

OTHER ENVIRONMENTAL REGULATIONS RELEVANT TO PROPERTY LAWYERS

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Introduction

1. “They were the best of times, they were the worst of times”. It may not quite be 18th Century France, but those working in the property field (be it transactional, conveyancing or litigation) will be well aware of the steady and constant attempts by the relative upstarts of planning, environmental and other regulatory regimes to infiltrate the well-ordered world of the property lawyer.
2. The earlier papers in this seminar have considered the impact which the planning regime, and practical issues arising from the same, have had in this area over the past few years – specifically in relation to conveyances and conditional contracts.
3. Although somewhat lagging behind its planning counterpart, it is becoming apparent that the environmental regulatory regimes are also beginning to creep into the property lawyer’s case load as well. In particular, these issues are becoming pertinent in the context of tenant’s obligations to observe and abide by all relevant statutory regimes and requirements in the context of commercial leases (or indeed, to keep premises in repair), and the potential consequences the landlord may face if those obligations are not complied with. In addition, landowners and potential landowners are becoming increasingly aware that there may be specific regimes or requirements they are expected to observe if they wish to acquire certain land, or to use it for a certain purpose – and looking to their legal team for answers as to what those requirements might be.
4. This paper seeks to set out an overview and introduction to the various environmental regulation regimes which may require consideration in such cases.

The broad legislative framework

5. The principal provisions of environmental legislation have been broadly consolidated into 4 main Acts, supplemented by a host of Regulations. The 4 main Acts whose provisions merit some acquaintance are:

- The Environmental Protection Act 1990;
- The Environment Act 1995;
- The Water Resources Act 1991; and
- The Water Industry Act 1991.

6. Of these Acts, it is the first two which are likely to be of most relevance to the property lawyer.¹

The Environmental Protection Act 1990 ("EPA 1990")

7. The EPA 1990 has been described by some commentators as being "*as close to codification of environmental law as the law of England and Wales has got*"² and contains the main bulk of the legislative framework of environmental regulation in the UK. It is divided into a number of parts, dealing with specific areas and issues which arise in this area.

- Part I: This dealt with Integrated Pollution Control and Air Pollution Control by local authorities. These provisions were repealed by the Pollution Prevention and Control Act 1999 which now governs this area, with the Regulations made pursuant to that legislation.
- Part II: This deals with waste on land, its regulation and sanctions for non-compliance;
- Part IIA: This Part was introduced into EPA 1990 by the Environmental Protection Act 1995, and concerns the remediation of contaminated land.

¹ In broad term, the Water Resources Act 1991 contains the responsibilities that the Environment Agency inherited from the National Rivers Authority in respect of conserving water resources, ensuring that water quality objectives are met, issuing discharge consents, flood defences, fisheries and mines. The Water Industry Act 1991 makes provision for supply of water, trade effluent and sewerage services.

² Wooley QC et al '*Environmental Law*' 2nd Edn (OUP, 2009) para 2.06

- Part III: This Part deals with statutory nuisances; specifically, proceedings for statutory nuisance, fixed penalties, and noise abatement orders;
- Part IV deals with litter
- Part VIII contains the ‘Miscellaneous’ provisions of the Act, including restrictions on import/export of waste, and the burning of straw and stubble.

The Environment Act 1995

8. This Act established the Environment Agency and Scottish Environment Protection Agency. The powers and functions of those bodies are found in Part I of the Act. Part IV of the Act makes provision for regulation of air quality, and Part V (Miscellaneous provisions) provides, *inter alia*, for powers of entry on the part of enforcing authorities to ensure compliance with the various environmental regulatory regimes.

Pollution control and environmental permits

9. As mentioned above, a system of integrated pollution control was first established by Part I of the EPA 1990. This was repealed by the Pollution Prevention and Control Act, described in its Preamble as:

“An Act to make provision for implementing Council Directive 96/61/EC and for otherwise preventing and controlling pollution; to make provision about certain expired or expiring disposal or waste management licences; and for connected purposes”

10. The material operative provisions of the Act is section 2 which provides for the Secretary of State to make Regulations for any of the purposes in Part 1 of Schedule 1 to the Act, in short, being the establishment of a permit regime to regulate potentially polluting activities. The section 2 power is described thus in section 1 of the Act:

“1.— General purpose of section 2 and definitions.

