

Managing Land development risks with Pollution Liability Insurances and Owner Controlled Insurance Programmes



Public Sector organisations are facing increasing pressure to deliver and develop surplus land to meet the UK's growing housing demand and to create space for employment. Potential risks associated with contaminated land have been highlighted in a number of significant previous cases, such as Redland-Crest and Corby. Furthermore, the recent collapse of large UK construction firm Carillion will inevitably lead to questions about the viability of contractor-placed insurance programmes and how future liabilities, particularly around pollution and environmental damage, should be apportioned if a project stakeholder is no longer trading.

Public Sector organisations can conduct substantial due diligence on greenfield and brownfield sites, but it can still be difficult to ensure that long-tail pollution liability risks can be identified and managed effectively. There are however, site and project-specific insurances available to mitigate pollution, contamination and environmental damage liability risks associated with land development and contractor default.



Case Studies

Crest Nicholson Residential Limited, R (on application of) v Secretary of State for Environment, Food and Rural Affairs and Others [2010] EWCH 561 (Admin)

The Crest case involved St Leonard's Court, an estate comprising 66 residential units near St Albans. From the 1950s to the 1980s the land housed a chemical works, which from 1980 was operated by Redland Minerals Ltd. When Crest Nicholson Residential Limited purchased the site from Redland, due diligence revealed that some contamination had occurred, although the full extent was not disclosed. Crest demolished the chemical works in 1983 in order to build St Leonard's Court, which was finalised in 1987. In late 2000, St Albans District Council identified a source of water contamination; bromate and bromide had leached into the soil and contaminated the water source. The Council referred the case to the Environment Agency.

The test used for establishing liability in contaminated land cases is based on whether the parties "caused or knowingly permitted" the presence of a pollutant in, on or under the land. The Environment Agency served a remediation notice against both Redlands and Crest, claiming they were liable. Despite both companies appealing, the High Court refused their appeal and apportioned liability.

Redland argued that they had sold the site to Crest "with information". However, while Redland had provided information showing contamination had occurred, the court deemed Crest could not reasonably have been aware of the extent of the contamination, nor had Redland provided information on the specific bromate contamination. Accordingly the "sold with information" test only limited their liability to some extent.

Crest was found responsible for a proportion of the liability. Despite arguing they did not "cause" the contamination, the Court ruled that a party does not have to introduce a contaminant to a site to have caused it to be in, on or under the land. A party can be found liable for contamination to land through both action and inaction. The Court held that Crest was liable on account of how it dealt with the redevelopment works. Crest had demolished the former factory but had knowingly left the contaminated soil exposed to further rainfall, which would have led to leaching and later, contamination.

Corby

In the 1980s, Corby Borough Council acquired a large area of contaminated land from British Steel to regenerate following the closure of the steel works.

The council constructed a tip for the contaminated soils and transported hundreds of lorry loads of soil along the roads linking the former steelwork sites to the tip.

A number of children were born in the Corby area between 1986 and 1999 with deformities of their upper limbs. The mothers of these children lived close to or had contact with this area at the time of the works, which coincided with their pregnancies.

