such that it was entitled to an indemnity for the costs of any works agreed with or required by the Environment Agency. Group disputed liability of the following grounds:-

(i) The March letter was not a "claim" within the meaning of the Pollution Indemnity Agreement;

(ii) Plc had in any event not complied with one or more of the conditions contained in the Pollution Indemnity Agreement; and

(iii) Plc was in breach of an implied term of the Pollution Indemnity Agreement that Plc would not do anything to incite or encourage the Environment Agency to make a claim.

The Court (Blackburne J) held that:

(i) The Court was satisfied that, on a proper construction of the March letter, the Environment Agency had made a "claim" for the purposes of the Pollution Indemnity Agreement. It was significant that the March letter expressly referred to the Agency's powers to serve a notice, in the event that Plc failed to carry out the necessary works.

(ii) Plc was not in breach of any of the conditions for making an indemnity claim against Group.

(iii) The Court did not consider it was appropriate to imply into the Pollution Indemnity Agreement a term of the kind contended for by Group. In any event Plc had done nothing to incite or provoke a claim by the Agency.

Hindsight is a wonderful thing, and it is easy from this point of view to identify issues that should have been addressed by the parties at the time of entering into the Pollution Indemnity Agreement. The first thing, of course, is that they should have foreseen the change in the regulatory provisions! In practice it is almost impossible to ensure that every possible scenario will be covered. The party giving the indemnity wants to identify as well as it can do what is the scope and limit of its liability. The indemnifier will therefore resist such wide wording as would enable the indemnified party to claim for matters which are only remotely connected to the principal subject matter of the indemnity. Therefore the parties have to agree on the kind of eventualities which are conceivable possibilities and, out of that list, those which they agree should properly be the subject of the indemnity.

Any such indemnity drafted today should reflect more fully what happens in practice with the Environment Agency (and often other statutory bodies, including local authorities). It should, therefore, acknowledge that the regulatory body will seek to proceed by way of agreement and will delay serving a formal notice where there is any likelihood of early agreement on a practical solution. The Indemnity Agreement can usefully include provisions enabling the indemnifier to be a party to any negotiations with the regulatory body in any circumstances which could lead to a claim under the indemnity. This is in addition to the right commonly reserved by the indemnifier to have control over the conduct of any legal proceedings, where it is going to have to foot the bill for any damages, remedial action etc. In the latest *Eastern Counties Leather* case the Court held that there is no implied obligation not to incite or encourage the Environment Agency to make a claim.

When, as is common practice, the indemnity is subject to a limitation period, there is a temptation for the indemnified party to seek to "flush out" any liabilities which might be subject to the indemnity. It is therefore sensible on behalf of the indemnifier to restrict what can be done in this way by an appropriate "whistle blowing" provision. If the indemnified party, or someone on its behalf, "blows the whistle" or find some spurious excuse to invite the regulatory body to inspect any land or water affected, then any right to claim under the indemnity will be lost.

It is also sensible for the parties to agree at the outset what constitutes a "trigger" for a matter to be covered by the indemnity. The March letter was only just within the period of the indemnity. Is the mere intimation of a possible claim sufficient, or does it need a letter before action or even the commencement of formal proceedings? Is it enough that it has been

received by the indemnified party, or does it have to be communicated to the indemnifier within the time limit?

There is a suggestion in the judgement of Mr Justice Blackburne that if the March letter had merely set out the works required, that might not have been enough to satisfy the terms of this particular Agreement. The fact that it went on expressly to refer to the Agency's right to serve a formal works notice was regarded as significant. Perhaps the Court might have reached a different conclusion and decided that the indemnity no longer applied, if the reference to a formal notice had not been included.

Significant sums of money were at stake in the *Eastern Counties Leather* case. The judgement refers to amounts in excess of £1,000,000. This was in relation to spillages which took place prior to 1976, many years previously. However, the impact on the underground aquifer continued at such a level as to justify the Environment Agency in requiring major remediation works over a long period of time. Where the stakes are as high as this, the wording of a Pollution Indemnity Agreement becomes critical.

Case references

Cambridge Water Company v. Eastern Counties Leather
[1994] 1 All ER 53

Eastern Counties Leather Plc v. Eastern Counties Leather Group Limited
[2002] EWHC 494 (Ch)

Key provisions of Section 161A Water Resources Act 1991 (introduced by Environment Act 1995)

"161A.- (1) Subject to the following provisions of this section, where it appears to the Agency that any poisonous, noxious or polluting matter or any solid waste matter is likely to enter, or to be or to have been present in, any controlled waters, the Agency shall be entitled to serve a works notice on any person who, as the case may be, -

(a) caused to knowingly permitted the matter in question to be present at the place from which it is likely, in the opinion of the Agency, to enter any controlled waters; or

(b) caused or knowingly permitted the matter in question to be present in any controlled waters.

(2) For the purposes of this section, a "works notice" is a notice requiring the person on whom it is served to carry out such of the following works or operations as may be specified in the notice, that is to say –

(a) in a case where the matter in question appears likely to enter any controlled waters, works or operations for the purpose of preventing it from doing so; or

(b) in a case where the matter appears to be or to have been present in any controlled waters, works or operations for the purpose –

(i) of removing or disposing of the matter;

(ii) of remedying or mitigating any pollution caused by its presence in the waters; or

(iii) so far as it is reasonably practicable to do so, of restoring the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters.

(3) . . . . . ."

THE CLEA MODEL AND PART IIA

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The Contaminated Land Exposure Assessment (CLEA) model was released earlier this year and can be downloaded, along with related documents, from www.defra.gov.uk/environment/landliability/. Its release follows almost 10 years of development by a team from Nottingham Trent University and it represents an important element within the government's Part IIA implementation process.

The CLEA model was initially designed to produce successors to the Inter-Departmental Committee on the Redevelopment of Contaminated Land (ICRCL) levels. These levels were published in the mid-1980s to aid decision-making in relation to contaminated land although, since they are not explicitly risk-based, they were deemed inappropriate for use under Part IIA. The use of quantitative tools is important under Part IIA since it allows

the significance of "pollutant linkages" to be judged.

The statutory guidance specifies that a local authority should consider that there is a significant risk of significant harm if:

(a) "it has carried out a scientific and technical assessment of the risks arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such assessments;
(b) that assessment shows that there is a significant possibility of significant harm being caused; and
(c) there are no suitable and sufficient risk management arrangements in place to prevent such harm."

