

CONTAMINATED LAND

The Contaminated Land Regime applies to all land, regardless of use. It can affect owners, occupiers, developers and lenders. Liability under the legislation is retrospective as well as prospective.

Local authorities have a duty to continue to inspect their areas to identify contaminated land. They (or the Environment Agency or Natural Resources Wales (“NRW”) in some cases) can require the removal or other remediation of contamination. Remediation can be costly, and may result in costs that exceed the value of the property. In addition, the possibility of contamination may make the property difficult (or even impossible) to sell, let or mortgage.

Who is liable?

Liability falls primarily on the company or other person who caused or knowingly permitted the presence of a substance in, on or under land such that the contamination is posing significant harm or a significant possibility of significant harm to human health, water, property or designated ecological sites such as sites of special scientific interest (“Class A person”). Class A persons are liable for remediating the property and off-site migration of contaminants.

If the authority cannot identify a Class A person, liability falls on the current owner or occupier of the land (including lenders in possession) (“Class B person”). Class B persons are liable for remediating the property. In simple terms, if a Class A person cannot be found by an enforcing authority after “reasonable enquiry”, the owner or occupier of the land (a Class B person) is liable.

There are complex exclusion provisions for transferring liability from one person to another.

The regime applies to the transfer of the freehold or the grant or assignment of a lease of over 21 years.

Investigations

There are broadly two ways for a potential buyer to establish the potential of contamination.

Enquiries of the current owner/tenant

We will make enquiries of the current owners/tenants relating to a variety of environmental issues. However, sellers are often reluctant to reply to such enquiries, expecting you to rely on your own independent investigations.

Searches

We will obtain a search (often called an “environmental desktop report”). This will provide:

- information from the statutory registers kept by the Environment Agency, NRW, local authorities, Natural England and various other sources; and
- basic information such as past and current land use, nearby landfills, pollution incidents, and whether the land has a nature conservation designation.

The cost of a search varies from £250 to £400 plus VAT depending on the complexity of the report. We will order the type of search that we consider appropriate to the property you are acquiring.

In addition you should inspect the property carefully, alerting us to any activity or occurrence which may indicate that contamination is present (e.g. dead areas of vegetation, leaking containers or pools of chemicals).

It is important to note that these enquiries and searches will not provide a simple answer to the question "Is the land contaminated?" Even if the results give no indication of contamination, this does not guarantee the property is not contaminated. The reports from commercial search companies are compiled solely from paper records, with no inspection of the site itself.

Interpretation of search reports and replies to enquiries

We are not surveyors or environmental consultants and are therefore unable to advise on whether the results of the initial searches and enquiries necessitate a full site investigation. However, those results will indicate whether you should instruct environmental consultants. Such consultants will provide interpretation and guidance on the advisability of an in-depth desktop study and/or intrusive investigations. Once you have reviewed the environmental desktop report, please let us know if you are commissioning further investigations or wish us to do so on your behalf.

Risks in particular transactions

Selling:

Selling property, whether freehold or leasehold, will not automatically absolve you from liability under the contaminated land regime. If you have caused contamination or if you have knowledge of contamination at your property and have not remediated it, you can, in most cases, transfer your remediation liabilities. If this situation applies to you, please let us know so we can discuss how to transfer those liabilities. We have specialist environmental lawyers who are able to advise and draft the necessary documents.

Buying:

We will undertake the enquiries and searches outlined in this note. If, as a result of those investigations and the advice of your surveyor or environmental

consultant it seems there is a risk of contamination, then let us know as you may decide not to proceed at all or, if you do proceed, the terms on which you do so may be affected. Again, we have specialist legal experts who can advise you on the legal consequences of any issues arising from the technical information revealed by your investigations and provide guidance on the most appropriate way forward.

Leases:

You should not assume that just because you are a tenant, you have no liability for contamination. You will be liable for any contamination you cause or knowingly permit. In addition you may be liable as a Class B person. Further, a lease may allocate liability for remediating pre-existing, as well as future, contamination on the tenant.

Other liabilities

This note covers only the contaminated land regime. Whilst this is the key environmental concern when transferring rights in real property, other environmental legislation may also apply depending on the environmental condition of the property.

TO FIND OUT MORE

For further information about any of the issues raised in this guide, please contact:



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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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