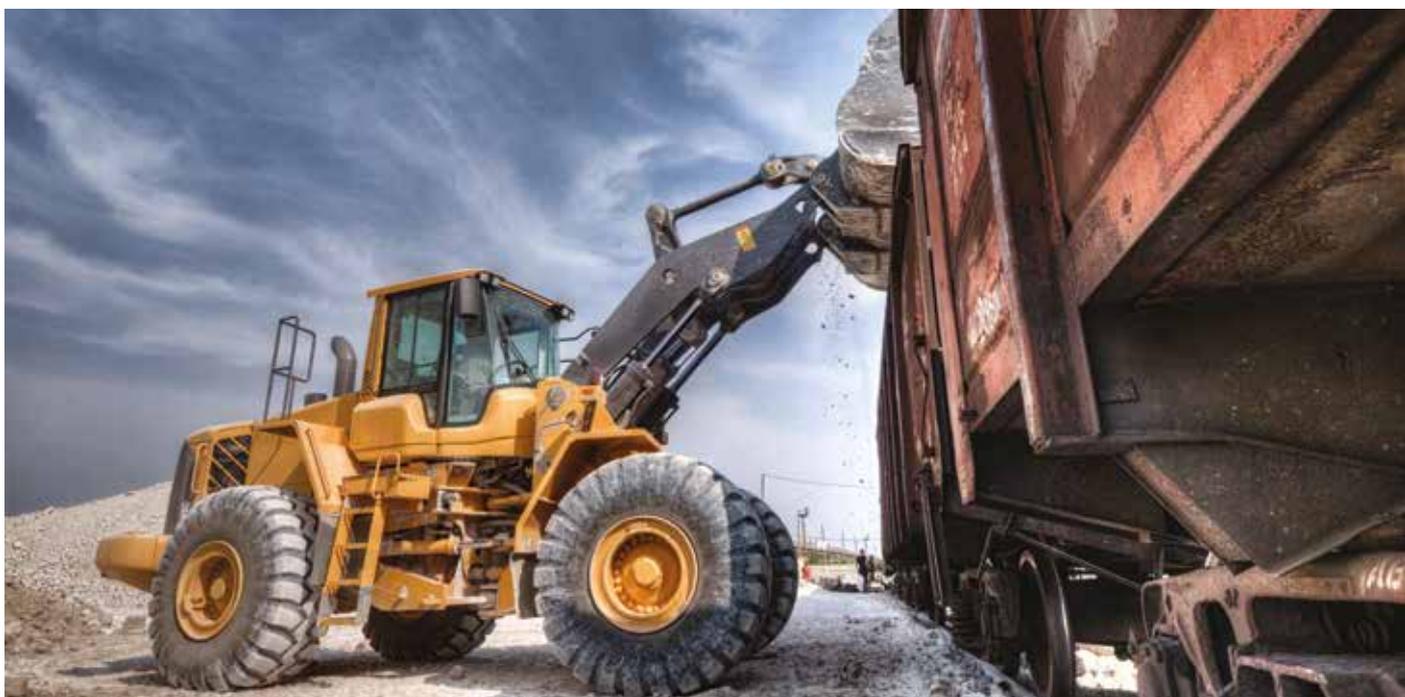
The group sued Corby Borough Council for damages for personal injury allegedly caused by the council's negligent handling of the contaminated soils (Corby Group Litigation v. Corby Borough Council [2009] EWHC 1944 (TCC)).

It is reported that the costs and settlement for the case were at least £10 million to £15 million.

Lessons

These cases should serve as a warning to Public Sector organisations involved in land transactions and development projects. Whilst, usually the law works on the basis of the 'polluter pays' model, it could be seen in practice to apply instead on the basis of strict liability, as the responsibility to remediate contaminated land can arise without any active fault, breach of law or intention. Although not dealt with explicitly, the Court's opinion on Redland-Crest underlined that if it is not possible to find who caused or permitted the contamination, liability can pass to the current owner and occupier. Developers and former land owners are not immune from liability for historical events, and selling / disposing of contaminated land is not necessarily a bar to future liability, even where disclosures are made.





Professional Indemnity (PI) insurance - perception or reality?

The traditional route of using contracts to transfer liability is understood but there is a limitation in this approach: insolvency. If a company no longer exists, any financial settlement is unlikely and importantly, a PI policy will no longer be in place.

For contaminated land and other developments, clients often seek consultant and contractor PI insurance as a safeguard against potential long-term residual pollution problems, often under the misapprehension that their PI insurance offers a direct benefit.

However, it is important to remember that PI insurance is negligence-based; incepted primarily for the protection of the consultant or contractor against claims of negligence during the course of their work or professional duties. The burden of proof for negligence is extremely onerous.

If a contract is in breach of the terms of the PI policy, the cover can be invalidated and the contractor or consultant will have to defend and settle a claim. Most consultants or contractors will have a very low credit rating when compared to insurers.