In recognition of the fact that assessments of this nature can be extremely difficult and complex, the guidance then states that pre-determined guideline values may be used in some circumstances, as follows:

"To simplify such an assessment of risks, the local authority may use authoritative and scientifically based guideline values for concentrations of the potential pollutants in, on or under the land in pollutant linkages of the type concerned. If it does so, the local authority should be satisfied that:

(a) an adequate scientific and technical assessment of the information on the potential pollutant, using the appropriate, authoritative and scientifically based guideline values, shows that there is a significant possibility of significant harm; and

(b) there are no suitable and sufficient risk management arrangements in place to prevent such harm."

Finally, there is a requirement that the use of such values must be withdrawn when they are inappropriate, as follows:

"The local authority should be prepared to reconsider any determination based on such use of guideline values if it is demonstrated to the authority's satisfaction that under some other more appropriate method of assessing the risks the local authority would not have determined that the land appeared to be contaminated land."

Using standard risk modeling techniques, CLEA produces detailed simulations of human health risk from soil contamination to produce such "Guideline Values" (GVs). To date, GVs have been produced for seven contaminants, with further values being planned for release soon. It should be noted that CLEA is only relevant to the assessment of chronic human health risks and that other receptors, such as controlled waters, buildings and ecosystems, as well as acute human health risks, cannot be assessed using CLEA or the GVs it generates.

In terms of its technical attributes, the CLEA model is characterised by the following:

- Produces GVs for three land-uses:
  - residential (with and without gardens)
  - allotments
  - commercial/industrial
- Uses Monte Carlo techniques to develop probability density functions of GVs, from which the 95%ile value is taken as the final figure
- Can only handle one chemical at a time
- Limited ability to change default assumptions
- Eighteen age classes of individuals, with different assumed body weights etc, are considered
- Ten exposure pathways are considered, including:
  - Direct contact (ingestion/dermal)
  - Vapour/dust inhalation (indoors/outdoors)
  - Vegetable ingestion
  - Ingestion of soil clinging to vegetables
- For certain chemicals, provides GVs which may vary with pH, soil type, and other soil characteristics

As with all exposure models, CLEA operates in conjunction with toxicological information to produce GVs. Such information takes the form of "Tolerable Daily Soil Intake" (TDSI) or "Index Dose" values, the former being calculated by subtracting background exposure, or Mean Daily Intake (MDI) values, from Tolerable Daily Intake (TDI) values, while the latter are doses of carcinogens deemed to be insignificant from the perspective of cancer causation. TDIs and Index Doses (and/or their base data) are obtained from reputable sources such as the Department of Health and the World Health Organisation.

Technical guidance supporting Part IIA recommends the use of GVs for screening site

chemical data for the possibility of risks to human health. It should be noted, however, that GVs are not fail-safe and that in some instances they may be under-conservative. This "use with caution" requirement is reflected in the statutory guidance, which states that:

"In using any guideline values, the local authority should be satisfied that:

(a) the guideline values are relevant to the judgement of whether the effects of the pollutant linkage in question constitute a significant possibility of significant harm;

(b) the assumptions underlying the derivation of any numerical values in the guideline values (for example, assumptions regarding soil conditions, the behaviour of potential pollutants, the existence of pathways, the land-use patterns, and the availability of receptors) are relevant to the circumstances of the pollutant linkage in question;

(c) any other conditions relevant to the use of the guideline values have been observed (for example, the number of samples taken or the methods of preparation and analysis of those samples); and

(d) appropriate adjustments have been made to allow for the differences between the circumstances of the land in question and any assumptions or other factors relating to the guideline values."

As well as being used by the government to provide GVs, CLEA can be run in site-specific mode to provide more tailored estimates of acceptable contaminant levels (known as "site-specific guidance values" – SSGVs). Users can specify variations in certain parameters such that deviations from the generic assumptions incorporated into the GV-generation process can be accommodated. This is consistent with the "tiered" approach to site assessment implied by the statutory guidance and made explicit in technical supporting documents.

Although it has been widely publicised and endorsed by the UK government as an essential tool for Part IIA related site assessments, there are key limitations of CLEA which render it inadequate on its own for complying with the statutory guidance. These include:

- does not address chemical additivity
- does not address synergistic effects
- may not necessarily be "authoritative"

Perhaps more fundamentally, the extent to which CLEA and its GVs can be used to assess whether there is a "significant possibility of significant harm" is open to question. As indicated above, GVs represent contaminant concentrations which, if exceeded, may result in greater than 5% of the exposed population being exposed to contaminants in excess of their TDSI. Given that a TDSI is likely to be many orders of magnitude below the dose required to elicit significant harm in humans (by virtue of the way in which it is derived), it is difficult to see how this key test is supposedly met by exceeding a GV. The opportunity exists for someone to appeal against a remediation notice on these grounds and presumably it is only a matter of time before someone does.

ENVIRONMENTAL INFORMATION

By Simon Boyle, Solicitor, Legal Director, GroundSure

1.What Information Is Now Available?

1.1 Setting the Scene

As lawyers, surveyors or developers looking to buy land we clearly want to find out as much as we can about it before we or our client proceeds. This includes not just the condition of the land itself but neighbouring land with activities that could impact on the subject site. We are therefore fortunate that there is a great deal of information available either in the public domain or from private companies and specialist providers.

However this information has not come without a fight! Many companies were at first reluctant to have what they regarded as confidential information placed on the public register. There were grave concerns that this could either lead to competitors obtaining confidential information or environmental activists using it and bringing unnecessary litigation or generally just stirring up adverse publicity.

These claims along with the whole issue of access to environmental information were considered in the tenth report of the Royal Commission on Environmental Pollution,(RCEP) Tackling Pollution-Experience and Prospects (HMSO 1984 Cmnd 9419). The Commission was strongly in favour of making environmental information available

to the public that it believed would lead to better environmental protection.

"We consider that the aim of policy should be the progressive removal of existing discrepancies so that in the long run the public will be entitled to the fullest possible amount of information on all forms of environmental pollution…."

As time has gone by the recommendations of the RCEP have become implemented, partly through legislation and partly through voluntary disclosure.

1.2 Legislation

EU Directive On Freedom of Access to Environmental Information 90/313

This 1990 Directive required a fundamental change to access to environmental information. For the first time the public were to have unrestricted access to 'information relating to the environment' subject to certain exceptions. However there was no requirement to make the data easily accessible to the public.
The Directive is soon to be replaced by the recently adopted Directive on Public Access to Environmental Information, see below.

Environmental Information Regulations 1992

These Regulations implemented the 1990 Directive into UK law.
The Regulations place a duty upon government departments and public authorities to make environmental information available to whoever requests it.
The Regulations do not apply to companies (although arguably privately owned companies carrying out public functions, such as water companies, are emanations of the state and therefore fall under the Regulations.) There is also a very broad
Exception in para 4(1) 'Nothing in these Regulations shall require the disclosure of any information which is capable of being treated as confidential.'

