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
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

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
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

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
Barr v Biffa
Group action

2011:oulson 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

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
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

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
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

• 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
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

– 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
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

Contaminated land regime

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

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)
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

- 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
Environmental Damage Regulations

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

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)
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

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
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

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
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)

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
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)

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
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

**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
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

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
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)

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
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

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
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

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
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

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
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?