Warranty agreements usually require PI insurance for 12 years, provided it remains: 'available at economic cost'. PI insurance is annual cover rather than one-off for the period of the contract the policy is 'claims-made'.

This means that any claims have to be made during the policy period. If the insurance is lapsed, cancelled or non-renewed at any time, there is no cover.

Further complicating matters, the majority of environmental PI policies are placed on an 'aggregate limits' basis and are not ring-fenced to a particular project. If a consultant or contractor has entered into a number of agreements and suffers one or more

claims during a policy period, the aggregate limit of indemnity could easily be exhausted. The question is, how can you secure a project and ring-fence liability?

Selecting technically capable and experienced advisors and contractors is one key element of risk management. This should include using a qualified insurance professional to undertake due diligence of the insurance offered before being appointed. PI insurance and other insurances will provide some protection but PI insurance and warranties are primarily based on fault and negligence, which can be difficult and costly to prove. Often consultants have to rely on incomplete regulatory guidelines. What is 'definite' may yet be resolved to any degree of confidence in both scientific and legal fields. The shifting sands of liability through scientific discovery and case law add to uncertainty.

Trying to protect your organisation against the wide range of risks merely through reliance on someone else's insurance and contractual provisions is not the only, and is unlikely to be the suitable, option.

Site and Project-specific Pollution Liability insurances

Increasingly landowners and developers, rather than putting the risk onto other parties or retaining the risk, are acquiring contaminated land insurance through Pollution Liability policies, in order to obtain comprehensive long-term financial protection against environmental risks. Public Sector organisations could benefit from the same approach.

Polices can cover third-party claims and regulatory actions and include consequential loss, property damage, bodily injury, on and off site remediation costs and environmental (natural resources) damage.

Benefits can include:

- ✓ A site specific 'ring-fenced' policy with long term duration of cover
- ✓ Project specific cover (contractors pollution liability cover) for the development phase based on a long-term occurrence based policy wording
- ✓ Cover for change in law and applicable regulations
- ✓ Cover for legal and technical defence costs
- ✓ Cover for emergency response and mitigation costs
- ✓ Cover can include landowners or tenants business interruption costs
- ✓ Flexibility to add additional insureds to include other stakeholders, funders, tenants and others
- ✓ The policy can be assigned with the ability to stay protected as an additional insured
- ✓ Secure credit rating with a regulated insurance company
- ✓ Accountability in the risk transfer

The insurance industry is the most regulated industry for the transfer of liability. For provision of suitable long-term financial protection against the environmental risks associated with land development, project specific insurance should be the preferred method. This could be argued as the only real way of providing long-term accountable protection on a sustainable basis.

Owner Controlled Insurance Programme (OCIP) for Construction works and building projects

It is increasingly common for land and project Owners to control construction insurances via an OCIP, where a project is large, complex or commercially sensitive. Public Sector organisations are usually Owners and it is they who tend to suffer most if the insurance program does not protect the project assets, liabilities and potential revenues, not to mention the statutory responsibility for service delivery. It is natural therefore that, as Owners, Public Sector organisations should wish to control the insurance arrangements of key projects.

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An OCIP is typically a combined Contractors All Risks / Third Party Liability (CAR/TPL) insurance policy that is purchased by the Owner, and covers all parties for insured perils and the Owner (should they buy Delay in Start Up [DSU] insurance) for the costs resulting from delay in the delivery of the project.

Increasingly, the benefits of Latent Defects insurance are being recognised and included as part of the OCIP. It provides cover for the cost of rectifying or repairing structural damage caused by a fault in the design, construction or materials of a new build, conversion or completed build project that may not be apparent at the time of practical completion.

The best time to effect latent defects insurance is at the start of a construction project and the policy can run for 10 or 12 years if under seal.

Importantly, the policy provides protection against contractors' insolvency, as insurers pay to rectify the problem even if the Contractor no longer exists.

There is no need to establish who is at fault or prove negligence and it can eliminate time delays and legal costs associated with legal proceedings.

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