DEFRA have produced a document entitled Guidance on the Implementation of the Environmental Information Regulations 1992 available at www.defra.gov.uk.

On 15 July 2002 DEFRA launched a public consultation period for new Environmental Information Regulations. These are expected to come into force at the end of this year and will meet the UK's obligations under Aarhus, see below.

The Local Government (Access to Information) Act 1985

This inserted new provisions into the Local Government Act 1972.
These allow members of the public to inspect agendas and reports for local councils and their committees. The public may also attend meetings of the council.
There are grounds where the public may be excluded from the meeting or documents withheld from public inspection. One of these grounds, and most commonly used, is that it would involve the disclosure of exempt information.

The Aarhus Convention

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision Making and Access to Justice 1998. (The Aarhus Convention)
The 15 EU Member States along with other countries signed this UN Convention in Aarhus, Denmark in 1998. It came into force on 30 October 2001.

The main objective of the Convention is to promote Principle 10 of the Rio Declaration 1992 which expresses the principle of public involvement in environmental issues; in other words to enable the public to properly understand the issues and through being informed to be involved in the decision making process.

The Convention is similar to the 1990 EU Directive in that it requires (under Article 4) public authorities to make information available upon request. There are exemptions to the requirement to disclose but these are to be construed narrowly.

Unlike the 1990 EU Directive the Convention also requires public authorities to take active steps to collect, possess and disseminate environmental information (Article 5)

EU Access to Environmental Information Directive

This Directive was adopted on 8 November 2002.
A new Directive was thought to be necessary to meet the requirements of the Aarhus Convention and also to ensure that public authorities make the information on accessible electronic databases.

Member States have two years in which to implement the Directive into their national legislation.

Freedom of Information Act 2000

This legislation has resulted from a Labour manifesto pledge to make more information publicly available. The Act sets out a general right of access to information held by public authorities. The Act itself does little to increase the availability of environmental information however section 74 of the Act enables the Secretary of State to implement new Environmental Information Regulations in line with the requirements of the Aarhus Convention.

1.3 Voluntary Disclosure

Many UK companies, especially those involved in waste, water and energy sectors now produce environmental reports. There is no prescribed standard for environmental reporting but they generally contain key benchmarking data covering for example energy use and waste production.
There are now calls that there should be a standardised approach to environmental reporting, notably the European Commission OJ L156/33.

Some companies are now accredited to the European environmental management standard, EMAS that requires the results of the company's environmental audit to be made available to the public. However the take up for EMAS has been low, most companies preferring the international standard, ISO 14001. This does not require public disclosure of information.

1.4 Public Registers

This is the traditional way of disclosing environmental information. These result from a statutory requirement upon the enforcing authority to compile a public register. Copies of entries on the registers can be obtained by payment of a reasonable charge. The registers include those held by:

Environment Agency

Prescribed Processes, including authorisations, revocations, notices.
EPA 1990 s90.

Waste Management Licences
EPA 1990 s64

Register of activities exempt from waste management licensing
Waste Management Licensing Regs 1994

Contaminated Land, list of special sites.
EPA 1990 s 78R

Abstraction licences
Water Resources Act 1991 s189

Discharge consents to controlled waters, prohibition and enforcement notices
Water Resources Act s190 Pollution Control Register

Maps of main rivers
Water Resources Act 1991 s193

Registrations and authorisations relating to radioactive substances
Radioactive Substances Act 1993 s 39
Water Industry Act 1991

Sewerage Undertakers

Trade effluent consents
Water Industry Act 1991 s196

Maps of water and sewage pipes.
Water Industry Act 1991 s198

Local Planning Authorities

Register of planning applications.
Town and Country Planning Act 1990 s69

Local Authorities

Local Land charges
Local Land Charges Act 1975

Local authority air pollution control (APC) prescribed process authorisations
EPA 1990 s20

Contaminated land remediation notices, remediation statements
EPA 1990 s78R

Noise abatement zones, registered noise levels
COPA 1974 s 64,66

Pollution, Prevention and Control Permits (Part A1 Processes)
Pollution Prevention and Control Regs 2000

1.5 Lists, Registers and Reports on Contaminated Land

Note all references in this section are to EPA 1990 Part II A.

Section 78B (1) requires local authorities to inspect their areas for the purpose of identifying contaminated land and possible special sites.

The Statutory Guidance (DETR Circular 02/2000, para B12) requires local authorities to adopt a strategic approach in carrying out their duty to inspect. The Guidance required local authorities to prepare written strategies, which should have been formally adopted and published by 20 June 2001.

The EA have reported that by July 2002 94% of local authorities had published their final inspection strategies.

In carrying out this review it appears that some local authorities have prepared unofficial lists of potentially contaminated sites. One such authority was Wigan MBC. A Mr Maile sought access to the council's database but access was refused. In the case of Maile v Wigan MBC [2001] Env LR 11the court held that this information was confidential and moreover its disclosure could have a detrimental effect by causing unnecessary fear amongst those who owned properties on the list.

Where a property is identified by the local authority as falling within the statutory definition of contaminated land and subsequently a remediation notice is served, then this must be recorded in a public register. See Section 78 R for this and other matters to be placed on the register.

Where a property is identified as contaminated land but no remediation notice is served, for example because remediation is carried out voluntarily (S.78 H (5) (a)) then, the person responsible for the remediation is required to prepare and publish the remediation statement. (S.78 H (7)) and this must then be placed on the public register (S. 78R(1) (c)).

S.78U (1) requires the EA to prepare a report on the state of contaminated land. In accordance with this in September 2002 the EA produced a very informative report 'Dealing with contaminated land in England'. This is available on the EA website www.environment-agency.gov.uk

This report states that by the end of March 2002 33 sites had been determined by local authorities (39 as at 2October 2002) as contaminated land and of these 11 had been designated as special sites. It also states that having completed the strategy papers, local authorities are now inspecting potential sites and this is likely to continue until 2006.

1.6 Maps

Maps are a vital source of information particularly for identifying historic land uses, which may have given rise to historic contamination. Maps can be separated into two main categories:

Historic maps

These date back to the 1850s and are often discussed in terms of Editions or epochs.
The Ordnance Survey generally left a period of some 20 years or so between Editions. Revisions to Editions were undertaken as considered necessary (for example where the land use had altered significantly).
Subsequent publications were referenced 'Edition 2', 'Edition 3', and so on.

In broad terms, for 6" County Series mapping:

Edition 1 mapping was published circa 1880
Edition 2 circa 1900
Edition 3 circa 1910-1920
Edition 4 circa 1930-1940

Nevertheless there are variations in dates as the country surveys were updated.
Additionally, areas of modern day London were surveyed and published in advance of the provinces.

