



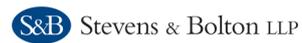
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## Environmental Liability Update

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## Topics

- Nuisance claims
- Contaminated land regime
- Environmental Damage Regulations
- Effect on insurance market
- Future environmental liabilities and insurance cover

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## Nuisance claims

- Barr v Biffa Waste Services Limited (Court of Appeal, March 2012)
  - Westmill Landfill, Ware, Hertfordshire
- Dobson v Thames Water Utilities Ltd (Technology and Construction Court, April 2012)
  - Mogden Sewage Treatment Works, Isleworth, Middlesex

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## Barr v Biffa Environment Agency prosecution

- 2004: waste disposal and odour complaints begin
- June 2005: Environment Agency (EA) prosecutes Biffa for breaching permit on 9 days in 2004 and 2005
  - “There shall be no odours emitted ... as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside [the landfill] as perceived by an authorised officer of the Agency”
- October 2007: Biffa convicted on 4 charges

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## Barr v Biffa Group action

- Odour complaints continue on regular basis
- 2007: law firm sends letter to residents saying they have been instructed to investigate possibility of claims
- 2008: EA issues formal warning to Biffa with view to another possible prosecution for odour

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## Barr v Biffa Group action

- 2009: 152 households bring action for nuisance from odour, dust, noise, fly infestation, litter, vermin and birds
- 2010: 5 week trial of lead cases involving 30 residents

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## Barr v Biffa Group action

2011: Coulson J

- environmental permit may be defence to nuisance
- if wrong on interaction between nuisance and environmental permitting, should be threshold
- threshold is 1 odour complaint per week / 52 per year
- only 2 lead claimants experienced interference above threshold
- would award each claimant £1,000 each year threshold was exceeded

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## Barr v Biffa Group action

- 2012: Court of Appeal allows Biffa's appeal
- no basis for statutory scheme such as environmental permitting to cut down private law rights
- permit did not authorise emission of odours
- no general rule requiring threshold in nuisance actions
- comments that legal costs reportedly £3m for each side

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## Dobson v Thames Water Statutory nuisance action

- July 2001: Hounslow brings statutory nuisance action against Thames Water to abate odours (treatment works substantially extended in 1999 resulting in increased complaints)
- 2004: Magistrates Court concludes statutory nuisance exists
- 2008: following appeals, Thames Water complies with modified abatement notice at cost of between £50m and £70m

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## Dobson v Thames Water Group action

- 2005: 1,350 residents bring action due to odours and mosquitoes; action seeks
  - injunction to prevent future nuisance
  - damages for past nuisance caused by negligence
  - declaration under article 8 of European Convention on Human Rights (Convention) for breach of right to family life
  - declaration under article 1 of first protocol of Convention for breach of property rights
  - damages under Human Rights Act 1998 (HRA) for breaches of Convention

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## Dobson v Thames Water Group action

- 2009: Court of Appeal
  - damages award to person with legal interest in property normally constitutes just satisfaction; no additional award necessary under HRA
  - damages award to person without legal interest in property when damages awarded to another member of household under common law to be decided on case-by-case basis

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## Dobson v Thames Water Group action

- 2010: 6 week trial of lead cases involving 10 households and 30 residents
- December 2011: Ramsay J issues 234-page judgment
  - denies request for injunction due to further work being carried out to address odours
  - rejects claim regarding mosquitoes
  - accepts 18 of 30 negligence allegations

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## Dobson v Thames Water Group action

- concludes that Thames Water breached article 8 of Convention
- awards damages only to claimants with legal interest in property but takes account of claims by members of households with no legal interest in calculating awards

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## Dobson v Thames Water Group action

- total damages of £20,120 for lead cases for 10 households involving 15 individuals with legal interest in property for 1999-2009 period
- awards range from £607.50 to £4,347.50 per household
- damages to be calculated for other claimants based on judgment
- legal costs? Solicitors for each side instructed two barristers including QCs

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## Contaminated land regime

- Part 2A of Environmental Protection Act 1990
- imposes liability on “appropriate persons” to remediate each “significant pollutant linkage” on contaminated land
  - persons who caused or knowingly permitted contamination (Class A persons)
  - owners or occupiers (Class B persons) if Class A person not found after reasonable inquiry by enforcing authority

