

What a waste...

Owners, purchasers, developers and tenants of contaminated land should be aware of a possible requirement to hold a waste management licence – as well as an obligation to bear the costs of remediation.

The European Court of Justice (ECJ) has recently blown a hole in UK waste and pollution legislation, with a decision that fuel oils which had accidentally leaked from filling station pipelines into surrounding soils, constituted 'waste' and would require a waste management licence. (*Van der Walle –C-1/03, 7 September 2004*).

'Waste' is any one or more of a range of defined substances which the holder of the licence discards, intends to discard or is required to discard in accordance with the Waste Management Licensing Regulations 1994, regardless of whether the substance has been discarded accidentally.

In the case before the ECJ, fuel oils had been spilled accidentally and soaked into the soil. The landowner had carried out a partial decontamination and the local authority, faced with the costs of a full remediation, brought criminal proceedings against the landowner under local (Belgian) waste legislation, in an attempt to recover its costs. The ECJ found that the nature of the resulting contamination meant that the fuel oils could not be re-used without processing. Not only was the soil contaminated, it was also 'waste'.

The waste regime

Soils contaminated with 'waste' must be disposed of by a licensed person to a licensed site in accordance with the Waste Management Licensing Regulations. The ECJ is now suggesting that *in situ* contaminated land could be subject to the same licensing requirements as holders of 'waste' and could be required to hold a waste management licence. This could result in additional and expensive regulatory requirements which are rigorously enforced. Special conditions on retaining the waste which would not arise under the land contamination legislation could be imposed.

The burden of cleaning up contaminated land can be passed from seller to buyer, or back to the original polluter under the contaminated

land regime contained in the Environmental Protection Act 1990. So long as the clean-up is effective at removing the contamination, criminal proceedings and fines can be avoided. However, the requirement to possess a licence could pass additional liabilities to a purchaser who would otherwise be prepared to accept the risk of possible remediation costs. Developers of brownfield sites may find the burdens of the waste management regime superimposed on contaminated land remediation schemes.

The UK courts are bound by the decision of the ECJ and we will have to wait for further European legislation to be enacted before any clarification of the law is given. We have yet to see whether the waste management regime will only be applied in cases of failure to remediate and/or unsuccessful clean-ups, and whether a defence of an innocent occupier will be available, but the seed has been sown for all types of land contamination to be considered as waste.

In the meantime, if you are considering acquiring a potentially contaminated site, you should:

- review the status of the contamination and consider taking remedial action
- ensure that the clean-up is sufficient to avoid any liability under the waste management legislation.

Tenants should also be aware as it is not unusual for a lease to put landlord obligations and liability in respect of remediation, obtaining licences, costs etc onto the tenant either directly via tenant covenants or indirectly via service charges. Liability can be avoided by careful definition of the premises demised and suitable 'carve outs' from the tenant's covenant and service charge obligations.

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