As one might imagine, a national map-making endeavour is likely to have both subtle and pronounced oddities and the results of the map-making endeavour are no exception.

Ordnance Survey maps are available in a range of scales.
For the purpose of identifying reasonably detailed land use the OS produced what were referred to as their Large Scale mapping.
This comprised scales 6":mile and above (i.e. 25":mile, 50":mile and in some cases 5ft:mile.)

Mapping archives are maintained at a number of copyright libraries and specialist institutions around UK/Eire (i.e.Oxford, London, Dublin).

Current maps

Compiled by the Ordnance Survey and available in the following scales:

The introduction circa. 1937 of the National Grid geo-referencing system led to the scales of maps published by the OS to be modified slightly.

6": mile became 1:10000
25": mile became 1:2500
50": mile became 1:1250

The scale of maps is vitally important when assessing a property and the surrounding areas for former land uses that could be a source of historic contamination.

1:10,000 scale maps often do not show important features such as garages and landfill sites. 1:2,500 scale contains much more information. (The packs issued by Certa at the conference contain maps illustrating the differences.)

1.7 Environment Agency Databases

Environment Agency databases contain information held by the EA in the public registers as noted above.

They also include the following:

A broad range of regulated and licensed industrial processes.

Regulation Information System for Waste Management (REGIS).
This covers Licensed landfill sites and waste treatment sites. Also closed sites since 1996 when EA took over responsibility from Waste Regulation Authorities.

Closed Landfill sites since 1976
This database has restricted access as it is still being quality assured.

Note there is no comprehensive EA database for landfill sites closed pre 1976.

Flood Plain Data. Divided into tidal and fluvial data. Basic information is available on the EA website but this is not as detailed as that supplied commercially.

This information is available either directly from the EA or from Value Added Resellers.

1.8 Other Data Bases

There are a number of other databases commercially available or through value added resellers.

British Geological Society

The BGS supplies a database on subsidence, which is itself obtained by amalgamating six datasets and includes Swell-Shrink Clay, Landslip, Gulls and Cambering and Compressible Ground Dissolution.

Catalist

A commercial organisation that supplies databases on petrol and fuel sites. The data includes information on current, closed and redeveloped sites.

Trade Directories

There are a number of trade directories including Yellow Pages and Kelly Directories.

Coal Authority

The coal authority issue maps showing areas affected by coal mining. From these the Value Added Resellers will indicate whether the subject property lies within a coal mining affected area. If it is then a coal mining report should be purchased from the Coal Authority.

National Radiological Protection Board

The NRPB produce maps showing those areas of the UK that are affected by Radon. If the subject property is in an area affected by radon then digital data can be accessed giving statistical information for that property.

National Land Use Database (NLUD)

This database, which is still being developed, aims to provide a record of land use in England. The database will record the amount of previously developed land and buildings that are unused or may be available for development.

Aerial Photographs

There are now commercially available data sets (such as those from Get Mapping) covering most of the UK. These are included in the reports of some of the VARs. Aerial photographs are regarded by lawyers as being very helpful in giving them an immediate 'feel' for the property and assist in identifying other potential issues such as access and boundaries.

2.Selecting Your Environmental Information Provider

The selection made will largely depend upon what you need the information for.
Lawyers acting on property transactions must first advise their client on the inherent risks associated with contaminated land. For all commercial properties the client should be advised on the need to do the appropriate searches. If the client agrees that you should provide environmental advice then in accordance with the Law Society Contaminated Land Warning Card the lawyer should:

Make enquiries of statutory and regulatory bodies.
AND
Undertake site history investigation e.g. obtaining site report from a commercial company.

If the client does not agree to the lawyer providing environmental advice then, to avoid a potential negligence claim, it is essential that this is recorded in writing.

2.1 Environment Agency Information

The regulatory search referred to is generally taken to be a search to the EA.
Most firms have their standard EA search. These typically ask for information held on the EA's public registers, flooding information and often site specific information for example whether a neighbouring river has banks in need of repair.

There is a charge of £58.75 (inc vat) for every standard search submitted to the EA. Bespoke searches incur higher charges.

A problem that many lawyers encounter is the slow time of response from the EA, typically 6 weeks, and which is often too late in terms of the timing in the transaction.

The EA are conscious of this problem, and also the legal obligations they will incur once the new Environmental Information Regulations expected for 2004. As a consequence the EA are looking to have the information from their databases available on line. A scheme is currently being piloted.

Whilst this initiative is to be welcomed it is important to realise that it will not provide all the necessary information required. It will not contain site specific information held by area offices, such as that on the state of riverbanks, and presumably if this information is required it will still be necessary to send a written enquiry to the EA.

Neither will the EA on line database contain information on historic mapping that is vital in order to assess whether the property could be affected by historic contamination.

It is very important to realise that a solicitor will not discharge his obligations to his client, as set out in the Warning Card, only by carrying out an EA search. Only a search with a commercial organisation will contain other essential information including that from historic maps.

2.2 Commercial Organisations

There are several "value added" resellers and environmental data suppliers whose business is to collect data from numerous databases and maps and assess this information for lawyers and other clients.
In selecting the appropriate supplier it is critical to assess the quality of the data and the company's competence to properly interpret the data. Essential points to consider are:

Map Scales

Most suppliers use 1:10,000 scale maps on standard commercial reports.
However this scale does lack essential information shown on 1:2500 scale maps.
A proper study and evaluation of historic maps is essential in order to identify potential issues such as historic (pre 1976) closed landfills and other industrial processes.

Interpretation of Results

Data can be interpreted either through computer programmes (such as that designed by Nottingham Trent University) or by an environmental expert. The best option is one that involves both methods, combining expediency with accuracy.

Current computer models are fast but do often show false positives. This may arise where the computer picks up on an object that may in fact not present a risk.

Interpretation by an environmental expert takes slightly longer but should be the preferred choice if accurate and sensible interpretation is required. However good interpretation is entirely dependent upon the individual(s) concerned. It is essential to

ensure that the individuals carrying out the interpretation have the necessary qualifications and experience.

Risk ranking

It is also important to identify the type and level of risk assessment included in reports. In most cases this will include the likelihood of the site being identified as contaminated land, but can also include a statement about the site's suitability for purchase and use, and the likelihood of the site appearing on any local authority lists of potentially contaminated land. This is useful information provided it is presented in the right way and not subject to so many qualifications that the statement is almost worthless.

Helpline

A Helpline operated by or on behalf of a data supplier is an essential requirement for transactions where an issue has been identified and where environmental support is necessary or desired. An expert service available in house is generally preferable as immediate advice can be given.

