

## Current contaminated land issues for local authorities

Much has been written recently regarding the recent decision of the House of Lords in the Bawtry case. Now that the dust has settled it is worthwhile looking at the specific implications of this judgment for local authorities acting as regulators and for those who are potentially liable for the remediation of sites they have responsibility for.

The case, *R (on the application of National Gas Grid Plc (formerly Transco Plc) –v– the Environment Agency*, was an appeal from the High Court leapfrogging the Court of Appeal straight to the House of Lords.

The court decided that on the very limited facts of this particular case National Gas Grid (NGG) should not have any liability for the remediation of contamination at a former gasworks. What has to be remembered when looking at liability under the Environmental Protection Act 1990 Part 2A is that it has to be demonstrated that those liable either caused or knowingly permitted the contamination. Although this site was previously owned by a former gas company the site had been sold and redeveloped some 20 years before British Gas were privatised.

Lord Hoffman made the point that NGG "did not cause or knowingly permit any substances ..... that was done ..... many years before".

Lord Scott noted that NGG "was not the polluter [it had] never been in the business of producing coal gas .... [it has never] been the owner of the site". He went on to say that "the ... site .... formed no part of the assets transferred ... [it was] sold for housing .... 20 years earlier ..... the liabilities did not exist ..... when British Gas was floated".

In the judgment much was made of the need to protect the private investors who were invited to subscribe for shares in the British Gas privatisation. Lord Scott noted that in the scheme of transfer from the nationalised company to the privatised company reference was made that British Gas should take over the assets and liabilities as they stood "immediately before transfer". When the transfer took place the contaminated land regime did not exist and consequently the liabilities could not have existed. This coupled with the fact that the site in question had been sold way before privatisation meant that liability did not pass to the new privatised utility company.

The House of Lords looked at the very specific wording of the Gas Act 1986 where the government privatised the gas industry. That Act talks about taking over the assets and liabilities as they stood immediately before the transfer date. Had the predecessors to British Gas (who actually caused the contamination) still been in existence they would have had liability. Similarly had the developers of the housing estate been in existence they may well have had liability. Given the wording of both the contaminated land regime and the specific wording of the Gas Act it meant liability did not pass to NGG.

Despite the comments of some commentators this case does not bring an end to the contaminated land regime. What it does mean is that very careful consideration needs to be given when trying to pass historic liability on to companies that have either been formed by mergers and acquisitions or property has been

transferred under statute eg through privatisation or local authority re-organisation.

From the regulator's point of view the position has not changed. Regulators need to tread carefully and consider who has potential liability. There are many housing estates around the country built over a former gasworks where remediation was carried out to a standard that may no longer be appropriate. This case means that NGG does not have liability for the small number of those sites where they were sold and then redeveloped prior to privatisation. It does not mean they have no liability for any former gas sites!

It should also be remembered that even when NGG do not have liability in most cases liability will fall on the current owners and occupiers or the public purse if any subsequent developer could not be found. In view of this careful consideration needs to be given at an early stage how to manage these issues.

As well as being a regulator many local authorities will have sites which are potentially contaminated where they are responsible for that contamination. Those sites need to be carefully managed with careful consideration given how best to deal with the complex issues that arise from them.

## Contact

For further information or advice, please contact:

Andrew Wiseman

E: [andrew.wiseman@bllaw.co.uk](mailto:andrew.wiseman@bllaw.co.uk)

T: 01489 555016

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