(1) The purpose of section 2 is to enable provision to be made for or in connection with—

(a) implementing Council Directive 96/61/EC concerning integrated pollution prevention and control;

(b) regulating, otherwise than in pursuance of that Directive, activities which are capable of causing any environmental pollution;

(c) otherwise preventing or controlling emissions capable of causing any such pollution.

(2) In this Act—

“activities” means activities of any nature, whether—

(a) industrial or commercial or other activities, or

(b) carried on on particular premises or otherwise,

and includes (with or without other activities) the depositing, keeping or disposal of any substance;

“environmental pollution” means pollution of the air, water or land which may give rise to any harm; and for the purposes of this definition (but without prejudice to its generality)—

(a) “pollution” includes pollution caused by noise, heat or vibrations or any other kind of release of energy, and

(b) “air” includes air within buildings and air within other natural or man-made structures above or below ground.

(3) In the definition of “environmental pollution” in subsection (2), “harm” means—

(a) harm to the health of human beings or other living organisms;

(b) harm to the quality of the environment, including—

(i) harm to the quality of the environment taken as a whole,

(ii) harm to the quality of the air, water or land, and

(iii) other impairment of, or interference with, the ecological systems of which any living organisms form part;

(c) offence to the senses of human beings;

(d) damage to property; or

(e) impairment of, or interference with, amenities or other legitimate uses of the environment (expressions used in this paragraph having the same meaning as in Council Directive 96/61/EC).”

11. The Act was originally implemented through the Pollution Prevention and Control (England and Wales) Regulations 2000/, which were subsequently replaced by the Environmental Permitting (England and Wales) Regulations 2007/3538.³
12. Those Regulations have, in turn, been replaced by the Environmental Permitting (England and Wales) Regulations 2010/675. These Regulations provide a consolidated system of environmental permitting in England and Wales. They also replace the system of consenting of water discharges in Chapter 2 of Part 3 of the Water Resources Act 1991, and the groundwater permitting system in the Groundwater (England and Wales) Regulations 2009/2902.⁴
13. The Regulations regulate essentially two types of potentially permitting industrial operations: (1) significant industrial activities (A1 activities) which are regulated by the Environment Agency and (2) less significant industrial activities (A2 activities) and installations controlled because of the potential emissions into air, land or groundwater resulting from the same (Part B operations).
14. By Regulation 12, a person is prohibited from operating a regulated facility or causing or knowingly permitting a water discharge activity or groundwater activity (save where such activity is an exempt facility) except under and to the extent authorised by an environmental permit.⁵
15. Part 4 makes provision for the relevant regulator to take enforcement action against an operator it considers is contravening an environmental permit (Regulation 36), and Regulation 38 sets out a number of offences resulting from non-compliance with the Regulations:

“(1) It is an offence for a person to—

(a) contravene regulation 12(1); or

³ The main difference between the two sets of Regulations being that additional waste operations were brought within the scope of the regime and some changes made to better align the domestic regime with that of the European legislative framework.

⁴ These Regulations provided for a regime of permits / consents for discharge of pollutants into groundwater, implementing Article 6 of Directive 2006/118/EC on the protection of groundwater against pollution and deterioration.

⁵ “Groundwater activity” is defined in paragraph 3 of Schedule 22 and “Water discharge activity” by paragraph 3 of Schedule 21

(b) knowingly cause or knowingly permit the contravention of regulation 12(1)(a).

(2) It is an offence for a person to fail to comply with or to contravene an environmental permit condition.

(3) It is an offence for a person to fail to comply with the requirements of an enforcement notice or of a prohibition notice, suspension notice, landfill closure notice or mining waste facility closure notice.

(4) It is an offence for a person—

(a) to fail to comply with a notice under regulation 60(1) requiring the provision of information, without reasonable excuse;

(b) to make a statement which the person knows to be false or misleading in a material particular, or recklessly to make a statement which is false or misleading in a material particular, where the statement is made—

(i) in purported compliance with a requirement to provide information imposed by or under a provision of these Regulations,

(ii) for the purpose of obtaining the grant of an environmental permit to any person, or the variation, transfer in whole or in part, or surrender in whole or in part of an environmental permit, or

(iii) for the purpose of obtaining, renewing or amending the registration of an exempt facility;

(c) intentionally to make a false entry in a record required to be kept under an environmental permit condition;

(d) with intent to deceive—

(i) to forge or use a document issued or authorised to be issued or required for any purpose under an environmental permit condition, or

(ii) to make or have in the person's possession a document so closely resembling such a document as to be likely to deceive.