3. Liabilities for Lawyers

Lawyers need to properly advise their client of the potential environmental risks in commercial and property transaction.

3.1 Commercial transactions

For company transactions this will mean undertaking proper due diligence on the target company. This will include checking that the target company is compliant; the costs of meeting permit requirements and planned capital expenditure. It must also include an assessment of the environmental condition of the properties currently owned and occupied by the target company. Former properties occupied by the target company will also need to be considered as these could have been contaminated by the company. Liabilities could arise if the target company polluted any of these properties the situation being worse if contaminants had or were in the process of migrating off site.

For transactions involving assets only it will not normally be necessary to assess previously owned properties.

3.2 Property Transactions- Identifying the Issues

For property transactions the most significant (but by no means the only) environmental risks are those associated with contaminated land. Recognising this the Law Society issued the Contaminated Land Warning Card in June 2001. This has in some ways helped solicitors by drawing the issue to their attention but on the other hand by increasing awareness and spelling out the actions solicitors must take it has increased their responsibility and the level of advice clients can expect. Solicitors who fail to advise their clients in accordance with the Warning Card and carry out the necessary environmental searches are potentially negligent.

To the author's knowledge there are no reported cases of solicitors being held liable as a result of a failure to warn clients about environmental risks in a property transaction. However it is certain that claims have been brought but are settled out of court or under arbitration. The author is aware of one such case where a firm of solicitors failed to provide written advice to their client (although oral advice had been given) of the risks caused by a historic landfill site. It is understood that the matter was settled by payment of circa £1 million to the client.

3.3 Property Transactions- Managing the Issues

Even when the solicitor correctly identifies a potential environmental issue his responsibilities do not end there. He then needs to guide and advise the client on what to do. The Warning Card refers to a range of possible actions:

- Advising on the need for full site investigation
- The use of contractual protections
- Advising withdrawal
- Advising insurance

Clearly at this stage, where an environmental issue has been identified, it is essential that the solicitor obtain good technical advice. The selection of environmental consultant is therefore critical. Not only must the consultant be technically competent but also it is also helpful if they are commercially aware and good at giving reliable cost estimates for carrying out the required remedial works. The solicitor is also responsible for ensuring that the consultant's contractual terms are adequate and that sufficient PI coverage is held.

A critical issue will also be the client's intended use for the property. If he intends to redevelop it for a more sensitive end use, for example from industrial to residential use then a costly remediation scheme may have to be implemented.

Solicitors also need to be aware of the various exclusion test set out in the statutory guidance including in particular the 'sold with information' test by which a buyer can be fixed with regulatory liability.

Although contractual protections and insurance are very important often the most straightforward way of resolving the issue between buyer and seller is to make an appropriate price reduction. This amount is likely to be a significant percentage of the purchase price and it is therefore essential to know that the technical information and cost estimates are reliable.

For further guidance on the risks for solicitors, recommended reading is the UKELA paper, Contaminated Land –Avoiding the Pitfalls available at www.ukela.org

Further Reading

Groundsure Homebuyers Reports Reference Guide Version 1.3 October 2002

UKELA, Contaminated Land-Avoiding the Pitfalls November 2001

Law Society Contaminated Land Warning Card June 2001

Environment Agency Dealing with contaminated land in England September 2002

Hughes, Environmental Law 4th Edition 2002

Tromans and Turrall-Clarke, Contaminated Land The New Regime 2000

Woolley, Pugh-Smith, Langham, Upton, Environmental Law 2000

Waite and Jewell, Environmental Law and Property Transactions 2nd Edition 2001

Halliwell, Environmental Law Handbook 5th Edition 2002

A TIME TO MOVE ON: A HARD LOOK AT MINISTERIAL ABILITY

Richard Hawkins

When Margaret Beckett as the new Secretary of State, walked through the doors of the newly entitled Department of Food and Rural Affairs after the June 2001 General Election, her first thoughts must have been to set her Department to rights whilst the worst national environmental disaster nation since the 1919 influenza epidemic , including wartime bombing, increased in severity.

Eighteen months later with the Iain Anderon's FMD 'Lessons To Be Learned Inquiry' Findings showing that for more than a month the PM and No 10 stood aloof from what was seen as primarily a Ministry of Agriculture Fisheries and Food problem, then completely reversed and intervened in detail, producing muddled decision making and contradictory signals that confused and infuriated those on the ground, the heavily criticised MAFF has been restructured, if certainly not forgiven in the fields, she can perhaps concentrate on other inherited problems.

Her Department has now well missed the Landfill 99/31 Directive (LFD) implementation date of 17th July 2001 with the distinct future possibility of EC fines of £500,000 per day ,so thus appraising her reappointed Minister of State Michael Meacher's 2 volumes of the National Waste Strategy (NWS), written principally to effect that transition, has been one of her urgent tasks.

Realising that , although municipal waste continues inexorably to grow at around 3% a year and probably more, with any reduction demanding changes in retailing practices and consumer behaviour , she was surprised that the NWS offered no discussion of options for minimisation delivery mechanisms or weakening the economic growth link with waste increase.

Likewise many new facilities for all waste streams will be required up to 2020, a significant number as soon as 2005. Yet the NWS gave only broad parameters of options for incineration ,recycling, composting and kerbside collection. A sea change in individual household charging , successful in Germany and the U S, was not debated.

Again she will have read (vol 2 para 3.33) that those seeking planning permission for waste engineering facilities,to say nothing of hazardous waste treatment plants, will face an uphill and extremely expensive task in both management time and financial expenditure .

Admonishing the waste industry to win the confidence of the public and the waste planning authorities to promote informed debate(vol 1 paras 4.12 & 13) is no immediate practical solution.
The Secretary of State then must have become really concerned about the ability of her inherited Minister of State to recognize field operational priorities. So she then convened the November 2001 Waste Summit. "We cannot too easily allow ourselves the luxury of closing down our options" said Beckett, "We need to come together to face up to the hard choices that need to be made." Not exactly rocket science to distinguish targets, policy instrument and policy tools.
She had, unannounced, already briefed , with the personal imprimatur of the PM, the Cabinet Office Performance and Innovation Unit (PIU), now called the Strategy Unit, to explore policy options for implementing the LFD's rigorous time table. Not a great vote of confidence in the NWS or its compiler.
Why are there these increasing doubts about Michael Meacher's ability to face up to hard choices and force through solutions? Doubts increasing now that DEFRA admits it was unaware of the implementation of EC 2037/2000 the ozone depleting substance regulations for refrigeration equipment disposal. .
Any person who obtains a First in Greats at Oxford has my genuine respect, but perhaps the Minister , after 6 years at DEFRA, and having been severely censured this June, by a Commons' Select Committee for his responsibility in the creation of the nationwide expensive and environmentally damaging fridge mountains, has achieved all he can and should move to another Department with a less exigent immediate timetable of the implementation of, for example, the Waste Electronic and Electrical Equipment and the End of Life Vehicles' Directives to fulfil. Do you agree? Let us know.