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## Contaminated land regime

- Introduced 2000
- Highly complex regime mostly set out in statutory guidance
  - exclusion tests
  - apportionment criteria
  - attribution criteria
  - hardship tests

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## Contaminated land regime

- Duty on local authorities to inspect areas for contaminated land
  - have inspected only about 10% of areas
- About 1,000 contaminated land sites have been determined
- Defra published figures until 2007

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## Contaminated land regime

- Three cases
  - Circular Facilities (London) Ltd v Sevenoaks District Council (Administrative Court, 2005)
  - R. (on the application of National Grid Gas plc) v Environment Agency (House of Lords, 2007)
  - R. (on the application of Redlands Minerals Ltd) v Secretary of State for Environment, Food and Rural Affairs (Administrative Court, 2010)

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## Contaminated land regime

- April 2012: new statutory guidance
  - 74 pages instead of former 190 pages
  - main changes
    - introduction of
      - significance threshold for water
      - 4 categories to assist enforcing authorities make determinations of contaminated land

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## Contaminated land regime

- local authorities to issue
  - risk summary when they make determination that land may be contaminated land on basis of risk assessment
  - written statement when they make determination that land is not contaminated land
    - may be conditional, eg, subject to current use
- does not change liability system

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## Environmental Damage Regulations

- Introduced to transpose Environmental Liability Directive (ELD) in England
- Separate regulations for Wales, Scotland and Northern Ireland

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## Environmental Damage Regulations

- Operators of Schedule 2 activities strictly liable for
  - preventing or remediating imminent threat of, or actual, environmental damage (ED) to
    - land
    - surface, ground and coastal waters (water)
    - species and natural habitats protected by Birds and Natural Habitats Directives (biodiversity)
    - sites of special scientific interest (SSSIs)

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## Environmental Damage Regulations

Non-Schedule 2 operators liable for

- preventing or remediating imminent threat of, or actual, ED to
  - biodiversity
  - SSSIs
- if operator intended to cause ED or was negligent

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## Environmental Damage Regulations

Enforcing authorities

- *Local authorities (LAs)*: land including preventive actions on land for LA-authorised activities
- *EA*: EA-regulated sites; all water including water in SSSIs and in respect of biodiversity, but not marine unless EA-regulated activity
- *Natural England*: land in respect of biodiversity and SSSIs
- *Marine Management Organisation*: marine but not EA-authorised activities

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## Environmental Damage Regulations

### Exceptions

#### Defences

- Operator not at fault or negligent and ED
  - result of third party's act that occurred despite operator's appropriate safety measures
  - result of action mandated by governmental authority
  - caused by emission or event expressly authorised by and fully in accordance with specified permit
  - emission or event not considered likely to cause ED according to state of scientific and technical knowledge at that time

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## Environmental Damage Regulations

### Thresholds

- water: significant effect on ecological, chemical or quantitative status or ecological potential of water (lowering Water Framework Directive status)
- biodiversity: significant adverse effect on conservation status of species or natural habitat
- SSSIs: site integrity

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## Environmental Damage Regulations

### Thresholds - land

- significant risk of adverse effect on human health including death, disease and serious injury, and
- gastrointestinal disturbances (nausea, vomiting, diarrhoea, abdominal pain)
- respiratory tract effects (irritation of the nose, throat and respiratory tract cough, sore throat, dyspnoea)
- central nervous system effects (headache, lethargy, drowsiness, decrease in IQ)

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## Environmental Damage Regulations

### Remediation - land

- Removal, control, containment or diminution of contaminants so that land no longer poses significant risk of adverse effect on human health
- remediation standard: lawful current use or approved future use

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## Environmental Damage Regulations

### Remediation – Biodiversity, water and SSSIs

- *Primary remediation*: remediation and restoration to “baseline” condition
- *Complementary remediation*: if damaged site cannot be fully restored, restoration of nearby site in addition to partial remediation of damaged site
- *Compensatory remediation*: losses between time ED occurred and its full remediation (providing, enhancing or improving same or new resources at damaged and/or alternative sites)