(5) It is an offence for an establishment or undertaking to—

(a) fail to comply with paragraph 14(3) or (4) of Schedule 2; or

(b) intentionally make a false entry in a record required to be kept under that paragraph.

(6) If an offence committed by a person under this regulation is due to the act or default of some other person, that other person is also guilty of the offence and liable to be proceeded against and punished accordingly, whether or not proceedings for the offence are taken against the firstmentioned person.”

Waste, Waste Management Licences and Environmental Permits

16. A comprehensive overview of waste law is far beyond the scope of this paper, the area being sufficiently heavy in legislation to occupy several texts on its own. However, the following provisions are considered to give the most useful introduction to the area, and matters likely to arise in respect of land which is not, for example, designated as a specialist waste use site.

17. As set out above, waste is governed at a macro level by Part II of the EPA 1990.

18. Waste is defined in s.75 of the Act:

“Waste” means anything that is waste within the meaning of Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council on waste.”

19. Article 3(1) provides (so far as is relevant) as follows:

““waste” means any substance or object which the holder discards or intends or is required to discard”

20. S.75 (4) also identifies 4 different categories of waste: controlled waste, household waste, industrial waste and commercial waste. The types of waste which fall within those categories of waste is prescribed by the Controlled Waste Regulations 1992/588. Hazardous waste substances are dealt with by the Hazardous Waste (England and Wales) Regulations 2005/894.

21. Section 33 of the EPA 1990 makes it an offence to:

- Deposit controlled waste or extractive waste, or knowingly to cause or permit the deposit of such waste in or on land, except in accordance with an environmental authorising that deposit; and
- Treat, keep or dispose of controlled waste, or knowingly to cause or permit those activities, without or in breach of an environmental permit.
- Treat, keep or dispose of controlled waste or extractive waste in a manner likely to cause pollution of the environment or harm to human health

22. s.33(1)(a) and (b) do not apply to waste operations which are “exempt waste operations”.

23. S.33 previous referred to “waste management licences” which were governed by the Waste Management Licensing Regulations 1994/1056. Those Regulations were revoked by the Waste (England and Wales) Regulations 2011/988 and “exempt waste operations” are to be found in Schedule 3 of those Regulations. Certain waste operations were brought within the scope of the environmental permit regime (rather than the waste management licensing regime) by the Environmental Permitting (England and Wales) Regulations 2007, and are now governed by the Environmental Permitting (England and Wales) Regulations 2010.

Contaminated Land

24. As set out above, the remediation of contaminated land is governed by Part IIA of the EPA 1990. It should be noted that these provisions are directed at securing the cleaning up of existing contaminated sites (and thus might bite on a landlord on tenant’s vacation) by regulatory intervention. They do not apply if the activity which is causing the contamination is ongoing : that falls to be dealt with through the environmental permitting (etc) regimes.

25. “Contaminated land” is defined in s.78A(2) which provides:

“Contaminated land” is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that—

a) significant harm is being caused or there is a significant possibility of such harm being caused; or

(b) pollution of controlled waters is being, or is likely to be, caused

and, in determining whether any land appears to be such land, a local authority shall, subject to subsection (5) below, act in accordance with guidance issued by the Secretary of State in accordance with section 78YA below with respect to the manner in which that determination is to be made”

26. Further elaboration is provided in s.78A(5):

“(5) The questions—

(a) what harm is to be regarded as “significant”,

(b) whether the possibility of significant harm being caused is “significant”,

(c) whether pollution of controlled waters is being, or is likely to be caused,

shall be determined in accordance with guidance issued for the purpose by the Secretary of State in accordance with section 78YA below.”

27. For the purposes of this part of the Act “owner” is defined in s.78A as follows:

““owner”, in relation to any land in England and Wales, means a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let”

28. The current guidance is that published by Defra in 2006: Circular 01/2006 *Contaminated Land*. Part IIA of the Act is also supplemented by the Contaminated Land (England and Wales) Regulations 2006/1380.

29. Section 78B imposes a duty on each local authority to cause its area to be inspected to identify contaminated land, and to enable it to decide of whether any such land is land which is required to be designated as a special site (i.e. one which is designated pursuant to s.78C(7) or s.78D(6) as one with particularly severe problems,⁶ and which will be the responsibility of the Environment Agency) Local authorities are given powers of entry for this purpose, and a power to take samples.