Recoverability of damages where a worker is exposed to asbestos whilst working for more than one employer and there was no means of determining which exposure had caused the disease

Fairchild v Glenhaven Funeral Services Ltd and others [2002] UKHL 22; [2002] 3 WLR 89, House of Lords

By Martha Grekos, Pupil Barrister at 4 Paper Buildings, chambers of Jean Ritchie QC, and visiting supervisor in Environmental Law, University of Cambridge[1]

The decision in Fairchild v Glenhaven Funeral Services Ltd and others[2] *should be welcomed as it is a departure from the general rule that, in order to prove causation, it is necessary at least to be able to satisfy the "but-for" test of causation. The House of Lords, affirming McGee v National Coal Board*[3] *(a dermatitis case in which the House of Lords held the tortious cause materially contributed to an injury for which there was also a non-tortious cause), has stated that in certain circumstances it is not even necessary to satisfy the but-for test of causation.*

In Fairchild, three appeals were heard together which related to employees who had developed mesothelioma caused by exposure at work to asbestos dust. All the employees had been exposed to asbestos dust during periods of employment with more than one employer. In each case, the claimant sought damages against defendants who, in breach of their duty to protect the employee from the risk of contracting the disease, had exposed him to substantial inhalation of asbestos dust or fibres.

Decision in the Court of Appeal

In the Court of Appeal, it was held that the claimants could not succeed in recovering damages for the asbestos-induced cancer of mesothelioma. This was because they were unable to identify, on balance of probabilities, the period in which the claimants had been exposed to the particular asbestos fibre or fibres by several potential tortfeasors which had initiated the malignant transformation.

Mesothelioma arises when one of the mesothelial cells in the pleura is damaged and undergoes malignant transformation, but it may also arise in the peritoneum. It is rare for mesothelioma symptoms to develop less than ten years after exposure to asbestos dust. The medical experts in these cases agreed that the

[1] A fuller analysis and commentary on this case is available in *Environmental Liability* (Sept/Oct 2002 issue) and *Journal of Planning and Environmental Law* (January 2003 issue).

[2] [2002] UKHL 22; [2002] 3 WLR 89, House of Lords.

[3] [1973] 1 WLR 1.

precise mechanisms resulting in the development of a tumour are unknown: the development is a multi-staged process which involves many gene changes and this is what results in a normal cell being transformed into a malignant cell. Asbestos might be involved at one or more of these stages, but the trigger might equally be a single, a few or many fibres. The law distinguishes between damage which is 'divisible' and 'indivisible'. Damage which is divisible is also described as 'cumulative'.

The Court of Appeal concluded that mesothelioma is an indivisible disease. Once it has developed, there is no sense in which past exposures can be said to have had a cumulative effect leading to that development. However, the risk that mesothelioma will occur increases in relation to the total dose of asbestos received. The court concluded that because the claimants could not prove on the balance of probabilities which periods of exposure caused or materially contributed to the cause of the mesothelioma, there was an evidential gap. It would therefore be unjustifiable to impose liability for the

> …whole of an insidious disease on any employer with whom the claimant was employed for quite a short time in a long working life… [w]e would be yielding to a contention that all those who have suffered injury after being exposed to a risk of that injury for which someone else should have protected them should be able to recover compensation even when they are quite unable to prove who was the culprit.[4]

The Court of Appeal considered a number of leading cases on causation and rejected the submission that *McGee* was consistent with the claimants' case in that if the different exposures were regarded as 'cumulative', in the sense that the longer the subject was exposed to asbestos, then there was a greater chance of developing mesothelioma. Material contribution to risk should amount to material contribution to injury in those cases where there is no knowledge, or means of knowledge, which enables the fact-finder to move from risk to contribution. The court distinguished *McGee* and said that such an argument could not be used where there is more than one causative agent, or, as here, there is more than one tortfeasor. The court therefore seemed anxious to avoid a so-called 'injustice' by declining to attach 'blame' when it perceived that an injury might have been caused by only one of several possible tortfeasors, or equally might have been caused by several or all of them. However, if they had all materially increased the risk of the disease, then there would have been no such 'injustice' in finding that each of them had caused it.

Decision in the House of Lords

The House of Lords unanimously overturned the Court of Appeal decision and allowed the claimants' appeals.

The leading judgment was given by Lord Bingham. He identified six conditions rendered it "just and in accordance with common sense" to treat the conduct of the defendants as making a material contribution to the risk of injury:

1. C was employed at different times and for differing periods by both A and B;
2. A and B were both subject to a duty to take reasonable care or to take all practicable measures to prevent C inhaling asbestos dust because of the known risk that such dust (if inhaled) might cause mesothelioma;
3. Both A and B were in breach of that duty in relation to C during the periods of C's employment by each of them with the result that during both periods C inhaled excessive quantities of asbestos dust;
4. C is found to be suffering from mesothelioma;
5. Any cause of C's mesothelioma other than inhalation of asbestos dust at work can be effectively discounted; and
6. C cannot (because of the current limits of human science) prove, on the balance of probabilities, that his mesothelioma was the result of his inhaling dust during his employment by A during his employment by B or both taken together.[5]

The crucial issue on appeal was whether, "in the special circumstances of such a case, principle, authority or policy requires or justifies

[4] [2002] 1 WLR 1052, at 1080. Court of Appeal.

[5] *Op Cit*, at 92.

a modified approach to proof of causation."[6] As Lord Bingham stated:

> The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another. Are these such cases? A and B owed C a duty to protect C against a risk of particular and very serious kind. They failed to perform that duty. As a result the risk eventuated and C suffered the very harm against which it was the duty of A and B to protect him. Had there been only one tortfeasor, C would have been entitled to recover, but because the duty owed to him was broken by two tortfeasors and not only one, he is entitled to recover against neither, because of his inability to prove what is scientifically unprovable. If the mechanical application of generally accepted rules leads to such a result, there must be room to question the appropriateness of such an approach in such a case.[7]

The Law Lords had questioned the appropriateness of such an approach by examining a range of decisions in analogous cases from other jurisdictions, as well as looking at Civil Codes and academic writing. They had recognised the value of the comparison process to check how fair our system actually is, and discovered that many jurisdictions expressly recognise the problem of indeterminate defendant. For example, Article 926 of the Greek Civil Code entitled 'Damage caused by several persons' provides:

> If damage has occurred as a result of the joint action of several persons, or if several persons are concurrently responsible for the same damage, they are all jointly and severally implicated. The same applies if several persons have acted simultaneously or in succession and it is not possible to determine which person's act caused the damage.