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## Environmental Damage Regulations

French report on ELD (April 2010) indicates substantial rise in potential costs for ED

- large spill of bleach from paper manufacturer (5 April 1997)
  - cost of remediating ED would have increased from €42,700 to between €140,000 and €400,000
- release of herbicides, insecticides and fungicides as result of fire at manufacturing facility (6 August 1996)
  - cost of remediating ED would have increased from slightly more than €10,000 to about €4 million

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## Environmental Damage Regulations

### Reported incidents in UK

- 2009: 4
  - 3 local authorities and Environment Agency
- 2010: 6
  - 4 local authorities, Countryside Council for Wales (CCW), Scottish National Heritage
- 2011: 3
  - Natural England, CCW, Department of the Environment for Northern Ireland

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## Environmental Damage Regulations

### Land damage (2009)

- home heating oil supplier discharged kerosene into disused tank causing oil to leak from severed pipe into ground around house
- supplier notified local authority
- authority concluded significant adverse effect on human health due to headaches, nausea and sore throats over 2-week period

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## Environmental Damage Regulations

### Land damage (2009)

- train refueling at depot resulted in diesel plume entering inspection chamber at rear of flats
- potential for plume to migrate under flats leading to fumes as well as diesel in chamber contaminating water supply by entering plastic pipes

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## Environmental Damage Regulations

### Water damage (2009)

- 30 June to 20 July 2009: pumps at United Utilities' unmanned pumping station near Southport failed
- release of raw sewage effluent killed over 6,000 fish and lowered water quality in 5km stretch of river
- EA determined ED due to lowering of status of water body under Water Framework Directive

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## Environmental Damage Regulations

### Water damage (cont'd)

- 4 Dec. 2009: EA served remediation notice
  - primary remediation: restocking fish
  - compensatory remediation: habitat and access improvements to compensate for loss of several years of services to anglers
- 14 April 2010: operator fined £14,000 for causing water pollution (offence not under EDR)

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## Environmental Damage Regulations

### Biodiversity damage (2011)

- Northern Ireland Environment Agency (NEIA) notified that site for which planning application for 3.5 hectare basalt quarry had been notified in 2009 was going to be cleared by excavators
- site was ecologically important meadows
- NEIA served stop notice under Northern Ireland equivalent of EDR

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## Environmental Damage Regulations

### Damage to SSSI (2011)

- company constructed access track across SSSI containing ecologically important peat bog to improve access for grouse shooting
- Natural England
  - concluded that integrity of SSSI had been adversely affected due to removal of vegetation, inversion of peats and drainage modification
  - served remediation notice directing operator to submit proposals to remediate SSSI

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## Environmental Liability Directive

### Other Member States

- Poland
  - over 400 incidents
- France
  - Coussouls de Crau oil spill
- Hungary
  - Kolontar red sludge spill
    - third-party liability insurance less than £100,000
    - not treated as ELD

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## Effect on insurance market

### General liability policies

- cover claims for bodily injury and property damage from sudden and accidental pollution incidents
- High Court concluded in *Bartoline v RSA* that typical coverage clause did not cover remediation costs
- cover for pollution in other policies depends on wording

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## Effect on insurance market

### General liability policies (cont'd)

- use of “Bartoline endorsements” on some policies
  - extremely limited cover
- use of “light” environmental liability endorsements on some policies

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## Effect on insurance market

### Environmental insurance policies

- provide cover for
  - gradual as well as sudden and accidental pollution
  - remediating pollution under ELD and other environmental legislation
  - primary, complementary and compensatory remediation under ELD for pollution and non-pollution environmental damage

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## Effect on insurance market

### Environmental insurance policies (cont'd)

- increase in number of carriers offering policies since introduction of ELD
- increase in scope and variety of policies
  - property transfer
  - operational risk
  - contractors pollution liability
  - Etc

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## Future environmental liabilities and insurance cover

- Bodily injury group actions?
- EU soil legislation?
- Revision of ELD?
- Cover for environmental liabilities under general liability policies?
- Future of environmental insurance market?

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