30. By s.78B(3):

“If a local authority identifies any contaminated land in its area, it shall give notice of that fact to—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the authority to be in occupation of the whole or any part of the land; and

(d) each person who appears to the authority to be an appropriate person;

and any notice given under this subsection shall state by virtue of which of paragraphs (a) to (d) above it is given.”

⁶ The types of contaminated land which would constitute special sites are set out in Regulations 2 and 3 of the Contaminated Land (England and Wales) Regulations 2006/1380

31. Once a site has been identified as contaminated land (or a special site), then the local authority (or Environment Agency in respect of a special site) is required by s.78E to serve a 'remediation notice' requiring that specified measures be taken to remedy the contamination. In respect of the remediation notice, s.78E(4)-(5) provides:

(4) The only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part are things which it considers reasonable, having regard to—

(a) the cost which is likely to be involved; and

(b) the seriousness of the harm, or pollution of controlled waters, in question.

(5) In determining for any purpose of this Part—

(a) what is to be done (whether by an appropriate person, the enforcing authority or any other person) by way of remediation in any particular case,

(b) the standard to which any land is, or waters are, to be remediated pursuant to the notice, or

(c) what is, or is not, to be regarded as reasonable for the purposes of subsection (4) above,

the enforcing authority shall have regard to any guidance issued for the purpose by the Secretary of State."

32. Further restrictions are contained in section 78H which provides, *inter alia*, for the local authority to use reasonable endeavours to consult with:

- the person on whom the notice is to be served,
- the owner of any land to which the notice relates,
- any person who appears to that authority to be in occupation of the whole or any part of the land, and
- any person of such other description as may be prescribed,

concerning what is to be done by way of remediation prior to serving the remediation notice. In addition, S78L provides for a right of appeal against remediation notices.

33. S.78M provides that it is an offence for a person served with a remediation notice to fail to comply with its requirements, without reasonable excuse. Ss.78N and P provide for an

enforcing authority to be able to carry out the remediation work itself, and recover the costs of the same.

34. S.78F governs the means by which it is determined who is the appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case, and provides as follows:

(1) This section has effect for the purpose of determining who is the appropriate person to bear responsibility for any particular thing which the enforcing authority determines is to be done by way of remediation in any particular case.

(2) Subject to the following provisions of this section, any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the contaminated land in question is such land to be in, on or under that land is an appropriate person.

(3) A person shall only be an appropriate person by virtue of subsection (2) above in relation to things which are to be done by way of remediation which are to any extent referable to substances which he caused or knowingly permitted to be present in, on or under the contaminated land in question.

(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of remediation, the owner or occupier for the time being of the contaminated land in question is an appropriate person.

(5) If, in consequence of subsection (3) above, there are things which are to be done by way of remediation in relation to which no person has, after reasonable inquiry, been found who is an appropriate person by virtue of subsection (2) above, the owner or occupier for the time being of the contaminated land in question is an appropriate person in relation to those things.

(6) Where two or more persons would, apart from this subsection, be appropriate persons in relation to any particular thing which is to be done by way of remediation, the enforcing authority shall determine in accordance with guidance issued for the purpose by the Secretary of State whether any, and if so which, of them is to be treated as not being an appropriate person in relation to that thing.

(7) Where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State.

(8) Any guidance issued for the purposes of subsection (6) or (7) shall be issued in accordance with section 78YA below.

(9) A person who has caused or knowingly permitted any substance ("substance A") to be in, on or under any land shall also be taken for the purposes of this section to have

caused or knowingly permitted there to be in, on or under that land any substance which is there as a result of a chemical reaction or biological process affecting substance A.

(10) A thing which is to be done by way of remediation may be regarded for the purposes of this Part as referable to the presence of any substance notwithstanding that the thing in question would not have to be done—

(a) in consequence only of the presence of that substance in any quantity; or

(b) in consequence only of the quantity of that substance which any particular person caused or knowingly permitted to be present.”

35. This may, perhaps, provide some comfort for landlords.

Conclusion

36. As set out above, this paper seeks only to provide a brief introduction to the main environmental regimes which may crop up in the property lawyer's caseload. It comes with a word of warning : the various statutory regimes are frequently subject to amendment, and application of the same (specifically the Environmental Permitting Regulations) depend entirely on the factual (and technical) circumstances of any given case.

37. To return to where this paper began, the immediate successor to the extract cited in paragraph 1 is perhaps worthy of note:

“It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair....”.

38. Perhaps only time will tell into which camp the ever increasing presence of the environmental regime in the property arena will fall.

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