It was concluded that such injustice as might be involved in imposing liability on a duty-breaking employer, who has not been proved to have caused the claimants disease is heavily outweighed by the injustice of denying redress to the victim. Lord Bingham's six conditions therefore tend to show that he is willing to relax the usual rule that the "but-for" test of causation is a threshold requirement for liability to be established, and that he would regard it as sufficient that the wrongdoing in question has caused a material increase in the risk of injury being sustained- this operating as a matter of law to satisfy the requirement of material contribution to the injury.

The speeches of all five Law lords contained discussion that the answer to many problems in the area of the law of tort is essentially dictated by policy considerations rather than by precedent; the 'but for' test of causation is not always the appropriate test:

> In truth, the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury.[8]

The House of Lords conducted a detailed review of *McGee* and it was concluded that it was unnecessary for a claimant to have to be able to satisfy the "but-for" test and that, on the authority of *McGhee*, a lesser test of causation was sufficient in a case where medical and scientific knowledge meant that no Claimant could establish the "but-for" test. The following conclusions were drawn: 1) the House of Lords in *McGee* was deciding a question of law; 2) the question of law was whether, on the facts found, a claimant who could not show the defendant's breach had probably caused the damage could still succeed; 3) the House of Lords in *McGee* could not draw any factual inference that the defendant's breach had probably caused the damage; 4) there was no distinction between making a material contribution to causing the disease and materially increasing the risk of the claimant suffering it; and 5) the claimant in *McGee* faced an insuperable problem of proof if the orthodox test of causation was applied, but regarding the case as one which justice demanded a remedy for the claimant, the House of Lords adapted the orthodox test to meet the particular case.

The House of Lords reviewed the analysis of *McGee* as highlighted in *Wilsher v Essex Area Health Authority*[9]. The Law Lords in *Fairchild* whilst they accepted that *Wilsher* remained

[6] *Ibid*, at 93.
[7] *Ibid*, at 96.
[8] *Ibid*, at 97.
[9] [1988] AC 1074.

sound authority on its particular facts (action for clinical negligence in which it was alleged that giving a premature baby excessive oxygen had caused retrolental fibroplasia, resulting in blindness), they found that the grounds upon which *McGee* was distinguished were unsatisfactory. The House of Lords in *Fairchild* disapproved of Lord Bridge's interpretation of *McGhee* in *Wilsher*. The Law Lords believe that *McGee* has far narrower principles and is limited to the five principles mentioned above. However, *Fairchild* is not as restrictive as *Wilsher*.

Commentary

There is recognised a public policy which favours compensating those who have suffered harm at the expense of their employer who owes a duty of care to protect them and fails to do so, even in the absence of fault (in its traditional form). The decision in *Fairchild* means that British employees exposed to asbestos through several employers do not now have to prove which single one was responsible in order to make a successful claim for compensation. The decision in *Fairchild* is essentially a relaxation of the rules of causation to recognise the effect of joint responsibility.

There are therefore major implications here for environmental liability. As we are very much aware, the need for evidence which is more or less irrefutable is very difficult. Too much of a causal link is needed which science cannot help; the more we understand the environment, the more complicated it actually becomes. The law of tort is too much concerned with culpability which obstructs the environmental aim - to attack the causes of environmental degradation. We need to bear in mind the 'precautionary principle', as measures should be taken despite scientific uncertainty about the likelihood of harm, even in cases where there is no scientific proof of a causal link[10]. A much lower standard of proof for environmental causuality is needed. *Fairchild* can assist here as it indicates that the test of causation is inadequate where there are multiple acts or events and that redress should not be denied to the victim. *Fairchild* is in accordance with fairness, justice and reason as the burden should fall accordingly rather than be borne by the Claimants. *Fairchild* represents at least an invitation to judges to strain at the usual constraints of causation if to apply them would produce a result perceived by the judge to be "unfair". Although the decision is restricted to the conditions applying in these specific cases, a similar argument might be permitted in analogous case if fairness and justice required it.

However, considerable difficulties still remain. The burden of proof still lies on the claimant as s/he has to prove that the six conditions, as mentioned by Lord Bingham, apply. This will include the need to demonstrate breach of duty by one or more defendants, as well as some causal link. Likewise, if no causal link can be shown at all, a claimant will not succeed. It will be interesting to see the degree to which *Fairchild* is applied in the future.

A broader consideration is whether the causation rules should be amended so as to reverse the burden of proof once the claimant has crossed at least an initial threshold ('rebuttable presumptions'). *Fairchild* renders an appropriate time to ask whether, in its strongest form, the onus of proof should lay on the polluter to demonstrate that the activities s/he proposes will not cause harm to the environment, instead of that they will cause harm.

[10] A working definition of the precautionary principle id Article 15 of the UNCED Rio Declaration of 1992 which states that "…where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

Report on UKELA Working Parties

Biotechnology Working Party
Joint Convenors: Daniel Lawrence and Martha Grekos
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Group members have produced their response to the Agriculture and Environment Biotechnology Commission's (AEBC) *Consultation Paper on future scenarios for the uptake of GM in agriculture*. This response has now been sent to Professor Malcolm Grant, chair of AEBC. A copy of the response paper is available on the UKELA website, under the Biotechnology Law Working Group homepage.

The next task for the group is to produce a draft response to the Department of

Environment's (Environmental Policy Division) *2nd Consultation Paper on the Draft implementing regulations: the EC Directive 2001/18 on the Deliberate Release into the Environment of Genetically Modified Organisms.*

The group is also liaising with the 2003 UKELA Conference organisers in order to organise a panel for the planned GMO discussion session taking place on Friday 27th June, 2003, 6-8pm.

Contaminated Land Working Party – Convenor, Matthew Townsend - Matthew.Townsend@allenovery.com

A meeting was held on 31 July 2002. Articles for the e-Journal were discussed, including: Brownfield Regeneration; the CLEA model; Progress under Part IIA Environmental Protection Act 1990; the sold with information test under the same Act; contaminated land tax relief and looking behind site investigation surveys.

Simon Boyle of Groundsure gave a brief explanation of what reports Groundsure can provide.

Michael Quint of PB Environment gave a presentation on the proposed Environment Agency guidance on the requirements for site closure reports in PPC surrender applications.

The group has submitted comments on the proposed Planning Technical Guidance on the Development of Land Affected by Contamination.

The group has looked at:

- the proposed Environment Agency guidance for operators on the requirements for site closure reports in PPC surrender applications

-contributed to the November edition of UKELA's e-journal

- been tracking progress of the Water Bill (in particular, in relation to the definition of Contaminated Land in the context of controlled waters)

- been tracking progress under Part IIA EPA

The group has continued to expand membership numbers

The next meeting is fixed for 29 January 2003.

Climate Change (Emissions Trading & Flexible Mechanisms) Working Party – Convenor, Helen Loose – helen.loose@ashursts.com **Secretary, Anthony Hobley -** arh@cmck.com

No meetings of the Working Party have taken place since the last report.

A response to the draft ETS Rules for CCA participants was submitted to DEFRA.

Insurance and Liability Working Party – Convenor, Valerie Fogleman – vfogleman@blg.co.uk

A meeting was held on 11 September 2002. The meeting was attended by Cuthbert Nestor of DEFRA to discuss the proposed Directive on environmental liability.

The next meeting is fixed for 13 November 2002.

IPPC Working Party – Convenor, Michael Hutchinson - Michael.Hutchinson@mayerbrownrowe.com

No meetings of the Working Party have taken place since the last report.

Nature Conservation Working Party – Convenor, Andrew Baker - mdxe56@dial.pipex.com

No meetings of the Working Party have taken place since the last report.

Planning Law Working Party – Convenor, Mark Challis – challism@nortonrose.com

No meetings of the Working Party have taken place since the last report.

Practice and Procedure Working Party – Convenor, Daniel Lawrence – daniel.lawrence@freshfields.com

No meetings of the Working Party have taken place since the last report.

Scottish Law Working Party – Convenor, Ian McPake – ianmcpake@todsmurray.co.uk

The Working Party met on 19 August 2002.

Responses were prepared for the EC Proposal for Directive on Environmental Liability; the Consultation for Public Access to Environmental Information and the Consultation on Management Review of SEPA.

Ian McPake is currently canvassing for new members to join the Working Party.

Sustainable Development Working Party – Convenor, William Upton – wupton@compuserve.com

No meetings of the Working Party have taken place since the last report.

Waste Working Party – Convenor, Andrew Bryce – bryce@ehslaw.co.uk **Secretary, Anju Sanehi -** anju.sanehi@dla-law.co.uk

The Working Party met on 18 September 2002 to discuss the Landfill Directive, Hazardous Waste Regs timetable, Planning Reform and Waste and the latest position regarding the Environmental Liability Directive. It was also discussed whether a speaker from DEFRA should be invited to give a talk on agricultural waste.

The Working Party were due to meet on 3 December 2002 to discuss proposals for a new Waste Forum; the Landfill Directive : Regulations and Acceptance criteria; Magistrates' tool-kit for environmental and health and safety prosecutions and Hazardous Waste Regulations timetable.

Water Working Party – Convenor, Elizabeth Hattan - elizabeth.hattan@freshfields.com

The Working Party met on 19 July 2002. Various consultations were considered including Extending Competition in the Water Industry and the Government's Strategic Review of Diffuse Water Pollution from Agriculture in England.

Elizabeth Hattan is standing down as convenor of the Water Working Party in January. A replacement convenor has yet to be confirmed.

Future talks fixed for the Working Party include a talk by Glen Plant on offshore renewable energy and a possible talk by the Environment Agency on abstraction and the Habitats Directive.

The next meeting was due to go ahead on 18 October 2002.

MARK BRUMWELL
SJ Berwin
Working Party Co-ordinator
11 December 2002
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REGIONAL GROUPS

North West Regional Group

had a speaker meeting on 9 December when Steve Salt of West Coast Energy Ltd spoke about the offshore wind industry and specifically the Rhyl Flats Project. The meeting was followed by the Group's Christmas dinner in Warrington.

South West Regional Group.

Our next meeting will be in February (date to be confirmed) at the offices of Burges Salmon when Stephen Tromans will speak about agriculture & the environment. The meeting will also be the AGM.

There is now a Conference e-mail address:
ukelaconference@plymouth.ac.uk

and the web page containing details of the Conference will be up and running in the New Year. The e-mail has been active as of yesterday.

MEMBERSHIP ENQUIRIES
to Richard Bines

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Please note the new subscription rates for 2003:
Student £10.00
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E – LAW

The editorial team want letters, news and views from you for the next edition due out at the end of January 2003.

All e-law contributions, be they letters, articles, book reviews, case reports etc should be dispatched as soon as possible (and in any event by 13 January 2003) by email to :

Catherine.davey@stevens-bolton.co.uk

Letters to the editor will be published, space permitting

E- Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

STOP PRESS

Message from Stephen Tromans .

Some of you may recall having met an Indian lawyer, Tariq Rehman, at the Sheffield conference. He is due to do an internship with FIELD on climate change from January to April 2003, but the funding for the cost of his accommodation has fallen through.

I am wondering if we might be able to help in some way - in particular whether members may know of anyone who could assist in providing accommodation or with the funding. Helping environmental lawyers in less well-resourced countries seems to me to fall within our objects. Is a bursary something that UKELA Council might consider as a use of funds?

It occurred to me that one of the large law firms might be
able to offer Tariq some part time work as a para-legal, for a modest salary that might defray his accommodation expenses. If anyone has any thoughts, could you let me know. Those who spoke to Tariq in Sheffield will know that he is someone who it would be very worthwhile to help.

Email from Tariq
Dear Mr Tromans,

Wish you marry Christmas and a very happy new year!

Hope you are all right. As I had already told you about my Internship at FIELD under Climate Change
Programme which is to begin from January next year, I have already started preparation to join Internship. However, unfortunately I am having some problems regarding accommodation in London. The organisation which initially had committed to support me financially, due to financial constraints, has now expressed its inability to support me. As you might already aware that NAPM-the organisation I work for,
is a movement which also has no such budget to support me. Recently we have been actively involved in
organising Climate Justice Summit which was held parallel to the UN sponsored COP-8 conferece in NewDelhi(Detail report of Climate Justice Summit is available on www.corpwatch.org OR www.corpwatchindia.org). I have arranged some funds for my living but as London is an expensive place to live in, that's quite insufficient to get accommodation in central London.
In this regard, may I request you if you could kindly help me in finding some funds or accommodation for me during my Internship period i.e.January-April 2003?

I will not be able to pay rent for accommodation but in return, will be happy to offer my services in however possible way.

It will indeed be a great help if you or
UKELA could help me in this regard. I understand there is a Climate Change Working Group within UKELA which might help me? I am very much excited about my
affiliation with FIELD and wont' like to miss the opportunity to work with them.

Thanking you and look forward to hearing from you.

Best regards,

Tariq

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